

UNIVERSITY COLLEGE LONDON

**THE COMPLEXITIES AND INEQUALITIES OF THE LAWS OF DIVORCE
IN CAMEROON AND HOW THESE CAN BE OVERCOME**

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**A thesis submitted to University College London (UCL) for the degree
of Doctor of Philosophy**

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DECLARATION

I, Acha Morfaw Epse Ghogomu Dorothy Lekeaka, confirm that the work presented in this thesis is my own. Where information has been derived from other sources, I confirm that this has been indicated in the thesis.

ACHA MORFAW EPSE GHOGOMU DOROTHY LEKEAKA

ABSTRACT

Unlike other areas where legislative reform has taken place, the Cameroonian Parliament has never legislated on divorce. Consequently, 57 years since Cameroon gained independence, the applicable laws in divorce matters are still those derived from the colonial era (received English and French laws) as well as customary law. Many of the rules on divorce are archaic and discriminatory. Moreover, the current multiple systems of courts in divorce matters often generate conflicts of jurisdiction.

As a result of legal pluralism in Cameroon, the law of divorce is complex, inconsistent, conflicting, over-lapping and detrimental to the rights and freedom of individuals who are bound by discriminatory customary rules. This thesis seeks to remedy this chaotic situation through a unified system of courts and laws.

Having justified the case for unification of law and court on divorce matters, this thesis presents a new constitutionally-compliant law on divorce for the whole of Cameroon. Three fundamental underlying objectives run through the proposed system: to support the institution of marriage up to the point that it has irretrievably broken down; to minimise the distress and bitterness in divorce proceedings and to eliminate discriminatory practices.

Protecting the institution of marriage while liberalising divorce, is one of the challenges in this thesis. For constitutional and social reasons, these conflicting interests are both important and I have given effect to both. I have argued in favour of a mixed system which considers Cameroon's received laws, customary laws and constitutional obligations and therefore reflects and respects Cameroon's sovereignty, historical and cultural specificity and international obligations.

The solutions proposed in this thesis seek to transcend the current social, legal and linguistic divides within the country and improve spouses' equality rights on divorce.

IMPACT STATEMENT

The present law of divorce in Cameroon is a hotchpotch of customs and different colonial experiences, all brought together since independence. Some of the rules are stagnant while others change as the rules in the foreign country of origin vary. Some are modern while others are archaic and discriminatory. This diversity makes the law of divorce in Cameroon extremely complex, leading to unfairness in its application.

The thesis deals with the complexities and inequalities of the laws of divorce in Cameroon and how these can be overcome. I investigated these complexities and inequalities focusing mainly on the grounds for divorce and the jurisdiction of the courts in divorce matters and found out that because of the specific type of legal pluralism in Cameroon the law, particularly the law of divorce, is complex, inconsistent, conflicting, overlapping and often discriminatory. The thesis addresses these numerous flaws by offering a constitutionally compliant unified law (and court system) on divorce which would be rid of its most archaic current elements, but still stay rooted in cultural norms – a solution which transcends the current social, legal and linguistic divides within the country and improves spouse's equal rights to divorce.

Although prior research has been carried out in divorce in Cameroon, these earlier works have concentrated more on one of the systems and have not ventured to elucidate the method and principles for the selection of the new rules. These earlier works have also neglected customary law. This thesis has, for the first time, examined in greater detail the complex nature of the laws of divorce in Cameroon across national linguistic (French and English) and legal (common law and civil law) boundaries as well as under customary law which crosses these linguistics and legal boundaries.

My analysis of the problems focuses on legislative texts and judicial decisions from civil law courts, common law courts and customary courts. Court decisions in Cameroon are hardly reported. This makes it difficult for legal practitioners to compare past judgements to enhance their case. Thus, the thesis will be useful to legal practitioners, law teachers and students.

Customary law also exists outside of legal texts and court decisions. Law is herein defined broadly as including statutory provisions, case-law as well as customary rules whether the latter are recognised with official legal validity or not. This deep pluralistic approach to law is indeed the only one susceptible to shed light on how divorce law is practiced and how discriminatory customs can endure, despite equality rights enshrined in the Constitution. I thus carried out field work which revealed some of the practices which had not found their way into the courts. The thesis will thus contribute significantly to the current push in Cameroon towards a mono-jural (Cameroonised) legal system. It could be used as the base for the unification projects in Cameroon. Equality rights for all parties in divorce matters will thus be guaranteed.

The impact could be brought about through education (classroom teaching) and publication.

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ABBREVIATIONS

Afr. J. Int'l & Comp. L	African Journal of International and Comparative Law.
AJCL	American Journal of Comparative Law.
Art.	Article.
BCA	Bamenda Court of Appeal.
BCLR	Botswana Common Law Report.
BLR	Botswana Law Report.
CASWP	Court of Appeal South West Province.
CCLR	Cameroon Common Law Report.
CRB	Customary law Record Book.
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women.
Ch	Chancery.
Comp and Int'l L.J. S. Afr	Comparative and International Law Journal of South Africa.
CPNC	Cameroon Peoples National Convention.
CSRO	Civil Status Registration Ordinance.
ECHR	European Court of Human Rights.
Ed	Editor.
Eds	Editors.
ERPL	European Review of Private Law.
EWCA	England and Wales Court of Appeal.
EWHC	England and Wales High Court.
Fam	Family Division.
FLR	Family Law Report.
fn	footnote
GJF	Global Jurist Frontiers.
HCB	High Court Bamenda.
HCF	High Court Fako.
HLR	Harvard Law Review.
HRQ	Human Rights Quarterly.
HWLJ	Hastings Women's Law Journal.

ibid	ibidem.
ICLQ	International and Comparative Law Quarterly.
ISFL	International Survey of Family Law.
J. Afr. L	Journal of African Law.
JLPU	Journal of Legal Pluralism and Unofficial Law.
KNDP	Kamerun National Democratic Party.
Ltd	Limited.
MCA	Matrimonial Causes Act.
n	note.
N. Ir. Legal Q	Northern Ireland Legal Quarterly.
OK	One Kamerun.
Ord	Ordinance.
p	page(s).
Para	Paragraph.
Rev. Cam Drt	Revue camerounais de droit.
SCHCL	Southern Cameroons High Court Law.
Sol Jo	Solicitor's Journal.
TLR	Times Law Report.
Tur. Eur and Civ LF	Turlane European and Civil Law Forum.
WCLR	West Cameroon Law Report.
WLR	Weekly Law Report.

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GENERAL INTRODUCTION

The present law of divorce in Cameroon is a hotchpotch of customs and different colonial influences, all brought together since independence. Some of the rules are stagnant while others change as the rules in the foreign country of origin vary. Some are modern while others are archaic and discriminatory. This diversity makes the law of divorce in Cameroon extremely complex, leading to unfairness in its application. The present situation calls for reform and this thesis advocates unification¹ as the best solution. Structurally, the thesis is made up of an introduction followed by five chapters and a conclusion. The introduction examines the existing legal framework and the problems arising from it. It lays down the purpose of the research, the justification for focusing on divorce and presents the methodology.

A) THE EXISTING LEGAL FRAMEWORK

In many areas of the law in Cameroon, Parliament has acted with the aim of resolving existing problems and harmonising²/unifying the laws in those areas. Divorce, however, is an area in which Parliament has not legislated. The applicable laws are still those inherited from colonial administrators (the English and the French) and customary law.

In Anglophone Cameroon,³ the law for the time being in force in England applies in divorce matters.⁴ Consequently, as the divorce law in England changes, the divorce law in Anglophone Cameroon must automatically change, irrespective of the cause of the change in England. The current laws

¹ Unification is 'the creation of a new uniform legal system entirely replacing the pre-existing legal systems which no longer exist as autonomous systems.' See A N Allot, 'Towards the unification of laws in Africa' (1965)14 *JCLQ* p366.

² 'Harmonisation is the removal of discord, the reconciliation of contradictory elements between the rules and effect of two legal systems which continue in force as self-sufficient bodies of law.' See A N Allot, *ibid*.

³ The phrases Anglophone Cameroon, Southern Cameroons, West Cameroon, North West and South West regions of Cameroon refer to the same territory: the English-speaking part of Cameroon, administered by the English as a UN trust-territory and comprising 2 of the 10 regions in Cameroon today.

⁴ This is by virtue of section 15 of the Southern Cameroon High Court Law (SCHL) 1955.

of divorce in England and therefore Anglophone Cameroon are found in the English Matrimonial Causes Act (MCA) 1973.⁵

In contrast, the law in Francophone Cameroon⁶ is static. It is the law as it was in France before Cameroon gained independence in 1960. The decree of 22nd May 1924 rendered executory in Cameroon all statutes and decrees which were promulgated in French Equatorial Africa before 1st January 1924. French decrees of 28th September 1897 and 17th March 1903 provide that all legislation in France previously extended to the territory of Senegal shall apply in French Equatorial Africa. The French law of divorce applicable in Francophone Cameroon is thus the 1884 French divorce law. The grounds for divorce under the 1884 French divorce law are now embodied in articles 229-232 of the civil code applicable in Francophone Cameroon. Any change in the divorce laws in France is not applicable in Francophone Cameroon.

By virtue of article 68 of the Constitution of Cameroon, these laws will continue to apply until they have been amended by local legislation.⁷ To this date, there has been no local legislation on divorce matters.

As concerns customary law, there are as many customary laws as there are tribes in Cameroon, each evolving at a different pace. This extreme diversity makes the application of the customary laws on divorce difficult. The situation is made worse by the fact that it is difficult to know the exact state of customary law due to its unwritten nature. Nevertheless, some common customary rules on divorce are discernible. These rules, which include both fault and non-fault grounds for divorce, are at times discriminatory. All divorces, even those on customary grounds, are pronounced by courts, but the courts are not to enforce any custom which is contrary to public policy

⁵ S. 1 (2) (a-e).

⁶ The phrases Francophone Cameroon and East Cameroon refer to the French-speaking part of Cameroon administered by the French as a UN trust-territory and comprising 8 out of the 10 regions in Cameroon today. Before re-unification with Anglophone Cameroon, Francophone Cameroon was known as the Republic of Cameroon. After re-unification with Anglophone Cameroon in 1961 the nation was baptised the Federal Republic of Cameroon comprising East and West Cameroon. In 1972 the name was changed to the United Republic of Cameroon made up of 10 provinces. Today it is known as the Republic of Cameroon after the 2008 constitutional amendments with 10 regions.

⁷ Article 68 states that 'The legislation applicable in the Federal State of Cameroon and in the Federated States on the date of entering 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.' Previous Constitutions have also maintained this position.

and good morals (in Francophone Cameroon)⁸ or repugnant to natural justice, equity and good conscience (in Anglophone Cameroon).⁹ The difficulty is that the vagueness of what is covered by these phrases subjects every customary law rule to the interpretation of the judges. Judges, (especially in Anglophone Cameroon) in the exercise of this discretionary power, have been known to enforce discriminatory customary rules that arguably are repugnant to 'natural justice, equity and good conscience', contrary to enacted legislation.¹⁰ Furthermore, the jurisdiction of the court in divorce matters in Francophone and Anglophone Cameroon is not uniform. In Francophone Cameroon, jurisdiction relies on the choice of the parties whereas in Anglophone Cameroon, while there is some element of choice, it depends primarily on the type of marriage (statutory or customary) celebrated.¹¹ As a whole, the present state of legal pluralism in Cameroon has increased the level of doctrinal complexity.

B) PROBLEMS ARISING FROM THE EXISTING LEGAL FRAMEWORK

Several problems arise from the existing pluralistic legal framework in Cameroon. First, pluralism of laws in Cameroon is detrimental to the rights and freedoms of individuals who are subject to customary jurisdictions because it keeps them bound by discriminatory rules. Further, interaction of people from different parts of Cameroon and inter-tribal marriages have created problems of conflict of laws. As Nina Dethloff explains, differences in the law of divorce and its legal consequences may cause a relationship which was established under and lived in reliance upon a particular legal regime to have different and unexpected legal consequences due to a

⁸ Articles 42 and 51 of the French decree of 31st July 1927 applicable in Francophone Cameroon provide that customary law will be excluded if it is contrary to the notion of *ordre public*.

⁹ Section 27 of the Southern Cameroons High Court Law (SCHL) 1955 applicable in Anglophone Cameroon.

¹⁰ For example, in *Sikibo Derago v Ngaminyem Etim*, [(1982) BCA/36/81, unreported] the Court of Appeal in Bamenda, North West Region held that: '... a customary law wife can neither inherit nor administer the property of her deceased husband because she is part of the chattels of her deceased husband to be inherited or administered.' See Chapter One p95 - 97.

¹¹ Although there is now some choice for customary marriages in Anglophone Cameroon, choice of jurisdiction does not import choice of law as in Francophone Cameroon. See Chapter Two p118 - 122.

change in residence.¹² If, for example, parties resident in Francophone Cameroon, where divorce cannot be obtained against an innocent party, later move to Anglophone Cameroon, where divorce can be obtained against the will of the innocent party, the innocent party will suddenly lose the protection against divorce which he/she may have relied upon. If people should lose their status or rights within the same country because of a change of residence, their confidence in the authority of the law could be undermined. Pluralism of laws can thus create conflict and undermine the rule of law.

The shortcomings of the laws of divorce in Cameroon do not relate only to the grounds for divorce but extend to the jurisdiction of the court to grant divorce as well. Uncertainties as to jurisdiction of the courts in divorce matters hinder the good administration and fairness of divorce decisions. There are three different courts with jurisdiction over divorce. These are Customary Courts, Civil Law Courts and Common Law Courts. The multiple systems of courts in Cameroon could generate conflicts of jurisdiction in divorce matters, especially in Anglophone Cameroon. Furthermore, the multiple systems of courts can also create a situation of multiplicity of proceedings (in Anglophone Cameroon). These multiplicities of courts and consequently of applicable laws need to be addressed. Finally, the discriminatory nature of many divorce provisions must be tackled. The Cameroonian Constitution guarantees equality rights¹³ which are relevant to divorce matters. However, despite theoretically being the basic law of the land to which all other laws must conform, the Constitution lacks real supremacy for want of an efficient mode of constitutional review. The current system of constitutional review in Cameroon is inadequate. It is preventive only. Once laws have been promulgated, the Constitutional Council can no longer declare the laws unconstitutional¹⁴ neither can ordinary courts step in. This thesis will suggest that the best remedy to these numerous flaws lies in a unified system of courts and laws.

¹² Arguments for the unification and harmonisation of Family law in Europe in K Boele-Woelki, (ed.) *Perspective for the Unification and Harmonisation of Family law in Europe* (Intersentia Oxford 2003) p49.

¹³ See the preamble of the Constitution.

¹⁴ Art. 47 (3) of the Cameroonian Constitution.

As soon as the Federal Republic of Cameroon was formed,¹⁵ by the unification of the Republic of Cameroon with Southern Cameroons, the Government of the Federal Republic of Cameroon created a commission¹⁶ to establish a uniform body of Family Law in the form of a code in Cameroon. In 1968 the first uniform law on family matters was enacted.¹⁷ This law dealt with births, deaths and marriages, leaving out divorce. The 1968 law was repealed in 1981 and its provisions consolidated in Ordinance N° 81-2 of June 29th, 1981, known as the Civil Status Registration Ordinance (CSRO). The 1981 law, like the 1968 law, is silent on the issue of divorce.

The idea of a family code is welcome by Cameroonians¹⁸ but there is potential disagreement as to its content. Antagonism between the Francophones (civil law) and the Anglophones (common law) increases this problem. Should the proposed single law of divorce be the law applicable in Francophone Cameroon, which is based entirely on the fault system or should it be based on a unique ground with a mixture of fault and non-fault facts, as it is in Anglophone Cameroon? Should discriminatory grounds for divorce continue to exist as they do under customary law? In 2004, a draft family code was devised by the Ministry of Justice to meet the aspirations of Cameroonians. The aspirations of Cameroonians are to have a code of family law applicable to the entire nation which would respond to Cameroon's specificities. The code has been put aside for more research to be carried out.¹⁹ It is hoped that this thesis will form a valuable contribution to the final product. The bases for jurisdiction in divorce matters in the draft family code are found in section 59 and the grounds for divorce in section 264.

¹⁵ 1st October 1961.

¹⁶ Created by Decree n° 64/DF/84 of 29th February 1964.

¹⁷ Law n° 68/LF/2 of 11th June 1968.

¹⁸ B Djuidje Chatué, *Les Conflits de lois dans l'avant-projet de code camerounais des personnes et de la famille-Vers une réforme conséquente?* (1st edn L'Harmattan Publisher Paris 2013) p10.

The code has featured in political campaigns. During the third extraordinary congress of the Cameroon Peoples Democratic Movement (CPDM) the ruling party, on July 21st, 2006, the President promised that the Family Code would soon see the light of the day. See 'intégralité du discours d'ouverture et de politique générale du Président Paul Biya au troisième congrès-extraordinaire du RDPC. Texte intégral du discours de clôture du président Paul Biya au congrès extraordinaire du RDPC 21 juillet 2006.' <http://www.spm.gov.cm/fr/documentation/discours/discours/article/intergralite-du-discours-douverture-et-de-politique-generale-du-president-paul-biya-au-troisieme-con.htm>.

¹⁹ See Chapter One p96-98

C) PURPOSE OF RESEARCH

The purpose of this research is to offer a constitutionally-compliant unified law on divorce which would be rid of its most archaic current elements but still stay rooted in Cameroon's cultural norms. I will first investigate the complexities and inequalities of the laws of divorce in Cameroon focusing mainly on the grounds of divorce and the jurisdiction of the courts in divorce matters and propose a lasting solution to these complexities and inequalities. The proposed solution will embrace the different customs and received laws and thus reflect the cultural, political and legal distinctiveness of Cameroon but without the current discriminatory provisions.

Although prior research has been carried out in the area of divorce²⁰ with some comparative analysis of the two legal systems applicable in Cameroon, these earlier works have concentrated more on one of the systems and have not ventured to elucidate the method and principles for the selection of new unified rules. These works have also tended to neglect customary law. This thesis will, for the first-time, attempt to examine in greater detail the complex nature of the laws of divorce in Cameroon, across national linguistic (French and English) and legal (common law and civil law) boundaries as well as under customary law which crosses these linguistic and legal boundaries. It will focus principally on the jurisdiction of the courts to grant divorce and on the grounds for divorce. The present thesis puts in place a methodology for devising a new unified law and makes proposals on the substantive principles that should be adopted. As the first major work on the topic in Cameroon, the thesis will be a significant contribution to the current push in Cameroon towards a mono-jural legal system.

D) PROPOSED SOLUTION

I will propose unification as the best solution to the problems inherent in the complex nature of the laws of divorce in Cameroon. I will establish that other

²⁰ G Ngoumtsa, *Les Conflits de lois en matière de divorce* (Mémoire présenté et soutenu en vue de l'obtention du Diplôme d'Etudes Approfondies en Droit Privé, Yaoundé 2003-unpublished) ; S Tabe Tabe, *A Comparative Study of the Causes and Ramifications of Divorce under Statutory Law in Cameroon* (Thesis Yaoundé 11,1997-unpublished).

alternative solutions such as harmonisation, integration²¹ and constitutional overrides are inadequate to solve these problems. Unification will create a new law which will replace the existing archaic and discriminatory laws. A unified system of laws will avoid the problems inherent in the internal conflict of laws. It will make the law less complex and easier to ascertain, while a unified system of court will solve the problem of ascertaining the jurisdiction of the court. For any uniform law on divorce to be meaningful however, social conditions must be considered. Unification is the most appropriate way forward for Cameroon because it is best able to take account of Cameroon's distinctive historical, demographic, political and cultural conditions of pluralism. Pluralism in Cameroon is not only state legal pluralism²² but also deep or strong legal pluralism.²³ Deep legal pluralism recognises the normative power and influence of non-state actors. In Cameroon, these non-state influences will generally occur through customary practices. Finally, legal pluralism is also exhibited by Cameroon's commitment to its international obligations in which the protection of human rights (which includes the right to non-discrimination and equality before the law) is one of the fundamental pillars of democracy and has a universal scope.²⁴ In the course of unifying the laws of divorce in Cameroon therefore, its pluralistic nature in all these respects must be considered. My proposed unified law will essentially be made up of elements from the civil law, as applicable in Francophone Cameroon, from the common law, as applicable in Anglophone Cameroon and from customary law and will be human rights and constitutionally compliant. It aims at making divorce less complex, more

²¹ Integration occurs when different laws with regards to a particular branch are brought together under one enactment so that 'the different systems continue to exist but without conflict and that some elements thereof may be unified.' A Allot, 'Towards the Unification of Laws in Africa' (n1) p366

²² State legal pluralism is a situation in which differently officially recognised state laws co-exist. (G J van Niekerk, 'Legal pluralism' in J C Bekker, C Rautenbach N M Goolam (eds) *Introduction to Legal Pluralism in South Africa* (2ndedn Lexis Butterworths 2006) p5.

²³ When other 'regulatory orders are generated in semi-autonomous social fields other than that of the state it creates a situation of deep or strong legal pluralism. (C Himonga, 'State and Individual Perspective of a Mixed Legal System in Southern African Contexts with Special Reference to Personal Law' (2010) 25 *Tul. Eur and Civ. LF* p26 <http://heineonline.org> accessed 10th January 2014).

²⁴ G W Mugwanya, 'Augmenting the Struggle for Gender Equality in Uganda: A case for the Domestication of International Human Rights Standard' (2000) *J. Afr. L.* 754 <http://heineonline.org> accessed 11 Dec 2013.

accessible and offering less discriminatory and more predictable outcomes than the present system.

E) EXPLANATION OF THE METHODOLOGY

Remedying the complex and conflicting legal situation in Cameroon could be done by several mechanisms including harmonisation, intergration, unification or simply by effective constitutional override provisions. Indeed, the attainment of a more coherent system of law in Cameroon could be done by the adoption of one of the different existing legal systems in Cameroon. This is the easiest method to attain a single system of law in a pluralist nation. However, this method invokes a policy of domination which is likely to be resisted considering the existing Anglophone/Francophone conflict²⁵ in Cameroon. I will consider the different methods and explain why harmonisation, integration or constitutional overrides alone are insufficient. I will argue that the fairest way to reflect the distinctiveness of Cameroon, embracing colonial and customary influences, is unification. I will adopt a comparative approach to analysing the options for unification. The advantages of a comparative approach cannot be underestimated. Comparative analysis can provide a wide range of options from which to choose. This range of options will enrich the supply of solutions, offering opportunities for selecting good rules²⁶ or modernising existing ones. To attain the goals of unifying the rules on divorce in Cameroon, comparative analysis will therefore be my starting point. The main methodology for my comparative analysis may be termed 'functional', in the sense that the comparison will focus on the function or effects of the law rather than on legal rules per se. The Cameroonian Constitution will also serve as a point of comparison (*tertium comparationis*) given that my aim is to propose a modern and constitutionally-compliant divorce law for the whole of Cameroon. Throughout the thesis, comparison will be made between the different legal systems that are applicable in Cameroon and with customary

²⁵ The nature of the conflict is discussed in Chapter Two p161 – 163.

²⁶ K Zweigert and H Kötz, *Introduction to Comparative Law* (3rd ed. Clarendon Press Oxford 1998) translation from the German version by T Weir p23.

law, to bring out points of convergence and divergence between them. Preference will be given in my proposed unified law to existing converging solutions if these are in line with the Constitution. The advantage of this approach is that it is likely to cement national cohesion. However, the very fact that rules are to be unified implies that not all the rules are the same. Identifying which ones converge and which ones are truly different may at times be a question of degree. The rules will be examined and adjustments made²⁷ where necessary before incorporating them into the unified law.

I will also refer to some foreign rules. If the comparative analysis suggests the adoption of a foreign rule, the foreign rule will be analysed to make sure that the rule or a modified version of it meets the cultural and political needs of Cameroonian society. Foreign rules should not be rejected just because they are foreign. The point to note is that the reception of foreign rules of law is not a matter of nationality but of usefulness and need. 'No one bothers to fetch a thing from afar when he has one as good or better at home, but only a fool would refuse quinine just because it did not grow in his back garden.'²⁸

The plural laws of Francophone and Anglophone Cameroon will be analysed, but I will also look to their parent systems. Finally, I will examine other countries with similar plural systems such as South Africa and Botswana. Like in Cameroon, in these countries customary law is applicable in addition to inherited legal systems. I will show that while the system of constitutional review in Cameroon is not adequate, insights could be drawn from South Africa and Botswana. I will also draw analogies in some instances with the European Union (EU) initiatives because the EU has also shared my goals of grappling with unifying projects of common law and civil law origins. The methodology used on those EU initiatives may therefore be an inspiration. Those involved in the harmonisation of private law under the EU have combined the 'common core' (which relies on rules common to all jurisdiction)²⁹ and 'better law' (which examines which interest should be

²⁷ The adjustments will be made in light of the problems encountered in the application of the present law.

²⁸ K Zweigert and H Kötz (n26) p30.

²⁹ See M Antokolskaia, 'The Better Law Approach and the Harmonisation of Family Law' in K Boele-Woelki (ed) (n12) p160.

protected the most)³⁰ methods though to different degrees.³¹ The goal of the EU on family law was to promote a common European family law. The task was not to be achieved through legislations but through ‘didactic elaboration of common principles’³² and Pintens suggested using the method employed by the American restatements of the Law.³³ However, as Antokolskaia noted, the “common core” method extensively used in the elaboration of the American Restatements can much less be relied upon for drafting the European principles.³⁴ The drafters of the American Restatement could restate the ‘common core’ of the existing case law but the drafters of the principles could not do so because of divergences in the laws of the different nations within the European Union.³⁵ She therefore suggested a move towards the ‘better law’ method whereby the better rule among the diverging rules existing in the national jurisdictions is selected, or a better rule if no existing solution seems satisfactory is engineered.³⁶ However, this is not the approach I want to adopt. Although the ‘common core’ method is easy to use because one can easily justify the chosen rule, the fact that I am advocating for unification implies that not all the rules are common to all the jurisdictions and therefore the common core method will not be sufficient. On the other hand, the ‘better law’ method fails to define how a rule is to be characterized as ‘better’ than an alternative rule. For example, should divorce be based

³⁰ ‘The choice for a minority rule or the elaboration of a new rule is distinctive of the “better law” method’. *ibid*; The ‘better law’ method researches the interest to be protected the most; W Pintens, ‘Europeanization of Family Law’ in K Boele-Woelki (ed) (n12) p31.

³¹ The European group on Tort law relied less on the common core method and more on the better law method because of the divergence in the European Law of Tort and little European Tort law capable of being restated as the existing common core. The members of the Lando Commission on European Contract Law equally made use of the common core and better law methods. They recommended using the better law method not only in the cases of “irreconcilable differences between the various domestic laws” but also when this provides “a more satisfactory answer than that which is reached by traditional legal thinking.” The Commission on European Family Law also adopted the common core and the better law method. Their working method followed that of the Lando Commission, the UNIDROIT Principles of International Commercial Contracts and the European Group on Tort Law. See M Antokolskaia, ‘The Better Law Approach and the Harmonisation of Family Law’ in K Boele-Woelki (ed) (n12) p164; W Pintens, ‘Europeanization of Family Law’ in K Boele-Woelki (ed) (n12) p30-31.

³² W Pintens, (n30) p3.

³³ *ibid*.

³⁴ M Antokolskaia, ‘The Better Law Approach and the Harmonisation of Family Law’ in K Boele-Woelki (ed) (n12) p161-162.

³⁵ *ibid*. While there is much diversity among different US States, there is at least a common Federal and Constitutional body of principles which is lacking across EU member States.

³⁶ *ibid*.

only on the irretrievable breakdown of marriage (as in Anglophone Cameroon) or should it be based only on fault grounds (as in Francophone Cameroon)? Or, should the grounds for divorce seek to stabilise the marriage or facilitate divorce? How do you select the better law? As Bradley explains, 'the concepts of a common core of legal policy and better family law have little if any validity' as 'objective criteria for legitimating components of a common core are not available.'³⁷ I will adopt an approach that will embody the rules under both the received laws and customary laws which are not contrary to the Constitution and are not discriminatory. I am happy to have several rules co-existing but they will apply to everyone and be administered by one court. I do not therefore aim at finding the better rule, but at eliminating those that go contrary to the Constitution or are in breach of human rights. Where two entrenched rules exist on the same point, both rules could be kept but parties should be given the option to choose. For example, fault grounds and fault and non-fault facts to prove irretrievable breakdown of marriage for purposes of divorce exist in Cameroon. The faults and non-fault facts could be converted to independent grounds for divorce while at the same time eliminating those that are unconstitutional, discriminatory or violate human rights. This co-existence will bring about a more liberal approach to divorce and will contain elements of the divorce laws in Anglophone Cameroon, Francophone Cameroon and customary law. The fact that there will be more choices available for divorce will make divorce more straight-forward and more in line with the evolution of Cameroonian society.

Restrictive grounds alone have proven to be ineffective because spouses find ways to circumvent the restrictions. I want a law that is in touch with social reality. A good law should conform to the spirit of society.³⁸ A good law should therefore take into consideration factors which include 'local manners, custom and physical environment.'³⁹ Hence customary law will be part of this study because customary law like state law influences people's behaviour.

³⁷ D Bradley, 'A Family Law for Europe? Sovereignty, Political Economy and Legitimation' in K Boele-Woelki (ed) (n12) p100.

³⁸ Montesquieu, *The Spirit of the Laws* (1748) Quoted by M Freeman and D Napier, Introduction Law and Anthropology in M Freeman and D Napier (eds) *Law and Anthropology: Current legal issues Vol. 2* p1.

³⁹ *ibid.*

Law is a symbol of cultural heritage, which reflects the spirit of the people and which evolves and grows.⁴⁰ Customary law, like any other law, is therefore not static. It is always changing to reflect how people are living at any given time.⁴¹ Customary law will therefore receive attention in this study because it is both socially important and constitutionally protected. This emphasis on customary law does not mean that all customary rules will form part of the unified law. Customary practices which violate the Constitution or human rights should be eliminated. Custom is a part of social, individual and national identity and cannot all be changed by simple formal law reform. Customary practices are said to be 'dictated by the aspirations of the ancestors, through a series of fetish beliefs.'⁴² As a result of the 'superstitious dynamics underlying traditional life in Cameroon, demands for change in customary values are generally never entertained for fear of negative reprisals from the ancestors.'⁴³ I will therefore propose rules which will thin out the negative effects of the discriminatory rules instead of eliminating the rules. For example, I will refrain from prohibiting the payment of the marriage symbol - the payment that the bridegroom or his family is expected to make to the wife's family before the marriage is valid.⁴⁴ Prohibiting this timeless and widespread practice altogether would not be in line with social reality. However, I will neutralize its legal effect. Instead payment of the marriage symbol would be optional and would have no effect on the validity of the divorce. Moreover, payment of the marriage symbol would be open to the wife's family as well as the husband's. In this way, potential negative effects of the marriage symbol will be mitigated. The future legal system will be a 'Cameroonised' system, a system which will feature characteristics from both the common law and civil law systems and traits of the customary laws of the people.

⁴⁰ R Cotterrel, *Law, Culture and Society* (Ashgate Publishers 2006) p103.

⁴¹ M Ndulo, 'African Customary Law, Customs, and Women's Rights' (2011) *Cornell University Law School* p118.

⁴² M Kiye, 'Conflict between Customary Law and Human Rights in Cameroon: The Role of the Courts in Fostering an Equitably Gendered Society' 36 (2015) 2 *African Study Monographs* p79.

⁴³ *ibid.*

⁴⁴ The marriage symbol is a gift made by the bridegroom or his family to the wife's family before or during the marriage. It is a symbol of the validity of a customary marriage. It is also known as bride price, bride wealth or dowry.

My analysis of the received laws focuses on legislative texts and judicial decisions. Enacted legislation is the principal source of received law on divorce but applications of the enacted laws by the courts are also of great importance, especially in Anglophone Cameroon where the doctrine of binding precedence prevails. Court decisions therefore play a vital role in this exercise. To grasp the intricacies of the laws of divorce in Cameroon, it will therefore be necessary to have adequate knowledge of court decisions on divorce issues in both Anglophone and Francophone Cameroon as well as under customary law. Unfortunately, court decisions in Cameroon are hardly reported. Following a research visit to Cameroon⁴⁵ to examine the archives of the Supreme Court, Courts of Appeal, High Courts and Customary Courts, I have compiled a data of decisions on divorce cases. The Court decisions have then been compared and analysed to identify the similarities and differences between Anglophone and Francophone judgements and between judgements from Customary Courts in Anglophone and Francophone Cameroon. 106 cases were examined. Of these, 46 came from the common law courts in Anglophone Cameroon, 23 from the civil law courts in Francophone Cameroon, 27 from customary courts in Anglophone Cameroon and 10 from customary courts in Francophone Cameroon. More cases were examined from courts in Anglophone Cameroon than from courts in Francophone Cameroon because judgements from courts in Anglophone Cameroon are more complex and posed more problems even when the facts of the cases were similar. The cases examined were cases decided over a long period of time (between 1960 – 2014) to show a clear picture of the evolution of court practices.

Customary law also exists outside of legal texts and court decisions. Law is herein defined broadly as including statutory provisions, case-law as well as customary rules, whether the latter are recognised with official legal validity or not. This deep pluralistic approach to law⁴⁶ is indeed the only one susceptible to shed light on how divorce law is practiced and how discriminatory customs can endure, despite equality rights enshrined in the Constitution.

⁴⁵ From December 3rd, 2014 - April 8th, 2015.

⁴⁶ The different types of legal pluralism are examined in Chapter Two p105 - 108.

I also carried out field work to reveal some of the practices that had not found their way into the courts. Thus, the field work did not seek to draw up an exhaustive survey of existing customs but to identify a few recurring difficulties as well as positive aspects within customary law on divorce. Two methods of investigations were used: the self-completion questionnaire and open-ended interview. One thousand questionnaires were distributed in villages within the ten regions in Cameroon⁴⁷ with each region receiving one hundred questionnaires. The questionnaires were given to a cross section of the population. This was necessary to get the views of a broad spectrum of the population. These included title holders (the king makers), men and women of ages 18-35, 36-59, and above 59 years. The questions were geared towards getting an understanding of the custom and to elucidate the grounds for divorce under the different customary practices. In this light, the first question was a summary of the historical development of the law of divorce in the particular custom. I then asked questions on the kind of behaviour that will constitute fault, such that the petitioner could rely on to obtain a divorce, and whether divorce could be granted on non-fault grounds. The third issue was whether there are discriminatory grounds for divorce for men and women. Out of the one thousand questionnaires, nine hundred and thirty-two were returned. Some of the questions in the questionnaires were not answered. Some questionnaires had conflicting answers to the same questions in the same village. The second method (open-ended interview) was then used to complement the self-completion questionnaire.⁴⁸ Having examined court decisions and the self-completion questionnaire, I had a broader insight on the customary practices and knew how to focus on the questions during the interview. 30 interviews were conducted. Here, as with the questionnaires, the interviewees were men and women from 18 years and above. The questions were essentially meant to clarify doubts in the responses to the questionnaire. Beyond that, however, I asked general questions on the experiences of some interviewees who were divorced. More information came out from the interviews. The interviews clarified some of

⁴⁷ Within the limited time I had in Cameroon, some of my colleagues at the Faculty of Law, University of Dschang helped with the distribution and collection of the questionnaires from the different regions during the Christmas holidays.

⁴⁸ The interviews were recorded for a proper analysis of the results.

the conflicting views that were found in the self-completion questionnaire. For example, in almost all the tribes the reply on the questionnaire showed that divorce is not allowed or is very difficult to obtain. But a follow up with the interviews revealed that this is not exactly true because in most of the customs, divorce is allowed if the marriage symbol is refunded. In some cases, it is even allowed on very flimsy grounds such as, 'I just don't want to live with him again' on the part of the woman⁴⁹ and, 'she is too much headache' (without specifying any particular problem) on the part of the man. Adopting this method was pertinent for it highlighted the gap between law (in theory) and practice. Any meaningful unified law must take into account not only different legislative texts and court decisions but also the different practices of the people.

The main obstacle during the interviews was communication. Some of the villagers interviewed, especially those above sixty-years old, could only speak their local language. I needed someone to translate what the interviewee was saying. Sometimes, based on my general knowledge on the customary practices in Cameroon, I doubted the translator's translation and needed to get a second translator to double check the translation. However, because the research carried out on this section is intended only to add illustrations of peoples' experiences to my study of the law, these conversations and survey results served my purpose of gaining a meaningful insight into the unwritten grounds of divorce under customary law. Thus, while a full survey of customary law was not within the scope of this work, meaningful examples of customs were necessary to understand customary practices.

F) STRUCTURE OF THE RESEARCH

Chapter one examines pre-colonial and colonial administration of justice in Cameroon explaining how the colonial past has shaped the present law. It also examines the present system of courts, legal personnel and post-colonial constitutional rights.

⁴⁹ Not wanting to live with the husband again could occur where the woman has found a lover.

Chapter two examines the problems posed by legal pluralism and multiple courts handling similar issues. It explores the different techniques such as unification, constitutional overrides, harmonisation and integration which might be used for overcoming the complexities and inequalities of the present system of divorce laws and courts, and makes a case for unification. Although unification is considered the best option, it is not without obstacles. The chapter also explains how these obstacles could be surmounted.

Chapters three and four scrutinise the current complexities and inequalities that exist in the substantive law of divorce in Anglophone Cameroon, Francophone Cameroon and under customary law. Chapter three focuses on adultery while chapter four analyses the tension between fault and non-fault-based grounds of divorce.

Finally, chapter five presents the specific improvements advocated for in relation to the substantive law of divorce and jurisdiction of the court. It sets out the main provisions to be included in a unified law of divorce which purports to be respectful of equality and more broadly of constitutional rights.

CHAPTER ONE

SYNOPSIS OF THE LEGAL HISTORY OF CAMEROON

INTRODUCTION

The Republic of Cameroon is a melting point of different geographical, cultural, linguistic and legal traditions. It is made up of over 250 different ethnic groups, each with its own dialect and culture (but with some similarities amongst these dialects and cultures) coupled with the two official languages, French and English. Unsurprisingly, it has been described as a 'meeting point for the peoples and races of Africa' or as 'Africa in miniature'.¹ Cameroon has a pluralistic legal system in which the common law operates side by side with the civil law in addition to its diverse customary laws which are applicable in specific matters. As stated above, in the English-speaking regions of Cameroon, the law 'for the time being in force in England' governs divorce matters² meanwhile, in the French-speaking regions of Cameroon, French law as it was before French Cameroon gained independence in 1960, governs divorce.³ This system came about because of Cameroon's colonial heritage. Cameroon was colonised first by the Germans, and then ruled (in parts) by the English and the French simultaneously as a mandated and later trust-territory under the League of Nations and the United Nations respectively. In this chapter, I will examine Cameroon's colonial past, explaining the origins of the complex nature of the law of divorce in Cameroon, the courts that administer divorce laws from pre-colonial period to the present day to show that the present system of courts in Cameroon is largely influenced by Cameroon's colonial past. Finally, I will analyse post-colonial constitutional guarantees relating to divorce to appreciate the impact of the Constitution on divorce matters.

¹ E Mveng, *Histoire du Cameroun* (Présence africaine, Paris 1963) p29.

² p25 - 26.

³ p26.

A) PRE-COLONIAL AND COLONIAL ADMINISTRATION OF JUSTICE IN CAMEROON

1) Pre-colonial administration of justice

Before the colonisation of Cameroon, Cameroonian law was based on the customs of the people. These customs differed from tribe to tribe although there were (and still are) similarities in some areas. There was (and still is) no single body of customary law applicable to the whole of Cameroon. The notion of marriage (and divorce) under customary law was and still is different in many ways from that recognised under English and French law. Under customary law marriage was and still is regarded as a matter for the two families, (the bride's and the bridegroom's)⁴ rather than for the state and is terminable as it is created (by family agreement). The emphasis was on consent and agreement between the two families and not just between the future husband and wife. This is still the situation under customary law today. However, the situation has evolved regarding the bride's consent. In the past, while the boy's consent was sometimes sought, the girl's consent was immaterial.⁵ This is supported by the fact that the girl child could be betrothed while still in her mother's womb.⁶ However, the consent of her father or a representative of her family was necessary. Once the marriage symbol was paid the marriage was regarded as valid. Today, however, although parental consent is still a requirement under customary law, the consent of the girl child is also relevant.

While consent (of the families) was crucial to marriage, on divorce consent was more ambivalent. There were some customs in which the notion of divorce was not known. With the Douala from the Littoral region for example, the woman, regarded as an object being bought or exchanged, remained in the husband's house until death, no matter the hardship she was undergoing. It was not uncommon to hear a father saying to her daughter during the marriage ceremony that 'as you marry this man you will die in his

⁴ M Doumbé-Mouloungou, *Les coutumes et le droit au Cameroun* (Editions Clé Yaoundé 1972) p24-26.

⁵ *ibid* p31.

⁶ *ibid*.

house'.⁷ Even the husband's death did not put an end to the marriage. The woman was obliged to remain in the family concession of the husband and remarry one of his male relatives.⁸ This is still practiced in some tribes today. Generally, where a dispute arose between a couple, the two families would try to reconcile them. Where divorce was available, it was the consent of the families rather than that of the husband and wife that was important. The wife had to endure the marriage if she wanted a divorce and her parents were against it.⁹ There were also situations similar to a judicial separation where if the woman had grown-up children, she could leave the matrimonial home and live with them. In these situations, if the woman could refund the marriage symbol, then the marriage would be terminated. Further, there were and still are no fixed grounds for divorce. Both fault and non-fault grounds were and still are applicable, depending upon the customs of the parties. The fault grounds the wife could use included the following: failure to provide for the family, neglect, cruelty, alcohol abuse and poor treatment of the wife. The husband on his part could divorce the wife in cases of adultery committed by the wife,¹⁰ desertion especially by elopement, trouble-making by a wife towards a co-wife, stubbornness towards the husband, challenge to his authority¹¹ and refusal to take care of him.¹² Other fault grounds were and still are 'witchcraft fears and accusations' by either spouse.¹³

The non-fault grounds include serious illnesses such as leprosy and madness.¹⁴ Infertility and impotence were and still are grounds for divorce under customary law, although these are not common grounds. Where the wife is barren, the husband can marry another woman as polygyny is practiced under customary law. Moreover, where the husband is impotent he

⁷ *ibid* p41.

⁸ She could even marry the husband's son from another wife but not her blood son.

⁹ On the other hand, the husband could easily send away the wife and marry another woman if he was no longer interested in the marriage, or neglect her and marry another woman since polygamy by the husband was and still is accepted.

¹⁰ Note that the wife cannot divorce her husband for adultery.

¹¹ This ground reflected the cultural milieu at the time of a macho society where a woman was not to voice her opinion, let alone challenge her husband's authority.

¹² J Mbaku, *Culture and Customs of Cameroon* (Greenwood Press London 2005) p154-155; R Brain, *Bangwa Kinship and Marriage* (Cambridge University Press 1972) p162.

¹³ *ibid*.

¹⁴ These are still grounds for divorce today under customary law.

may allow the wife to have a child or children with another man secretly.¹⁵ Finally, for wealthy women, exit was possible. A wealthy *Mafua* (queen) who did not want her personal property merged with that of her husband could refund the marriage symbol, thus putting an end to the marriage.¹⁶ Among the Bangwa people of the South West region, a father could divorce his daughter from her husband if he had no son who would succeed him and wished to claim the right of *pater* in her children.¹⁷ Once the husband accepted the refunded marriage symbol, he relinquished his rights as father to the children born of the wife. This ground is not applicable today. The marriage could also be terminated against the will of the wife by the refund of the marriage symbol by her father. Today however, divorce must be commenced by the husband or the wife and not a third party.

There are some few instances where divorce was recognised even though the marriage symbol was not refunded and this varied from custom to custom. Amongst the Gbaya of the Northern region, if the husband sent the wife away it was unlikely he would get a refund of the marriage symbol.¹⁸ In some cases where the husband knew he would not get a refund of the marriage symbol if he sent the wife away, he would mistreat the wife pushing her to leave the matrimonial home.¹⁹ If the wife left the matrimonial home, the husband would then ask for a refund of the marriage symbol.

In traditions where divorce initiated by the woman was not accepted, as with the Doualas of the littoral region or the Bulus of the South region, the plight of the woman was enormous. Amongst the Doualas of the Littoral region, where a married woman committed adultery, her left ear was cut off as a sign of her infidelity. This was meant to deter her from committing adultery again.²⁰ With the Bulus of the Centre region, it was accepted for a man to kill his wife if she committed adultery.²¹ Despite the harsh punishment faced by

¹⁵ See J Mbaku (n12) p155.

¹⁶ R Brain (n12) p160.

¹⁷ *ibid.* Succession amongst the Bangwa is patrilineal.

¹⁸ J Mbaku (n12) p155.

¹⁹ Under English law this will fall under constructive desertion. It will not be the wife who is in desertion because she was forced to leave the house due to the cruel treatment from the husband. The husband is regarded as the deserter.

²⁰ M Doumbé-Moulongo (n4) p42.

²¹ *ibid* p42.

the unfaithful woman, she could not in turn complain of her husband's adultery. This customary practice subjugated the woman to the status of a mere object. Such inhuman treatment for adultery is no longer practiced today but adultery remains a discriminatory ground for divorce.

Despite the striking and variable examples of divorce, divorce seemed to be a 'straight forward process' under pre-colonial customary law as matrimonial cases were mainly decided by easily assembled ad hoc bodies. Divorce cases were decided by the head of the two families, quarter head, or the chief and his council. The opinion of the head of the family carried the least weight and the opinion of the chief and his council the greatest.²² If there was a problem between the husband and the wife which they could not solve, the husband or wife would inform his/her parents who would then inform the other members of his/her family. The head of the family would then inform the head of the other family and a date and place would be fixed for them to meet and discuss the matter. If they decided that the marriage symbol should be refunded and an amount was agreed upon by the two families, the matter ended there and the marriage was dissolved by the refund of the marriage symbol. However, where there was disagreement as to whether the marriage symbol should be refunded and/or as to the amount, the matter was taken to the quarter head.²³ If any of the parties was not satisfied with the decision from the quarter head, the matter was then taken to the chief. However, divorce matters rarely reached this level.²⁴ The final appeal was with the chief and his council.²⁵ The chief was the highest authority of the land.²⁶ Other matters not directly related to status were resolved by the chief and his council or the chief's representatives. During the pre-colonial period therefore, either the matter was regarded as a family affair and it was dealt with by the families concerned, except where the families could not agree, or,

²² P Nkwi, *Traditional Government and Social Change* (The University Press, Fribourg Switzerland 1976) p99-105.

²³ M Doumbé-Mouloungou (n4) p47.

²⁴ *ibid* p28.

²⁵ If one were to compare this hierarchy with the modern courts it will be that the head of the two families could be likened to the High Court, the quarter head to the Court of Appeal and the chief and his council to the Supreme Court.

²⁶ P Nkwi (n22) p104.

it did not concern status and it was dealt with by the chief or by persons appointed by the chief who then reported back to the chief.

Layered upon the customary rules and procedure, traditional justice was sustained by beliefs in the supernatural.²⁷ Such beliefs were, and still are, a key factor in the observance of traditional rules.²⁸ The laws were and still are obeyed partly because of the fear that some evil consequences will befall you or a member of your family if you fail to obey the law.

This mix of customary rules and beliefs remains today. Colonialism did not abolish pre-colonial laws but merely introduced two systems of courts: one to apply pre-colonial laws (known as customary law) to the local people and another to apply the laws brought to Cameroon by the colonial administrators for the whites and Cameroonians of modern status. This decision to build upon pre-colonial laws explains the enduring influence of pre-colonial practice and the continued importance of customary law in Cameroon. I will now examine how justice was administered during the colonial period.

2) Colonial administration of justice in Cameroon

Cameroon's colonial past has manifested itself in contrasting laws, administrative policies and court systems some of which differ from the customary practices of the people. Cameroon was colonised by the Germans and then the English and the French took over Cameroon from the Germans simultaneously as a mandated and later trust-territory under the League of Nations and later the United Nations. When the Germans colonised Cameroon, they established two types of courts; one for the whites and another for Cameroonians.²⁹ When England and France took over Cameroon under the mandatory and later the trusteeship system, they did not discard the customary laws that existed. Like the Germans, they also set up two types of courts and had two different laws applicable in these courts; one for the natives and the other for Europeans (and in the case of French

²⁷ P Nkwi (n22) p55-59.

²⁸ M Kiye, 'Conflict between Customary Law and Human Rights in Cameroon: The Role of the Courts in fostering an Equitably Gendered Society' 36 (2015)2 *African Study Monographs* p79.

²⁹ N Rubin, *Cameroon: An African Federation* (Pall Mall Press London, 1st edition 1971) p33-34.

Cameroon for those Cameroonians who have been assimilated and were thus treated as Frenchmen.

a) The administration of justice in Cameroon by the Germans (1884-1916)

After a struggle for control of Cameroon between the English and the Germans, Cameroon was annexed by the Germans in 1884 as a result of a treaty, concluded between Eugene Nachtigal on the side of the Germans and the Douala chiefs, dealing with trade and surrendering their sovereignty to the Germans.³⁰ German rule in Cameroon lasted for thirty two years.³¹ During this period, a system of government was introduced which slightly altered the traditional set-up in Cameroon by either incorporating or subordinating traditional rulers (local chiefs) to German authority. The head of the German administration in Cameroon was the governor. The governor was empowered to legislate for Cameroon and to administer the courts.³² Two sets of courts were established: one for the whites (which applied German civil and criminal law and procedure) and another for Cameroonians, which applied customary law.³³ This marked the beginning of the plurality of courts and laws in Cameroon.

The court for whites, the *Bezirksgericht*, was presided over by a judge aided by two or four lay assistants.³⁴ There was an appeal to the *Obergericht* in Cameroon. Later a Court of Appeal for whites only, the *Kolonialgerichtshof*, was established in Germany.³⁵ In the early days, the courts for blacks were adjudicated by German officials assisted by interpreters so that native customs could be considered and native languages could be used. But the small number of officials and their concern with regular administrative duties necessitated a change. A system of courts was subsequently provided in Douala. The court for blacks was put in the hands of native chiefs who were to render judgement according to native customs in civil cases. Appeal laid to

³⁰ N Rubin (n29) p24-29

³¹ 1884-1916.

³² H Rudin, *Germans in the Cameroons (1884-1914) A Case Study in Modern Imperialism* (Jonathan Cape, Thirty Bedford Square-London, 1931) p180-181. See also N Rubin (n29) p40.

³³ N Rubin (n29) p33-34.

³⁴ H Rudin, *Germans in the Cameroons (1884-1914) A Case Study in Modern Imperialism* (n32) p199.

³⁵ N Rubin, *Cameroon: An African Federation* (n29) p33.

the governor or to the *Oberrichter* appointed by the governor.³⁶ However, if an issue arose between a Cameroonian and a European, jurisdiction depended on the race of the defendant. If the defendant was a Cameroonian, the court for Cameroonians had jurisdiction, but if the defendant was a European, then the court for Europeans had jurisdiction.³⁷ This method solved problems relating to conflicts of jurisdiction. In any case, such problems could not arise in divorce cases because marriages between Europeans and Cameroonians were not allowed.

The First World War brought an abrupt end to German rule in Cameroon and Cameroon was handed over to England and France.

b) The administration of justice in Cameroon by the English and the French
The German rule in Cameroon lasted for thirty-two years (1884-1916) until Germany was defeated by the allied forces during the First World War. By the League of Nations Mandate, the English, represented by their Secretary of State for Colonies, Viscount Milner, and the French, represented by their Minister for Colonies, Monsieur Simon met in Paris on 4th March 1916 and partitioned Cameroon³⁸ along the Simon-Milner line. France had the lion's share of the territory (about four/fifths) while England had about one/fifth of the territory.

When the Supreme Council (as a de facto International government) met in Paris on 7th May 1919, they agreed that England and France should make a joint declaration to the League of Nations on the future of Cameroon.³⁹ On 28th June 1919, the treaty of Versailles was concluded and by virtue of article 119 of this treaty, Germany renounced all her rights to her overseas possessions in favour of the allied and associated powers. On 10th July 1919, England and France made a joint declaration confirming the partition of Cameroon. They agreed to administer their respective areas in accordance with article 22 of the League of Nations' Covenant according to which '*the well-being and development of peoples not yet able to stand by*

³⁶ *ibid* p34.

³⁷ C Anyangwe, *The Cameroon Judicial System* (Ceper Cameroon 1987) p33.

³⁸ The First World War ended in 1918 but the war ended in Cameroon in 1916.

³⁹ The Supreme Council was made up of Britain (Lloyd), France (Clemenceau), USA (Wilson), and Italy (Orlando).

themselves form a sacred trust of civilisation.' On 20th July 1922, the terms of the mandate formulated for Cameroon by England and France were approved by the Council of the League of Nations and came into force on 29th September 1923. French and English laws and administrative policies thus became applicable in Cameroon as a result of the defeat of the Germans in World War One and the consequent agreement under the League of Nations.

i) The received laws

The received laws applicable in Cameroon today are therefore derived from the English and the French.

Introduction of English laws in Cameroon

The enabling statute for the introduction and observance of English law in Anglophone Cameroon is the Foreign Jurisdiction Act 1890. In the 1880s and 1890s, during the scramble for Africa, England acquired territories through the device of establishing protectorates. The legal instruments that empowered her Majesty to exercise jurisdiction in a protectorate were the Foreign Jurisdiction Acts of 1843-1890. The 1843 Act was amended in 1866, 1875 and 1878 and consolidated by the Foreign Jurisdiction Act 1890. The Act provided that:

It shall be lawful for Her Majesty to hold, exercise and enjoy any power or jurisdiction which her Majesty now hath or may at any time hereafter have within any country or place out of Her Majesty's dominions in the same and as ample a manner as if Her Majesty had acquired such power or jurisdiction by cession or conquest of territory.

And where such a country is:

not subject to any government from whom Her Majesty might obtain power and jurisdiction by treaty or any of the other means mentioned in the Foreign Jurisdiction Act 1843, Her Majesty shall by virtue of this Act have power and Jurisdiction over Her Majesty's subjects for the time being resident in or resorting to that country or place.

Thus, with the acquisition of Cameroon, the Foreign Jurisdiction Act 1890 was used to secure Her Majesty's jurisdiction in circumstances similar to

those in the protectorate. By virtue of this Act, an Order in Council was promulgated which gave her Majesty's representative in Cameroon powers of legislation and administration. The League of Nations' mandate for British Cameroon merely put 'an international seal of approval on this state of affairs'.⁴⁰

By virtue of article 2 of the mandate, the mandatory power had the responsibility for keeping peace, order and good government of the territory and for promoting the material and moral well-being and social progress of its inhabitants.

Article 9 gave the mandatory '*full powers of administration and legislation in the area subject to the mandate*'. The area was to be administered in '*accordance with the laws of the mandatory as an integral part of their territory...*' The mandatory was therefore at liberty to '*apply her laws to the territory under mandate, subject to the modifications required by local conditions and to constitute the territory into a custom, fiscal or administrative union or federation with the adjacent territories under British sovereignty or control...*' On the strength of this article, Britain administered Cameroon as an integral part of her Nigerian colony.

After the Second World War, the United Nations Organisation (UNO) was established. It replaced the defunct League of Nations. The United Nations Charter put in place the trusteeship system to '*administer and supervise such territories as may be placed there under by subsequent individual agreement*'.⁴¹ There were two trusteeship agreements for Cameroon: the British and the French. Like the mandatory agreement, the trusteeship agreements also gave England and France full powers of jurisdiction, administration and legislation in Cameroon. They were thus to administer Cameroon in accordance with their own laws as an integral part of their territory and with such modifications as may be required by local conditions.⁴² The English ruled the northern part of British Cameroon as part of Northern Nigeria and Southern Cameroons as part of Southern and later Eastern Nigeria. Laws which were applicable in Nigeria were simply

⁴⁰ C Anyangwe, *The Cameroon Judicial System* (n37) p77.

⁴¹ Article 75 of the UN Charter.

⁴² Article 5 of the British Trusteeship Agreement and Article 4 of the French Trusteeship Agreement.

extended to British Cameroon. During this period of English administration, however, Southern Cameroonians resented being governed as an integral part of Nigeria. They wanted a separate identity because they were convinced that their interest would be better served by an agreement which did not put them under Nigeria. Thus, Southern Cameroonians asserted themselves and demanded greater rights and autonomy during a series of constitutional talks which were held in Nigeria.⁴³ At the Lagos conference held in January 1954, it was declared that Southern Cameroons would be separated from the Eastern region of Nigeria and become a quasi-federal territory but still under Nigeria.⁴⁴ In 1955 the Southern Cameroons High Court Law and the Magistrates' Court (Southern Cameroons) Law 1955 were enacted for Southern Cameroons. This law created for the first time in Southern Cameroons a High Court and a Magistrates' Court. Prior to this law, only Customary Courts existed in Southern Cameroons.

Section 11 of the Southern Cameroons High Court Law states that:

Subject to the provisions of any written law, and in particular of this section and of sections 10, 15 and 22 of this law ...

- a) the common law;*
- b) the doctrines of equity; and*
- c) the statutes of general application which were in force in England on or before the 1st day of January 1900, shall in so far as they relate to any matter with respect to which the legislature of the Southern Cameroons is for the time being competent to make laws, be in force within the jurisdiction of the court*

In relation to practice and procedure, section 10 adds that:

The jurisdiction vested in the High Court, so far as practice and procedure are concerned, shall be exercised in a manner provided by this law or any other written law, or by such rules and orders in court as may be pursuant to this law or any other written law, and in the absence thereof in substantial conformity with the practice and

⁴³ The Richardson Constitution of 1946 named after Sir Arthur Richards (Lord Milverton), Governor of Nigeria 1943-7); The Macpherson Constitution of 1951 introduced by Sir John Macpherson which replaced the 1946 Constitution; and the constitutional conferences held in London in August 1953 and in Lagos in January 1954.

⁴⁴ The Littleton Constitution of 1954.

procedure for the time being of Her Majesty's high Court of Justice in England.

However, the justification for applying the present divorce laws of England in Anglophone Cameroon lies in section 15 of this same law which provides that:

The jurisdiction of the High Court in probate, divorce, and matrimonial causes and proceedings may, subject to the provisions of this law and in particular of section 27 and to rules of court, be exercised by the court in conformity with the law and practice for the time being in force in England.

The phrase 'for the time being in force in England' implies that, as English law changes in probate, divorce and matrimonial causes and proceedings, and also in practice and procedure, the law in former West Cameroon (the then Southern Cameroons) automatically changes, unless local legislation has been enacted. It is immaterial that the change is caused by some economic, political or social upheavals which are specific to England and alien to Cameroon. To date, no local legislation has been enacted in divorce matters. Therefore, the law 'for the time being in force in England' still governs divorce matters in what is now the North West and South West Regions of Cameroon known as Anglophone Cameroon. By contrast, the law in Francophone Cameroon does not change.

Introduction of French laws in Cameroon

In Francophone Cameroon, the enabling instruments for the application of French and French-derived laws are the decrees of 16th April 1924 and 22nd May 1924. These decrees are applicable as a result of the French mandate of 20th July 1922 for French Cameroon.⁴⁵ The French decree of 16th April 1924 provides that:

The Commissioner of the Republic shall promulgate statutes, decrees, orders and regulations emanating from the Government of the

⁴⁵ After the partition of Cameroon between England and France, German laws remained in force for a while in French Cameroon until the mandate system became effective. This period of transition was necessary because the presence of France in French Cameroon was seen by the French as a military occupation of an enemy territory. Accordingly, France had to administer Cameroon in accordance with The Hague Regulations of 1907 which prohibited any amendments of the laws in force in the territory.

*Mandatory State, as well as orders and regulations emanating from the Government of the mandated territory. Statutes, decrees and regulations in force in France shall not be rendered executory in Cameroon except by decree of the French Head of State.*⁴⁶

However, because of the ambiguity and vagueness of this decree, another decree was issued, on 22nd May 1924, which rendered executory in Cameroon all statutes and decrees which were promulgated in French Equatorial Africa before 1st January 1924. This decree provides that:

*Statutes and decrees promulgated in French Equatorial Africa before 1st January 1924 are hereby rendered executory in the territory of Cameroon placed under French mandate. The powers conferred on the Governor-General and on Lieutenant-Governors by those instruments shall devolve on the Commissioner of the Republic. However, the provisions of the above-mentioned instruments that shall apply are those that are not contrary to decrees specifically passed for Cameroon and to the French mandate of 20th July 1922 for Cameroon.*⁴⁷

The statutes and decrees that were promulgated in French Equatorial Africa by 1st January 1924 include the following:

French decrees of 28th September 1897 and 17th March 1903 which provide that all legislations in France previously extended to the territory of Senegal shall apply in French Equatorial Africa. The received laws in today's Francophone Cameroon therefore include the following:

All French laws which were applicable in Senegal on or before 17th March 1903 and any amendments thereof made in Senegal before 17th March 1903; Laws passed in French Equatorial Africa up to January 1924 and in French Cameroon from 1924; all statutes and decrees in force in France which are

⁴⁶ Le Commissaire de la République promulgue les lois, décrets, arrêtés et règlements émanant du Gouvernement de l'Etat mandataire, ainsi que les arrêtés et règlements émanant du gouvernement local. Les lois, décrets et règlements en vigueur en France ne peuvent être rendus exécutoires au Cameroun que par décret.

⁴⁷ Art 1er- Sont rendus exécutoires dans le territoire du Cameroun placé sous le mandat de la France les lois et décret promulgués en Afrique Equatoriale Française antérieurement au 1er janvier 1924. Les attributions conférées par ces actes au gouverneur-général et lieutenants-gouverneurs seront dévolues au Commissaire de la République.

Toutefois, ces textes ne seront applicables que dans celles de leurs dispositions qui ne sont pas contraires aux décrets pris spécialement pour le Cameroun et au mandat français sur le Cameroun du 20 juillet 1922.

applicable in French Cameroon by virtue of a decree of the French Head of State; all statutes and decrees enacted in France after 1st January 1924 and promulgated in French Cameroon by the local Commissioner. Consequently, the French and French-derived laws that are applicable in Cameroon are those that were applicable in Cameroon before Cameroon became an independent state. Unlike in Anglophone Cameroon, any change in the divorce laws in France which took place after Cameroon became independent is not applicable in Cameroon. Anglophone and Francophone Cameroon can also be contrasted in relation to the administration of each territory.

ii) Differing administrative policies

The French colonial policies in Cameroon fluctuated between 'assimilation'⁴⁸ and 'association'⁴⁹ while the English policy of 'indirect administration'⁵⁰ was applied in Anglophone Cameroon.

The French policies of assimilation and association

The French administered French Cameroon as part of the French colonial empire, although Cameroon retained its autonomy. French colonial policy in Africa is said to have fluctuated between 'assimilation' and 'association/paternalism'. The policy of assimilation was designed from the beginning to establish profound economic and cultural links with France and was not geared towards the attainment of independence by the colonies.⁵¹ The French regarded African culture and institutions as inferior and not worthy of preservation.⁵² Their goal was to transform the colonised people into French citizens. Cameroonians had to learn the French culture, adopt

⁴⁸ Assimilation emphasises on 'the right of anyone who acquired the French language and habits of life to be treated as any other French citizen' and thus dismissed the possibility of 'any divorce between France and those in the colonies who could be regarded as Frenchmen.' See N Rubin (n29) p48.

⁴⁹ Association entails more paternalism, 'that is an assumption that most Africans either could not or should not be treated as citizens on an equal basis' as Frenchmen. Ibid.

⁵⁰ 'It was a system of governance under which natural rulers were given the opportunity to rule their subjects under the guidance of the British authority.' See T Eyongetah and R Brain, *A History of Cameroon* (1st edn Longman Group Ltd 1974) p113.

⁵¹ N Rubin (n29) p148.

⁵² D Gardinier, *Cameroon: United Nations Challenge to French Policy* (Oxford University Press 1963) p10.

the French ways of thinking and manner of life and anyone who acquired the French language and habits of life was to be treated as any other French citizen. The policy of assimilation was also used to reinforce the idea that France and her overseas territory were one and indivisible.⁵³ As such, if the policy of assimilation had been fully pursued it would have involved not only the turning of Africans into Frenchmen politically and culturally but also the incorporation of the territory they inhabited into the French State. French colonies were thus often referred to as overseas France.⁵⁴ However, it was not possible to apply this policy fully because France lacked the financial resources to establish an educational system which might carry out the policy of assimilation among the African masses. As Neville remarked, 'To absorb all the inhabitants of the French African possessions would have involved vast expenditure, and could in theory have reduced metropolitan France to a position of impotence within the French empire if it had succeeded'.⁵⁵

Association, on the other hand, involved a greater degree of paternalism. This is an assumption that Africans either could not or should not be treated as citizens on an equal basis, and thus stressed the more traditional colonial objectives of bringing 'peace, order or good government' as well as economic development to the overseas dependencies.⁵⁶ As Gardinier explains, 'if the policy of paternalism had been practiced to the end, it would have resulted in the permanent subordination of the Africans to European control.'⁵⁷ Aspects of association were combined in Cameroon with assimilation as they were elsewhere in French West and Equatorial Africa. Notwithstanding the difficulties of pursuing pure assimilation in Cameroon, the policy did include creating a thoroughly Gallicised elite which would help to diffuse French culture among the masses that would one day be able to assist in the administration of their territory.⁵⁸ As the members of the elite acquired a certain level of French culture, they could apply for French

⁵³ *ibid* p49.

⁵⁴ France d'outre-mer.

⁵⁵ N Rubin (n29) p48.

⁵⁶ *ibid* p148.

⁵⁷ D Gardinier (n52) p11.

⁵⁸ *ibid* p13.

citizenship.⁵⁹ Those Cameroonians who acquired the French habits and could speak French were regarded and treated as French citizens. They were known as *assimilés* or *évolués*. As French citizens, French laws were applicable to them. The rest of the people who did not acquire the status of *assimilés* or *évolués* were known as *indigènes*. They were regarded as inferior, subjected to a separate treatment and customary laws were applicable to them. The shortage of funds made French administrators use traditional rulers (chiefs) to rule the local people. However, these traditional rulers owed allegiance directly to the central administration and were required to apply colonial policies and not local customs. They were not allowed to use their powers in the traditional manner. They were subordinates to the central administration and they could not take advice from their elders or notables. They received salaries from the French administration and they could be dismissed from their office, stripped of their position as local chiefs and replaced by the French if they did not obey the French administrators. After the Second World War, a series of changes in French attitudes, coupled with the policy of the United Nations towards France, made France review her policy in Africa. Of interest is the development in Togoland. Togoland, like Cameroon, was a trust-territory under the supervision of the English and the French. The United Nations' action concerning Togoland posed a great challenge to the French policy of assimilation in that country and contributed enormously to the abandonment of that policy in Cameroon as well.⁶⁰ The UN planned to bring colonial rule to an end by setting forth 'self-government or independence' as the goal for all trust-territories. France had declared its intention in 1945 to place Cameroon (and Togo) under the trusteeship system. In January 1946, the UN demanded mandatory powers to submit trusteeship agreements for their mandated territories. By mid-January, France changed its decision to place Cameroon (and Togo) under the trusteeship system and declared instead that it meant 'to make them an integral part of French territory.'⁶¹ The objective was to prepare the Africans to run their own affairs within the

⁵⁹ *ibid.*

⁶⁰ *ibid* p77-94.

⁶¹ *ibid* p8.

framework of a 'centralised unitary French Republic', thus ruling out the possibility of 'eventual self-government or independence' for its territories. Most of the members of the United Nations objected to the French decision not to place the mandates under trusteeship. Considering these objections and ensuing pressure, 'France reluctantly agreed to place the mandate under trusteeship'. However, France still construed its obligations as a mandatory power and deemed the goals of trusteeship to be compatible with the policy of assimilation. It submitted a draft trusteeship agreement which allowed the administration of Cameroon 'as an integral part of French territory' and did not accept anti colonialist modifications. When eventually the Ewes (in British Togoland, French Togoland and Gold Coast now Ghana) clamoured for unification,⁶² a chain reaction ensued with the two Togo lands (British Togoland and French Togoland) joining the call for unification and independence, with the support from anti-colonialists in the United Nations. Eventually a call for independence followed in French Cameroon. Finally, France accepted the need for more local participation and control in each of her African territories, ultimately granting them independence.⁶³

The English policy of indirect administration

In Southern Cameroons, the English administration was based on the policy of indirect rule (which was already implemented in Nigeria) whereby traditional institutions were maintained. Indirect administration meant that local affairs were managed by natives and not by foreigners. The people progressed at their own rhythm and in a manner chosen by them under the guardianship of their traditional rulers.⁶⁴ The English acted only as referee. They (English) did not seek to alter the way of life, culture and traditional institutions of the people, as the French did. In this way, the customs of the people were maintained.

⁶² *ibid* p72. The Ewes were a coastal people who were split by colonial boundaries among three political units: French Togoland, British Togoland and Gold Coast (now Ghana). They experienced two different administrations since the English administered British Togoland as an integral part of Gold Coast.

⁶³ N Rubin (n29) p41. French Cameroon gained independence on 1st. January 1960.

⁶⁴ A Allot, 'Towards the Unification of Laws in Africa' (1965)14 *ICLQ* p369.

Both the English and the French had financial constraints which led them both to delegate powers to local people. The difference however was in the underlying ideology. While the aim of the English under the indirect rule was to make the African a good African, who would be proud of being an African, 'on the basis of a true African civilisation,'⁶⁵ the aim of the French was to convert the Africans into Frenchmen and their territories into overseas France. This difference in policy perpetuated deep differences which still exist today in the attitude and culture of English-speaking and French-speaking Cameroonians.

The native authorities in Southern Cameroons provided the means for the daily management of Africans by their chiefs and it was through them that the district officer regulated the development of the rural areas.⁶⁶ Using local institutions for the development and advancement of the African people by themselves and for themselves seems to have been the best method for both the English and Africans. It was a realistic system given the English scarce finances. It also suited the Africans who could thus genuinely express themselves. As Morris and Read put it, '*The ideal was now a traditional chief or elder who dispensed fair but firm justice to his people, whose interests were his primary consideration and who, for their part, felt for him both affection and respect*'.⁶⁷

The use of local chiefs by the French was for the benefit of the administration. Thus, the local chiefs were easily replaced if they failed to serve the interest of the administration.

The English knew that the mandate system only permitted them to guide the mandated territory until the people could stand by themselves. It was sensible for them to have used the traditional institutions and allowed the people to administer their own affairs. The customs of the people were thus not greatly affected in Anglophone Cameroon as they were in Francophone Cameroon.

⁶⁵ T Eyongetah and R Brain, *A History of Cameroon*, (Longman Group Ltd 1974) p15.

⁶⁶ *ibid* p51.

⁶⁷ H F Morris and J S Read, *Indirect Rule and the Search for Justice; Essays in East African Legal History* (Clarendon Press Oxford 1972) p15.

As will be shown in Chapter Three,⁶⁸ these differences in the administrative techniques of the English and the French has an impact in the current application of the customary laws of divorce by the courts in Francophone and Anglophone Cameroon. As the English did not seek to alter the way of life, culture and traditional institutions of Anglophone Cameroonians and allowed the people to rule themselves through their traditional rulers, Anglophone Cameroonians turn to cherish their customs more than Francophone Cameroonians who were brought up to accept the French culture, ways of thinking and manner of life and to regard the African manner and culture as inferior and not worth preserving. The French policy of assimilation thus contributed in the erosion of the customs of the people in Francophone Cameroon and this is noticeable still today in the application of customary rules by the courts in Francophone Cameroon.⁶⁹

In the next sub-section, I will examine the colonial courts that administered colonial laws relating to divorce.

c) Colonial courts

When England and France took over Cameroon under the mandatory and later the trusteeship system, they did not discard the customary laws that existed. They established two systems of courts in Cameroon: native courts for the local people, and non-native courts for the whites and 'assimilated' Cameroonians where the imported laws were applicable. Thus, the plurality of courts and laws commenced by the Germans were strengthened by the English and the French. Unlike the French however, the English never encouraged the concept of the *assimilé* in their colonial administration. The local people were left to administer themselves and the English acted only as umpires. No French court was presided over by Cameroonians except for the *Tribunal de Conciliation* whose jurisdiction was limited to reconciling the parties. Meanwhile, the Customary Courts in Southern Cameroons were presided over by local persons. The main difference in the systems of courts

⁶⁸ p180.

⁶⁹ The tendency for the Customary Courts in Francophone Cameroon is to compare the customary law rule that governs the case with the relevant received French law and will not apply the customary rule if it contradicts the received law. By contrast, the Customary Courts in Anglophone Cameroon do not make any such comparison with the received English law. See p178 – 181 of this thesis.

introduced by the French and the English respectively is that, 'the former was based on a vertical segregation while the latter was based on a horizontal segregation'.⁷⁰

i) The system of courts in Anglophone Cameroon established by the English
The first courts established by the English for Southern Cameroonians were by ordinances that were already applicable in Nigeria. These courts were: The Native Courts,⁷¹ the Provincial Courts⁷² and the Supreme Court.⁷³ Before Southern Cameroons became independent by unification with French-speaking Cameroon in 1961, several modifications in the court system occurred.⁷⁴ The courts that existed in Southern Cameroons prior to unification were established by the 1954 Nigerian Constitution Order-in-Council. These courts consisted of courts administering customary law, namely, native courts⁷⁵ and courts administering the received English law, namely, the High Court⁷⁶ and the Magistrates' Court.⁷⁷ The Federal Supreme Court in Lagos (Nigeria) used to exercise appellate jurisdiction from the Southern Cameroons' High Court.⁷⁸ These courts will now be examined.

The Customary Courts

The Customary Courts were governed by the native courts ordinance, cap 142 of the 1948 revised laws of Nigeria. Customary Courts applied and still do apply native law and custom.⁷⁹ These courts had full jurisdiction in all Matrimonial Causes (including divorce) other than those arising from or

⁷⁰ C Anyangwe, *The Cameroon Judicial System* (n37) p82. The vertical intergration introduced by the French was based on a system whereby whites and assimilated Cameroonians were given preferences over unassimilated Cameroonians. Other than the tribunal de conciliation whose jurisdiction was limited to reconciling the parties, no French court was preided over by local persons. Cameroonians could not be judges in any of the courts even in the Customary Courts where local or native laws were applicable. The horizontal segregation introduced by the English had clear division of the court system. The local courts were managed by Cameroonians with the English having only supervisory roles.

⁷¹ Native Court Ordinance No 5 of 1918.

⁷² Provincial Court Ordinance No 7 of 1914.

⁷³ Supreme Court Ordinance No 6 of 1914.

⁷⁴ 1924, 1933, 1943 and 1954. For details of this see C Anyangwe (n37) p70-74.

⁷⁵ Native Courts Ordinance. Cap. 142 of the 1948 revised laws. Note that the words 'Native Court' include Customary Courts.

⁷⁶ Section 50, Southern Cameroon High Court Law 1955.

⁷⁷ Magistrate Courts (Southern Cameroon) 1955.

⁷⁸ Southern Cameroons (Constitution) Order-in-Council, 1960.

⁷⁹ The interpretation section of the Southern Cameroons High Court Law 1955 provides that the phrase 'native law and custom' includes Muslim law.

connected with a Christian marriage.⁸⁰ Christianity was brought into Cameroon by the Europeans and the type of marriage a European or a Christian could contract was monogamous⁸¹ contrary to the customs of the people of Cameroon who only practised polygamy. Not surprisingly therefore, the jurisdiction relating to Christian marriages was taken away from the Native Courts. Customary Courts were composed of natives within the locality of the courts. They had no professional legal training and followed a procedure which was less highly formalised than the procedure before the Magistrates' and High Courts.⁸² Lawyers were not and still are not allowed to appear before Customary Courts. District Officers had access to Customary Courts which they supervised. In cases where there was an apparent miscarriage of justice, or an error which required correction, the District Officer ordered the matter to be transferred to the appropriate Court of Appeal.

Southern Cameroons, like the Regions of Nigeria, had their own Magistrates' Courts, subordinate to the High Courts. These High Courts and Magistrates' Courts were set up in Southern Cameroons on 31st December 1955 by the Southern Cameroons High Court Law 1955 and the Magistrates' Courts (Southern Cameroons) Law 1955.⁸³

The High Court

The jurisdiction of the High Court includes similar 'jurisdiction which are vested in or capable of being exercised by Her Majesty's High Court of Justice in England.'⁸⁴ Since Her Majesty's High Court of Justice in England has jurisdiction over divorce, by extension the High Court in Southern Cameroons had (and still has) jurisdiction over divorce. But the High Court in Southern Cameroons was not to exercise original jurisdiction in any suit or

⁸⁰ S.8.

⁸¹ Lord Penzance in the English case of *Hyde v Hyde* (1866 L.R. I. P and D. 130) conceived marriage as understood in Christendom as 'the voluntary union for life of one man, one woman to the exclusion of all others.'

⁸² This is still the position today.

⁸³ Magistrate Courts did not and still do not have original jurisdiction in divorce matters. However, they had appellate jurisdiction over appeals from parties aggrieved by decisions or orders of an appeal officer given on appeal from Customary Courts. Appeals from decisions from Magistrate Courts lay to the High Court. The Magistrate Courts administered the same law as administered in the High Court.

⁸⁴ SCHL 1955 section 7.

matter which was 'subject to the jurisdiction of the Native Court relating to marriage, family status, guardianship of children, inheritance or the disposition of property and death'.⁸⁵

This therefore means that the High Court in Southern Cameroons did not have jurisdiction over customary marriages and divorces as these were subject to the jurisdiction of the Customary Court. By implication therefore, the High Court had jurisdiction only over Christian marriages or marriages between Europeans which were automatically monogamous. The High Court was, and still is, staffed with professional judges.

The High Court had appellate jurisdiction to hear and determine appeals against the decisions of magistrates' Courts.⁸⁶

The High Court was also bound to:

*observe, and enforce the observance of every native law and custom which is not repugnant to natural justice, equity and good conscience, nor incompatible with any law for the time being enforced and nothing in this law shall deprive any person of the benefits of any such native law or custom.*⁸⁷

*Such laws and customs shall be deemed applicable in causes and matters where the parties thereto are natives and also in causes and matters between natives and non-natives where it may appear to the court that substantial injustice would be done to either party by a strict adherence to the rules of English law.*⁸⁸

Appeals from the High Court lay with the Federal Supreme Court. The Federal Supreme Court was established in Lagos (Nigeria).

ii) The system of courts in Francophone Cameroon established by the French

In French-speaking Cameroon, two systems of justice, *justice de droit français* and *justice de droit indigène* and hence two types of courts, were established by the French.

⁸⁵ SCHL 1955 section 9 (1) (b).

⁸⁶ *ibid* s.30.

⁸⁷ *ibid* s.27 (1).

⁸⁸ S. 27 (2).

'Justice de droit français'

Justice de droit français was designed for the French (whites in general) and those Cameroonians who had acquired French citizenship (*évolués* or *assimilés*). These persons had their own system of courts which was different from the indigenous people and these courts applied French laws in force in France as modified in French West and Equatorial Africa.⁸⁹

These courts were: The Court of First Instance (*tribunaux de première instance*), Justices of the Peace (*justices de paix*), Appeal Counsel (*conseil d'appel*) and the Criminal Court (*cour criminelle*).

A series of amendments took place in the court system⁹⁰ but by 1959 before French Cameroon gained its independence the courts that existed for Frenchmen (whites in general) and Cameroonians of citizen status were: the Justice de Paix, Tribunaux de première instance, Cour criminelle and Cour d'appel. The Justices of the Peace Courts were presided over by District Officers appointed by the High Commissioner, but they did not have jurisdiction over matrimonial issues including divorce.

The Court of First Instance (*Tribunal de première instance*) was staffed with career magistrates although it was from time to time presided over by French civil servants appointed by the High Commissioner when there was a shortage of career magistrates.⁹¹ It had jurisdiction over civil, commercial and criminal matters which were not within the jurisdiction of the *Justice de Paix*. Appeal from this court lay with the *Cour d'Appel*.

The Court of Appeal (*Cour d'Appel*) was the highest court in Cameroon for the French and Cameroonians of *citoyen* status. This court was composed of career magistrates. It heard appeals from the above discussed courts including the Criminal Court⁹² (*Cour criminelle*). It also saw to the correct interpretation and application of the law.

⁸⁹ A decree of 29 December 1922 established a hierarchy of courts to administer French laws in all matters involving Frenchmen, whites and Cameroonians of *citoyen* status.

⁹⁰ For more details see C Anyangwe (n37) p99.

⁹¹ C Anyangwe, *The Cameroon Judicial System* (n37) p100.

⁹² The Criminal Court has not been examined in this work because it has jurisdiction only in criminal matters and criminal matters fall outside the scope of this thesis.

‘Justice de droit indigène’

Justice de droit indigène was applicable to the rest of the Cameroonian masses who were regarded as *indigènes* (or *administrés*) and a different system of court set up in 1921⁹³ and modified in 1927⁹⁴ was established for them. A separate legal regime known as *indigénat* applied to them. They were not given the benefit of the rights that existed under the French legal system. Customary law was applicable to them. The 1921 Decree put in place local courts. These local courts applied indigenous laws to the extent that they were not incompatible with French civilisation or French public policy. These local courts were: Grade I courts (*tribunaux de premier degré*), Racial courts (*tribunaux de races*), Grade II courts (*tribunaux de second degré*) and an organ of control, (*Chambre d’homologation*). These courts were presided over by Frenchmen with the help of native assessors nominated by the High Commissioner.

The 1927 decree abolished the *Tribunal de race* but maintained the other courts established by the 1921 decree. The decree established four courts namely: *chambre spéciale d’homologation*, *tribunaux de second degré*, *tribunaux de premier degré* and the *tribunaux de conciliation*. Apart from the *tribunaux de conciliation* which were presided over by a local chief, all the other courts were presided over by Frenchmen. It was mandatory to first submit a marital problem for conciliation either to the village chief or the *tribunaux de conciliation* before the commencement of any divorce action. Where conciliation was not successful litigants went to the Grade 1 Court (Tribunal de premier degré).

The Grade I Court had exclusive original jurisdiction over cases dealing with personal status, marriage, divorce and affiliation.⁹⁵ The Grade I court still exists today but has concurrent jurisdiction with the High Court in divorce matters. Appeals on divorce cases from the Grade I court went to the Grade II Court (Tribunal de second degré) and a further appeal to the Special Appeal Chamber (Chambre spéciale d’homologation).

⁹³ Decree of 13th April 1921.

⁹⁴ Decree of 31st July 1927.

⁹⁵ Customary Court was created in 1944. It stood in a coordinate position with the *Tribunal de premier degré*. Conciliation was obligatory in this court although it was not obligatory in the *Tribunal de premier degré*. Customary Courts were presided over by local chiefs.

The special Appeal Chamber (a division of the Court of Appeal) was the highest court for Cameroonians and was exclusively in charge of appeals from the courts for natives. It was the overriding duty of this chamber to ensure that courts for Cameroonians applied only those customs which were compatible with 'les principes de notre civilisation'.

This dual system of courts continued until it was fused by the judicial re-organisation ordinance 1959⁹⁶ when the Cameroonian Legislative Assembly, having won a large measure of political autonomy, passed ordinance No. 59-86 overhauling the judicial institutions of the country (Francophone Cameroon).⁹⁷ The principal objective of this law was to integrate traditional justice within the mainstream of modern justice by abandoning the two systems of courts which hitherto existed and creating in their place a single unified court system with jurisdiction over all persons indigenes and non indigenes.⁹⁸ It thus abolished the distinction between *justice de droit français* and *justice de droit indigène* but replaced it with *justice de droit moderne/justice de droit écrit* (a euphemism for French law) and *justice de droit local* (customary law).⁹⁹ There were and still are two types of courts and two types of laws that govern divorce. The new system did not really alter the court's structure. There was no real distinction between the two. 'It was merely the old distinction in a thinly veiled form.'¹⁰⁰ This Ordinance created the following courts: Court of Conciliation (*Tribunal de conciliation*), Court of First Instance (*Tribunal de première instance*), Grade 1 Court (*Tribunal de premier degré*) Court of Appeal (*Cour d'Appel*), Criminal Court (*Cour Criminelle*) and Supreme Court (*Cour Suprême*). Except for the Supreme Court which was a new creation, the other courts differed from those which they superseded (and whose names they maintained) in appearance only. The Supreme Court was (and still is) the highest court in the country. It had jurisdiction over appeal cases relating to lack of jurisdiction, mistake of law and miscarriage of justice.

⁹⁶ Ordinance No 59-86 of 17th December 1959.

⁹⁷ The decree of 31st July 1927 thus remained the basic text governing the system of courts for the indigenous people until the judicial reforms of December 1959.

⁹⁸ C Anyangwe, *The Cameroon Judicial System* (n37) p108.

⁹⁹ *ibid* p109.

¹⁰⁰ *ibid*.

The received French law continued to be applicable. The law that governed divorce and other family issues depended on whether the Cameroonian had opted for '*droit moderne* or *droit local*. This colonial system of administering justice has filtered through to the present day.

B) POST-COLONIAL ORGANISATION OF THE COURTS AND CONSTITUTIONAL GUARANTEES IN CAMEROON

1) Post-Colonial Organisation of the Courts

Post-colonial organisation of the courts will be considered under two periods: from independence (re-unification of the two Cameroons) to the formation of the unitary state in 1972 and, from 1972 to the present day. In both periods, there were two systems of courts (traditional courts and modern courts) and two systems of law (customary law and modern/received law).

a) Organisation of the courts from 1961-1972

On re-unification and independence, the two Cameroons became one nation. By virtue of article 46 of the 1961 Constitution,¹⁰¹ the judicial system in West and East Cameroon continued to function through their respective pre-unification courts. In West Cameroon, a separate system of courts (customary and non-customary) existed under the common law and statute in use before 1961. In East Cameroon, the 1959 system of courts which derived its inspiration and tradition from French practice continued to function. At federal level, many federal courts were created. Each federated state had a subordinate system of courts of appeal (one in West Cameroon and four in East Cameroon) as well as its own Supreme Court. There was no common court of appeal except where there was an erroneous interpretation of federal law in either state, in which case appeal lay to the Federal Court of Justice. Moreover, each state had its own judiciary to which the Head of State appointed members after consultation with the Federal Council of Magistracy.

¹⁰¹ First Constitution of Cameroon.

The jurisdiction of Federal Courts covered the entire country while that of State Courts were limited to their respective States. Each federated state had its own courts (and laws) that governed divorce issues. These courts will now be examined.

i) Federal courts

The Federal Courts were the Federal Court of Justice, the Federal High Court of Justice and the Military Tribunals.¹⁰²

The Federal Court of Justice

This court was established by the 1961 Constitution. It exercised both original and appellate jurisdiction. It had original jurisdiction to determine issues between the federated states, or between one of them and the federal government.¹⁰³ The Court had appellate jurisdiction to resolve issues on conflict of jurisdiction between the three judiciaries¹⁰⁴ and the interpretation of Federal laws.¹⁰⁵ With the movements of persons from West Cameroon to East Cameroon and vice versa and inter marriages of persons from the two regions divorce between couples from the two regions was expected to arise.¹⁰⁶ The power of the court to resolve conflict of jurisdiction was therefore necessary given the complex interaction between the common law and the civil law system in Cameroon. This power of the Federal Court of Justice avoided the extra cost and inconvenience of hearing the same case in two different courts under separate legal systems.¹⁰⁷ Each of the two component states of the Cameroonian federation had its own system of courts.

¹⁰² The Federal High Court of Justice was in effect a court of impeachment created by article 36 of the 1961 Constitution to try the President of the Republic for High Treason committed in the exercise of his duties and also the Vice President of the Republic, Federal Ministers and Secretaries of State for conspiracy against the security of the state. Following independence on 1st January 1960, the Cameroon Republic set up Military Tribunals to try persons convicted of guerrilla campaigns. These courts are not directly relevant to this thesis and therefore will not be examined in the body of the thesis.

¹⁰³ Article 33 of the 1961 Constitution.

¹⁰⁴ Law No. 69/LF/1 of 14 June 1969.

¹⁰⁵ *ibid.*

¹⁰⁶ For an analysis of the conflict situation in Cameroon see p108 - 113.

¹⁰⁷ The court also had appellate jurisdiction to give final judgements on such appeals as may be granted by federal law against the judgements of the superior courts of the federated states whenever the application of federal law was in issue.

ii) State Courts

Courts in West Cameroon

These were the West Cameroon Supreme Court, the West Cameroon Court of Appeal, the High Courts, the Magistrate Courts, the Labour Courts and the Customary Courts. These may be conveniently classified into courts with original jurisdiction¹⁰⁸ and courts with appellate jurisdiction.

The courts with original jurisdiction were and still are: the Magistrates' Courts, the Labour Courts, the Customary Courts and the High Courts. The Magistrates' Courts and the Labour Courts did not and still do not have jurisdiction over matrimonial issues including divorce. These courts will therefore not be examined here. Courts with original jurisdiction over matrimonial issues including divorce were and still are the Customary Courts and the High Courts.

Customary Courts

Customary Courts are governed by the Customary Courts Ordinance Chapter 142 of the 1948 revised laws of Nigeria.¹⁰⁹ These courts dealt with matters under customary/traditional law such as customary marriage, divorce and claims for the refund of the marriage symbol. Neither the Magistrates' Court nor the High Court had jurisdiction over matters for which the Customary Court was competent.¹¹⁰

A Customary Court administered customary law prevailing in the area in which the court was located or binding between the parties so far as it was not 'repugnant to natural justice, equity and good conscience.' The Customary Court was not and still is not staffed with career judges.

A separate system of appeals existed for Customary Courts. Appeals lay from Customary Courts of first instance to Customary Courts of appeal.¹¹¹

Further appeals went to the District Officer and then to the Senior Divisional

¹⁰⁸ These are courts that hear matters first and whose decisions are subject to appeal.

¹⁰⁹ It should be re-iterated that Anglophone Cameroon was administered as part of Nigeria and therefore the received English laws applicable in Nigeria were applicable in Anglophone Cameroon.

¹¹⁰ SCHCL 1955 section 9 (1) (b).

¹¹¹ Customary Courts of Appeal were established by warrants under the Southern Cameroons Native Courts Amendment Ordinance No 8 of 1961.

Officer of the Division in which the Customary Court sat. A further appeal from the Senior Divisional Officer's court lay to the Prime Minister, then to the High Court. There were too many layers of appeal from the Customary Court of First Instance each moving further and further away from the people and the custom.¹¹² It is inconceivable that a Prime minister should be involved in a divorce case between a man and a woman in a small distant village.

The High Court

The pre-independent Southern Cameroons High Court was merged in the West Cameroon Supreme Court which the ordinance of 16th October 1961 created. But the Southern Cameroons High Court Law No. 7 of 1955 continued to be in force by virtue of section 11 of the Ordinance of 16th October 1961. The court had both original and appellate jurisdiction. In its original jurisdiction, it possessed and exercised all the jurisdiction, powers and authorities, other than admiralty jurisdiction, which are vested in, or capable of being exercised by her Majesty's High Court of Justice in England. It therefore exercised jurisdiction in matrimonial causes including divorce. However, the High Court did not have original jurisdiction over matters in which jurisdiction was vested in the Customary Courts.¹¹³ Its jurisdiction in divorce matters was therefore limited to non-customary marriages.

Appeals from the High Court went to the Court of Appeal¹¹⁴ and a further appeal to the Supreme Court¹¹⁵.

Courts in East Cameroon

The colonial court system which existed in French-speaking Cameroon was, on the eve of independence, re-organised by the judicial organisation ordinance No. 59/86 of 17th December 1959. Under the 1959 ordinance the dual system persisted but only at the first instance. The various courts which

¹¹² Special appeal judges who were not legally qualified judges but who had much experience of customary practices having been Senior Divisional Officers were appointed to hear and determine appeals that would normally be heard by the Senior Divisional Officers.

¹¹³ These include customary marriages and divorces.

¹¹⁴ The West Cameroon Court of Appeal was set up on 16th October 1961 by Ordinance No. 61/OF/9.

¹¹⁵ The West Cameroon Supreme Court was also set up by the same ordinance (ibid).

existed in East Cameroon consisted of courts with original jurisdiction, courts of first and last resort and courts with appellate jurisdiction. The courts of first and last resort dealt exclusively with criminal matters and therefore will not be examined here.

There were five types of courts with original jurisdiction. These were: Court of First Instance (*Tribunaux de première instance*), Labour Courts (*Tribunaux de travail*), Justice of the Peace (*Justices de paix*) Grade I Courts (*Tribunaux de premier degré*) and Customary Courts (*Tribunaux coutumiers*). The first three types of courts were known as modern or written law courts (*juridictions de droit moderne ou écrit*) and were exclusively for litigants with modern or written law status. The last two types were known as traditional or local law courts (*juridictions de droit traditionnel ou local*) and their jurisdiction was limited to persons of customary/traditional law status.

The courts with appellate jurisdiction were and still are the Courts of Appeal and the Supreme Court.

As concerns divorce, the Justice of the Peace Court and the Grade I Court¹¹⁶ had original jurisdiction. While the Justice of the Peace Court dealt with persons with modern status and applied the French received law, the Grade I Court dealt with indigenes and applied customary law. Appeals from these courts lay to the Court of Appeal and a further appeal to the Supreme Court.

b) Organisation of the Courts from 1972

In 1972 there was a constitutional amendment creating a unitary state and a unitary system of court was set up by virtue of Article 31 of the 1972 Constitution and Ordinance No. 72/4 of 26 August 1972.¹¹⁷ Two main reasons appeared to have prompted this reform; economic considerations and judicial policy. There was a need for a simpler and less complicated system of courts. Due to the large number of courts, litigants were often confused as to which of those courts they could take their case. Besides, there were too many stages of appeal within the Customary Court system in West Cameroon. Moreover, there was a great shortage of judicial personnel. There were not enough judges to staff all the existing courts. Even if

¹¹⁶ The Grade I Court still exist and still have original jurisdiction in divorce matters.

¹¹⁷ This replaced the separate system of courts that hitherto had existed in Cameroon.

expatriate judges could be recruited, there was not always enough money to pay all of them.¹¹⁸

Laws from the Federal State and Federated States continued to be applicable in so far as they were not repugnant to the Constitution and so long as they had not been amended by subsequent laws.¹¹⁹ All successive Constitutions have maintained this provision. The effect of this has been the preservation of a substantial body of laws received from both England and France. Even though there have been some local legislations, there has been no local legislation on divorce. The law that governs divorce are still of colonial origin and customary law. The present system of courts in Cameroon is based on the 1972 Judicial Organisation Ordinance and its subsequent amendments. The dual system of courts and laws established during the colonial period was maintained in the ordinance. These courts will now be examined.

i) Courts with Original Jurisdiction

In Cameroon, the courts with original jurisdiction in divorce matters are the Traditional Courts (made up of the Grade I Courts in former East Cameroon and the Customary and Alkali Courts in former West Cameroon) and the High Courts.

Traditional Courts

Both the Grade I Courts in former East Cameroon and the Customary and Alkali Courts in former West Cameroon apply customary law. However, the basis for jurisdiction in both courts are different.¹²⁰ These courts are also staffed differently. While those in former East Cameroon are staffed with professionally trained judges, those in Anglophone Cameroon are staffed with lay persons who are versed in customary law. This has had an impact on the application of customary law rules on divorce.¹²¹

¹¹⁸ C Anyangwe, *The Cameroon Judicial System* (n37) p136.

¹¹⁹ Article 38 of the 1972 Constitution. The 1961 Constitution also had similar provision.

¹²⁰ This is examined in p118 - 119.

¹²¹ This is examined in p178 - 180.

The High Court

The High Court is located at Divisional level¹²² and staffed with professional judges. By virtue of the 1972 Judicial Organisation Ordinance, the High Court had jurisdiction over actions and proceedings relating to the status of persons, civil status, marriage, divorce and affiliation, subject however to the legal provisions relating to the *ratione personae* jurisdiction of the Customary Court.¹²³ This provision therefore excluded customary marriages and divorce from the jurisdiction of the High Courts in Anglophone Cameroon by virtue of the SCHL.¹²⁴ However, in 2006, another law was enacted¹²⁵ which amended this provision by giving the High Court jurisdiction in all divorce matters without taking away the jurisdiction of the Customary Courts. This means that as from 2007 both the High Court and the Customary Court have jurisdiction over customary divorces. These multiple courts with original jurisdiction in divorce matters increases the risk of multiplicity of proceedings.¹²⁶

Appeals from the above courts with original jurisdiction lay with the Court of Appeal and a further appeal to the Supreme Court.

ii) Courts with appellate jurisdiction

The courts with appellate jurisdiction in divorce matters are the Court of Appeal and the Supreme Court

Court of Appeal

The Courts of Appeal are found at the regional headquarters of each region. Cameroon has ten regions and therefore there are ten Courts of Appeal in Cameroon. Eight are found in the French-speaking part of the country and these apply the civil law, while the remaining two are found in the English

¹²² There are 58 administrative divisions in Cameroon. Consequently, there are 58 High Courts in Cameroon.

¹²³ S.16 (1) (b).

¹²⁴ S. (9) (1) (b).

¹²⁵ Law No 2006/015 of 29 December on Judicial Organisation. This law entered into force on 1st January 2007.

¹²⁶ The difficulties involve in multiplicity of proceedings is examined in Chapter Two p138 – 142.

speaking part of the country. These two apply the common law. All Courts of Appeal are staffed with professional judges.

The jurisdiction of the Court of Appeal is exclusively appellate. It hears appeals on points of law, facts or a mixture of legal and factual issues.

Supreme Court

There is a single Supreme Court for the entire Republic which is located in Yaoundé. It exercises all the powers which hitherto were exercised by the defunct Federal Court of Justice and the two Supreme Courts of the Former West and East Cameroon. The Supreme Court is the highest court in Cameroon. It is primarily a court of cassation and only rarely does it decide a case on its merits. It hears petitions alleging an error of law in the judgement of a court below. If the court allows an appeal it will give 'judgment in Cassation.' This sets out the error or errors of law in the contested judgement, and is accompanied by a cassation order, setting aside the earlier judgement, and an order of *renvoi* sending the case back to be retried (on facts and law) by a court of the same competence as the one whose judgement was set aside. If the Supreme Court dismisses the 'appeal' the previous judgement stands and there is no *renvoi*. This reflects the French model.¹²⁷ The Supreme Court reviews the judgement, not the case. In Cameroon, all cases may be examined only at two levels: by the courts with original jurisdiction and the Courts of Appeal. The Supreme Court is thus concerned only with points of law and not facts. The main function of the court is to ensure that the judgements of the lower courts are in accordance with the law, thereby seeing to the unity of case law. The court is also empowered to resolve cases of positive¹²⁸ and negative¹²⁹ conflict. Thus, where there is a conflict of jurisdiction in divorce cases between the High Court in Anglophone Cameroon and the High Court in Francophone Cameroon or, between the High Court and Customary Court, the matter

¹²⁷ A West, Y Desdevises, A Fenet, D Gaurier, M-C Heussaff and B Lévy, *The French Legal System* (Butterworths London 1998) p86-87.

¹²⁸ A positive conflict arises where two authorities or courts of law assume jurisdiction in the same matter.

¹²⁹ A negative conflict arises where two authorities or courts of law decline jurisdiction in the same matter.

should be resolved by the Supreme Court.¹³⁰ The court also exercises control over the interpretation of law and custom.¹³¹ The Supreme Court is staffed with senior professional judges trained in the school of administration and magistracy (ENAM) situated in Yaoundé.

c) Legal personnel

Magistrates¹³² are the main persons responsible for the administration of justice in Cameroon. Judges and State Prosecutors belong to the same professional body, the magistracy, which is made up of the judiciary and the legal department,¹³³ and have also received the same training.

To become a magistrate in Cameroon you must have fulfilled the conditions prescribed by the Public Service Rules and Regulations. In Cameroon, magistrates are trained at the National School of Administration and Magistracy - ENAM (Judicial Division, Judicial and Legal Section) for a period of two years.¹³⁴ Entrance to ENAM is by competitive examination after having acquired at least a post graduate diploma in law in any of the law faculties of the universities in Cameroon or an equivalent from a foreign university.¹³⁵ This is the standard procedure for becoming a magistrate in Cameroon even though there are statutory provisions for direct appointment of law teachers and practitioners.¹³⁶

Courses at ENAM for magistrates consist of lectures and seminars designed to increase the legal knowledge and practice of the law. This also corresponds to the French model.¹³⁷ Both Anglophones and Francophones

¹³⁰ There seems to be no decided case on this point as yet.

¹³¹ For details see C Anyangwe (n37) p169.

¹³² In a wide sense, the word magistrate refers to all public servants of the ministry of justice, the police and those from the territorial administration in charge of rendering justice. In a more restricted sense, however, the word magistrate only refers to civil servants of the Ministry of Justice in charge of rendering justice. See R Sockeng, *Les Institutions judiciaires au Cameroun* (3^{eme} ed. Groupe Saint Francois Douala-Cameroon 2000) p87. From this second definition, the word magistrate only embodies members of the judiciary and those of the office of the state prosecutor. Magistrates from the Court of First Instance to Supreme Court judges are referred to as Magistrates. A State Prosecutor in any court will therefore also be called a magistrate. In this thesis, I will use the word magistrate in the second sense.

¹³³ Judicial and Legal Service Rules and Regulations (Decree No. 82-467 of 4th October 1982), s.1.

¹³⁴ *ibid* s. 11 (1) (b).

¹³⁵ *ibid* s. 11 (1) (a).

¹³⁶ *ibid* s. 11 (2) (b).

¹³⁷ A West, Y Desdevises, A Fenet, D Gaurier, M-C Heussaff and B Lévy (n127) p95-96.

read the following courses in French: *Pratique judiciaire, pratique du parquet, pratique de l'instruction, pratique de greffes, organisation judiciaire et le statut de la magistrature, l'administration des juridictions, le contentieux administratif, exécution des décisions judiciaires and la police scientifique*.¹³⁸

In addition, Anglophones alone do the following in English: Judicial Practice, Civil Procedure, Criminal Procedure and Law of Evidence.¹³⁹ After his/her training, a magistrate may be appointed either as a judge or as a state prosecutor. He/she could serve as a presiding judge at one time during his/her career and as a prosecutor at another.¹⁴⁰ They are both governed by the same rules and regulations. However, in carrying out his/her judicial functions, a judge is guided by the law and his/her conscience only¹⁴¹ while a state prosecutor takes instructions from the Minister of Justice.¹⁴²

It has been observed that the majority of Cameroon's magistrates are monolingual and mono-jural.¹⁴³ Although both Anglophones and Francophones take some common courses in French, substantive rules are not included in the common courses. Moreover, magistrates in Anglophone and Francophone Cameroon 'live professionally cloistered lives with barely a nodding acquaintance with each other's legal system.'¹⁴⁴ Most of these judges and prosecutors have not officially appeared in the courts of the other system. It is unfortunate that no programme exists for such exchanges. Moreover, the legal probationers at the school of magistracy carry out their practical training and forensic experience in their respective legal systems. This means that they have no experience of the other system. It is important for judges not to be limited only to the functioning of their own legal system, especially in a bijural country like Cameroon that is moving towards unifying its laws. When a judge is exposed to another legal system applicable within the same territory, it enhances his/her understanding of the application of certain rules in that other system and it might help him/her to apply the law in

¹³⁸ C Anyangwe, *The Magistracy and the Bar in Cameroon* (Ceper 1989) p212-213.

¹³⁹ *ibid.*

¹⁴⁰ He may also serve as a bureaucrat doing administrative work at the Ministry of Justice. See Judicial and Legal Service Rules and Regulations (n133) s.2.

¹⁴¹ Judicial and Legal Service Rules and Regulations (n133) s.5.

¹⁴² Judicial and Legal Service Rules and Regulations (n133) s.3.

¹⁴³ C Anyangwe, *The Magistracy and the Bar in Cameroon* (n138) p4-5.

¹⁴⁴ *ibid.*

his/her jurisdiction better. Although a judge is to apply his/her own law, there are certain instances when a judge should (in a bijural nation) take account of the rules applicable in the other part of the territory. This is more so when a judge has to use his/her discretionary power to decide a case. In a bijural country that is moving towards unification of its laws, the judge should consider what prevails in the other legal system in order to reduce, as far as possible, the discrepancies that exist in the national legal systems.

The pluralistic system of courts established by the colonial masters in divorce matters did not have similar jurisdiction. There was one jurisdiction for the local people and another for the whites and assimilated Cameroonians. There were also two different laws governing divorce: one for the local people and another for the whites (and assimilated Cameroonians). From independence, Cameroon still has two sets of courts, Customary Courts which apply customary law and modern courts which apply the modern law as well as customary law.¹⁴⁵ It can therefore be said that the plurality of courts (and laws) in Cameroon is a direct consequence of colonialism. Colonialism recognised the need for courts (and laws) that reflected the cultural milieu of the people but also put in place other courts and laws for Europeans and Cameroonians who opted out of the African way of life. At independence, greater effort and time could have been invested in unifying the courts (and laws) since the colonial masters were leaving and the need for having separate courts no longer existed. Yet this plural system persists in the area of family law.¹⁴⁶ Some effort was attempted since 2007. Since then, the High Court has had jurisdiction over all marriages and divorces be they customary or civil. It is therefore no longer necessary to have two sets of courts.

Having examined the origins of the law of divorce and the court system, I will go on to analyse the impact of human rights in Cameroon, in particular, constitutional rights on gender equality. Gender equality is important for family law as a whole and divorce law in particular. With the creation of the unitary state, came the accession of Cameroon to several human rights

¹⁴⁵ Since 2006, the High Court in Anglophone Cameroon has jurisdiction over customary marriages and applies customary law when faced with such marriages.

¹⁴⁶ See p163 - 165 for reasons as to why the plural system persist.

documents and the creation of a Constitution that established rights. These rights are particularly important for family and divorce law.

2) An examination of post-colonial constitutional rights.

This section examines the origin of the Constitution and the enforcement of the rights guaranteed in the Constitution by the courts.

a) Origins of the Constitution

After the independence of Francophone Cameroon and its re-unification with Anglophone Cameroon, representatives from both sides met at Fouban for constitutional talks. The Fouban conference gave birth to Cameroon's first Constitution. This Constitution was amended several times, notably in 1972, 1996 and 2008, with each successive amendment maintaining or guaranteeing greater rights to individuals.

i) The Fouban Constitutional Conference

Francophone Cameroon became independent on January 1st, 1960, under President Amadou Ahidjo and was baptised the Republic of Cameroon. At this time, Southern Cameroon was not yet an independent State but was still under British rule. The fate of Southern Cameroonians had to be decided in a UN sponsored plebiscite which took place on 11th February 1961 and which opened two options namely, to become independent by joining the independent Federation of Nigeria or the independent Republic of Cameroon.

While the majority of Southern Cameroonians wished to become a fully independent State, this third option was not available to them.¹⁴⁷ There were two main political parties at this time in Southern Cameroon: the Kamerun National Democratic Party (KNDP), headed by Mr John Ngu Foncha, who was in favour of reunification with the Republic of Cameroon and the Cameroon Peoples National Convention (CPNC), headed by Dr E.M.L Endeley, who was in favour of joining Nigeria. At the plebiscite, the majority

¹⁴⁷ T Eyongetah and R Brain (n65) p157.

voted for re-unification with the Republic of Cameroon by 233,571 votes to 97,741.¹⁴⁸

After the plebiscite result was announced, a series of constitutional conferences was held for the preparation of a Constitution. The result of these meetings was a mixture of presidential and parliamentary forms of government, 'a melange bearing the superficial imprint of a series of political compromises between the respective positions of Ahidjo¹⁴⁹ and Foncha¹⁵⁰ but, in fact, reflecting more Eastern wishes than Western hopes.'¹⁵¹ It was also agreed that a federal system would be the best constitutional option. The most important of these conferences is the Fouban constitutional conference.

The Fouban conference took place from 17th July to 21st July 1961 and was attended by delegates from Southern Cameroons, led by Mr Foncha and the Republic of Cameroon, led by President Ahidjo. At the conference, President Ahidjo, while addressing the delegates, made it known to them that in his previous meetings with Mr Foncha, they had chosen a Federal structure for the future State since a unitary centralised State could not reasonably be envisaged given the existing 'linguistic, administrative and economic disparities.'¹⁵² Consequently a strong centralised federation was advocated for by the Republic of Cameroon, with one legislative chamber, a strong executive with the President as head of the federation and all foreign relations controlled by the federation.¹⁵³ However, the 'All-Party Constitutional Congress' made up of the KNDP, CPNC, OK, House of Chiefs and the Native Authorities (all from Southern Cameroons) that had met in Bamenda in June 1961 to discuss final consultation with the government of the Republic of Cameroon had a different vision. Not being aware of

¹⁴⁸ The British Northern Cameroonians voted to join the Republic of Nigeria by 146,296 votes to 97,659 votes.

¹⁴⁹ President of and representative for the Republic of Cameroon.

¹⁵⁰ Prime minister of and representative for Southern Cameroons.

¹⁵¹ V T Le Vine, *The Cameroon Federal Republic* (1st edition, Cornell University Press 1971) p81. Eastern here refers to the Republic of Cameroon while Western refers to Southern Cameroons.

¹⁵² H N A Enonchong, *Cameroon Constitutional Law: Federalism in a mixed common law and civil law system* (Centre d'édition et de production de manuels d'auxiliaires de l'enseignement 1967) p97.

¹⁵³ V J Ngoh, *Southern Cameroons 1922-1961: A Constitutional History* (Ashgate Publishing Ltd 2001) p154.

Foncha's agreement with Ahidjo, they advocated for a loose federation with a ceremonial rather than an executive President, a separate state and federal citizenship and a wide range of legislative powers to the states. They also recommended the establishment of a bi-cameral federal structure and the maintenance of a House of Chiefs in Southern Cameroons. During the meeting, the view was also expressed that the English system of justice and their rule of law should be preserved in the future constitution.¹⁵⁴ It was also proposed that until the integration of the English and French legal systems and the establishment of a codified Cameroonian law, the English legal system should apply in Southern Cameroons and the French legal system in the Republic of Cameroon.¹⁵⁵ Thus the idea of a uniform system of law in the form of a code existed in the minds of Southern Cameroonians despite the fact that they argued for a loose federation. The above proposals for a loose federation 'were diametrically opposed to what Foncha had agreed with Ahidjo during their several meetings, especially in October 1960 before the reunification. Ahidjo had hitherto settled for a 'strongly centralised federation' and ultimately a unitary State.¹⁵⁶ The proposed draft federal Constitution (of which Foncha had a copy in his keeping) was only revealed to the delegates from Southern Cameroons at the Fouban conference.¹⁵⁷ These delegates then made recommendations which aimed at creating a loose federation, something closer to a confederation.¹⁵⁸ Their aim was to limit the powers of the central government extensively with the President as an executive head constrained in his actions by the advice of his ministers. They equally wanted to protect regional interests by proposing a bi-cameral legislature. These recommendations were however not in line with the 'Ahidjo-Foncha joint declaration of October 1960'.¹⁵⁹ Beyond these strong divides, both sides, the Republic of Cameroon and Southern Cameroons saw from the beginning the

¹⁵⁴ V J Ngoh (n153) p155.

¹⁵⁵ *ibid.*

¹⁵⁶ *ibid.*

¹⁵⁷ V J Ngoh (n153) p156. This Constitution is a slight modification of the Constitution of the Republic of Cameroon.

¹⁵⁸ *ibid.* In a confederation, matters not regulated in common are fully controlled by the member states and those confided to the confederation are still controlled by member states. The stress is on the sovereign independence of each member state. In a federation on the other hand, the stress is on the supremacy of the federal government which has full powers over matters entrusted to it.

¹⁵⁹ *ibid.*

necessity for a uniform system of law. The underlying goal of unity in Southern Cameroons can be seen from the fact that Southern Cameroons only proposed the maintenance of the two systems of law until the establishment of a codified Cameroonian law. This goal of establishing a codified Cameroonian law can be seen as a move towards unifying the laws. In the Republic of Cameroon, a 'strong federation with one legislative chamber and a strong executive with the President as head of the federation' were advocated for but only because the linguistic, economic and administrative disparities made a unitary centralised State an unrealistic option. As the above-mentioned barriers no longer exist¹⁶⁰ and as Cameroon has now become a Unitary State, the time is ripe to also unify its laws.

Both Ahidjo and Foncha agreed that there should be an article in the Constitution on the adherence of Cameroon to the UN Charter and to the Universal Declaration of the Rights of Man. Foncha's proposal for the deletion of the word 'indivisible' from the Constitution was accepted but Ahidjo inserted a clause guaranteeing the integrity of the federation and prohibiting secession.¹⁶¹ Foncha's other demands such as dual nationality, a bi-cameral system and the transfer of the capital from Yaoundé to Douala were rejected. Christian Tobie Kuoh, a Francophone politician, explained that the Fouban conference was regarded as 'a very big success which will remain forever in our annals as one of the best pages of our history'.¹⁶² At the conference, the President was interrupted during his speech, from time to time, by clapping of hands and there was 'a thunderous applause as soon as he finished his speech. Everyone rose up in unison and sang the national anthem'.¹⁶³ Despite this success from the Republic's point of view, Southern

¹⁶⁰ Except for bilingualism which is a great source of the Cameroonian pride and all efforts are being made to preserve it.

¹⁶¹ Article 47 of the 1961 Constitution. Note that the word 'indivisible' reappeared in the 1972 Constitution article 1(2) and its 1996 amendments, article 1(2) para 2.

¹⁶² The above translations are mine. The original version reads thus : 'Cette rencontre de Fouban a été un très grand succès et restera à jamais dans nos annales une des meilleures pages de notre histoire.' C T Kuoh, *Mon Témoignage : Le Cameroun de l'Indépendance 1958-1970* (édition Karthala-Paris 1990) p131.

¹⁶³ *ibid.* The above translations are mine. The original text reads thus : 'Un tonnerre d'applaudissement éclate dès qu'il termine. Comme un seul homme, la salle se lève et entonne l'hymne national'.

Cameroonians were not satisfied and felt they had come out the loser.¹⁶⁴ Foncha had led the Southern Cameroonians to the conference like 'lambs to the slaughter house'.¹⁶⁵ At Foumban, Ahidjo made it clear that he would consider suggestions but that he and his delegations will have the final say of what would be accepted.¹⁶⁶ Overall proposals from Foncha which reflected a loose federation were rejected.

Ahidjo and his delegations went to the conference fully prepared. Ahidjo equally relied on his French advisers. The Southern Cameroonian delegates on the other hand, were not fully prepared. Some of them did not even have pre-knowledge of the draft Constitution. Besides, Foncha found it unnecessary and foolish to look for help from outside as he believed that drawing up the Constitution was a matter for Cameroonians themselves.¹⁶⁷ In addition, some of the Southern Cameroonian delegates particularly Foncha and Solomon Tandeng Muna were only interested in what they would personally gain from the union, ignoring the larger interest of Southern Cameroonians. Before the Foumban conference, Foncha and Muna struck a deal with Ahidjo in which they were promised 'juicy political appointments following the effective implementation of Ahidjo's proposal'.¹⁶⁸ Ahidjo naturally took advantage of their weakness and drafted the Constitution to suit the Republic of Cameroon. This imbalance is the bedrock of the Anglophone/Francophone conflict.¹⁶⁹ As a result of greed, naivety and the unwillingness to make use of foreign experts by their leader, Southern

¹⁶⁴ Foumban brings either happy or sad memories depending on whether you are an Anglophone or a Francophone.

¹⁶⁵ V J Ngoh (n153) p154; See also E Chiabi, *The Making of Modern Cameroon: A History of Sub State Nationalism and Disparate Union, 1914-1961 volume1* (University Press of America 1997) p128.

¹⁶⁶ V J Ngoh (n153) p160.

¹⁶⁷ V J Ngoh (n153) p161.

¹⁶⁸ Field's confidential report to his superior in London reads as follows: 'We believe, on very good information, that Foncha has already concluded a deal with Ahidjo, the idea being that the present government of the Republic will become the government of the Federation and...sovereignty will be transferred to it and defence and national security will become federal matters. In return...

Foncha has been promised the Vice-Presidency of the Federal Republic and Muna has been promised a post in the Federal cabinet... The CPNC and the OK have demanded an account of what went on during the last Foncha-Ahidjo talks, but Foncha strongly pressed by Muna, has kept mute.... I am sure the wretched little man is moved very largely by consideration of what is best for himself....', Quoted by V J Ngoh (n15) p160.

¹⁶⁹ Although I think the real root of the problem lies in the partitioning of Cameroon between England and France after the defeat of the Germans.

Cameroonians emerged as the underdog from the Foumban constitutional conference. These are serious impediments to any successful or long-lasting and peaceful political unification although it did not preclude the emergence of the constitutional text.

ii) The Federal Constitution of 1961

The Federal Constitution was enacted by virtue of law n° 61-24 of 1st September 1961 and adopted as the Federal Constitution on October 1st, 1961.¹⁷⁰ It is therefore the basic norm of the Cameroonian legal order from which any other norm derives its validity. Thus the Federal Republic of Cameroon, a democratic, secular and social state with French and English as the official languages was formed on 1st October 1961 out of the territory of the Republic of Cameroon (East Cameroon) and the territory of the Southern Cameroons (West Cameroon).¹⁷¹ National sovereignty is vested in the Cameroonian people and 'no section of the people, nor any individual, may assume the exercise thereof'.¹⁷² Although account was taken of the cultural differences of the two states, a federal form of government was agreed upon because 'it was perceived as a means of allaying the legitimate fears of Southern Cameroonians that they would become second class citizens, the underdogs and a neglected lot in the new Republic'.¹⁷³ Southern Cameroonians wanted a loose federation, something closer to a confederation but what they got was a type of federation in which power was centralised. The federated states virtually had no real powers of their own.¹⁷⁴ The division of power between the legislative and the executive was and still is in favour of the latter.¹⁷⁵ The powers of the legislative assembly were limited to matters that were specifically mentioned in the Constitution.¹⁷⁶ Article 46 of the Constitution states that, 'Previous legislations of the federated states shall remain in force in so far as it does not conflict with the

¹⁷⁰ Art. 59.

¹⁷¹ Art. 1 of the 1961 Constitution of the Federal Republic of Cameroon.

¹⁷² Art. 2.

¹⁷³ C Anyangwe, *The Cameroonian Judicial System* (n37) p130.

¹⁷⁴ Articles 5 and 6 of the 1961 Constitution.

¹⁷⁵ Articles 12-15.

¹⁷⁶ See articles 18(3) and 26.

provisions of this Constitution.’ Thus, at independence Cameroon had a pluralist system of law.

The Constitution did not discard the previous legislation in force in the two Federated States. Discarding them immediately would have been an unwise thing to do as time and serious reflections are needed to enact new laws. It therefore maintained previous legislations so long as it did not conflict with the provisions of the Constitution.¹⁷⁷ The Constitution also ensured the equality of all citizens before the law¹⁷⁸ and affirmed the adherence of the State to the fundamental freedoms set out in the Universal Declaration of Human Rights and the Charter of the United Nations.¹⁷⁹ By not referring to particular rights, but to the Universal Declaration of Human Rights and the Charter of the United Nations as a whole, it could be argued that the Constitution guaranteed all the rights mentioned in these instruments to its citizens as if all the provisions of these instruments were an integral part of the Constitution. Their constitutional standing is underlined by their position in the body of the Constitution¹⁸⁰ and cannot therefore be ‘regarded as an ordinary recital normally designed to show the reason for a made law. It is an intrinsic not extrinsic provision’.¹⁸¹ In 1972 the Constitution was amended¹⁸² but the human rights guaranteed in the 1961 Constitution were maintained.

iii) The Constitutional amendments

The opening paragraph of the preamble to the 1972 Constitution states:

We the people of Cameroon;

Proud of its cultural and linguistic diversity, a feature of its national personality which it is helping to enrich but profoundly aware of the imperative need to achieve complete unity, solemnly declares that it constitutes one and the same Nation, committed to the same destiny, and affirms its unshakeable determination to construct the

¹⁷⁷ Art. 46.

¹⁷⁸ Art. 1(2) para 3.

¹⁷⁹ Preamble section 2.

¹⁸⁰ Art. 65.

¹⁸¹ H N A Enonchong (n152) p183.

¹⁸² The 1961 Constitution was amended in 1969 and 1970 by law n° 69-LF-14 of 10th November 1969 and law n° 70-LF-1 of 4th May 1970 respectively but these amendments were minor and did not affect the rights discussed above.

Cameroonian fatherland on the basis of the ideal of fraternity, justice and progress.

This statement underlines the pluralistic nature of Cameroon which the people of Cameroon are proud of, but at the same time stresses that they are 'aware of the imperative need to achieve complete unity'. The pluralistic nature of Cameroon was therefore conceived as temporary, complete unity remaining the end political goal. The framers of the Constitution equally recognised that lasting unity could be obtained based on virtues like 'fraternity, justice and progress' and held these to be the guiding principles in the unification of laws in Cameroon.

The Constitution guaranteed inalienable and sacred rights to all without distinction as to race, religion, sex or belief.¹⁸³ It equally affirmed 'its attachment to the fundamental freedoms embodied in the Universal Declaration of Human Rights and the United Nations Charter' as did the 1961 Constitution. However, it also mentioned particular rights and freedom such as the right to freedom and security, the right not to be compelled to do what the law does not prescribe, the right to settle in any place and to move about freely, the right not to be subjected to prosecution, arrest, or detention except in cases and in the manner determined by law, the right of everyone to a fair hearing before the court, the right not to be harassed because of origin, opinion or beliefs in religious, philosophical or political matters, the child's right to education, the right to own property, the right and duty to work and to form trade union, the protection and promotion of the family, freedom of religion, expression, assembly, association and of the press.¹⁸⁴ Some of these rights have restrictions and most of the restrictions are fixed by the law.¹⁸⁵

In 1996 the Constitution was once more revised.¹⁸⁶ The above-mentioned rights were once more guaranteed protection. However, in addition, the 1996 Constitution affirmed its attachment not only to the fundamental freedoms enshrined in the Universal Declaration of Human Rights and the Charter of

¹⁸³ Preamble to the Constitution.

¹⁸⁴ *ibid.*

¹⁸⁵ For details of these restrictions see M.D. Afuba, 'The Constitutional Protection of Civil and Political Rights in Cameroon' (2006) *U Botswana* p673 <<http://heineonline.org>> accessed 11December 2013.

¹⁸⁶ Law No.96/06of 18th January 1996.

the United Nations but also to 'the African Charter of Human and Peoples' Rights, and all duly ratified International Conventions.'¹⁸⁷ By virtue of article 45, 'duly approved or ratified treaties and international agreements shall, following their publication, override national laws....' The Constitution also ensures the protection of minorities and the preservation of the rights of indigenous population in accordance with the law.¹⁸⁸ The Constitution equally 'recognises and protects traditional values that conform to democratic principles, human rights and the law.'¹⁸⁹ While it undertakes to protect and promote the family like the previous Constitution, it goes further to mention specifically that 'it shall protect women, the young, the elderly and the disabled.'¹⁹⁰ Thus each successive Constitution guaranteed more rights than its predecessors.

In 2008, the Constitution was again modified¹⁹¹ but the modifications did not affect the above discussed rights. Although fundamental human rights have thus been entrenched into the Constitution, these rights are nevertheless not fully enforced by the courts.

b) An Appraisal of Constitutional Rights

Safeguarding human rights is one of the cornerstones of democracy. Such universal and inalienable rights have been protected by the Cameroonian Constitution and the courts should endeavour to enforce such rights. Human rights must therefore be considered in any law reform project.

i) Protection of human rights and the Constitution of Cameroon

Fundamental rights have been guaranteed in all the Cameroonian constitutions. Even though the above guarantees are found in the preambles of the Constitution and it may be argued that by strict interpretation of the Constitution, the preamble only sets out the purpose of the Constitution, and therefore is not binding,¹⁹² this argument has no place in the recent Cameroonian Constitution as article 65 clearly states that 'the preamble shall

¹⁸⁷ Preamble second section.

¹⁸⁸ *ibid.*

¹⁸⁹ Art. 1(2) para 3.

¹⁹⁰ Preamble second section.

¹⁹¹ Law No. 2008/001 of 14th April 2008.

¹⁹² C Fombad, *Constitutional Law in Cameroon* (Wolters Kluwer 2012) p 215.

be part and parcel of this Constitution.’ The preamble therefore explicitly conferred the same effect as if it were found in any other section of the Constitution. Its vague, idealistic and non-executing character nevertheless ‘leaves the legislature with a large measure of discretion to determine how to realise these ideals by creating concrete rights.’¹⁹³

Cameroon has affirmed its attachment to the Universal Declaration of Human Rights, the United Nations Charter and all duly ratified international conventions. Cameroon has ratified many international conventions and treaties which deal with human rights such as: the Universal Declaration of Human Rights and the African Charter for Human Rights which is incorporated in the Constitution; the Convention on the Elimination of all forms of Racial Discrimination;¹⁹⁴ the Convention against Torture and other Cruel Inhuman and Degrading Treatment¹⁹⁵ and the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW).¹⁹⁶ In all these instruments, the human rights values of human dignity, non-discrimination and equality are explicitly spelt out. These are important values that go to the roots of human existence. The Convention for the Elimination of all forms of Discrimination Against Women (CEDAW) for example, was tailored to address ‘what history had revealed to be the broad and complex problem of eliminating gender inequality.’¹⁹⁷ CEDAW was unanimously adopted by the UN General Assembly on the 18th December 1979¹⁹⁸ to strengthen the provisions of international instruments that were aimed at combating discrimination against women. Cameroon has not only ratified the convention but has also ratified the Optional Protocol to the convention.¹⁹⁹ By these acts, Cameroon has affirmed its political will to promote and protect the basic rights of women, and has also confirmed its obligation to respect and fully apply the provisions of the convention. Therefore, by virtue of this convention, Cameroon (alongside other states

¹⁹³ *ibid* p216.

¹⁹⁴ Ratified 24th June 1971.

¹⁹⁵ Ratified 19th December, 1986.

¹⁹⁶ Ratified 23rd August 1994.

¹⁹⁷ G W Mugwanya, ‘Augmenting the Struggle for Gender Equality in Uganda: A case for the Domestication of International Human Rights Standard’ (2000) *J. Afr. L* p764.

¹⁹⁸ UN General Assembly Resolution 34/180 of 18th December 1979.

¹⁹⁹ Ratified on 7th January 2005.

that have ratified the convention) must refrain from engaging in any act of discrimination against women and must ensure that both public institutions and private actors act in accordance with this provision.²⁰⁰ Article 16 of the convention (CEDAW) is intended to remove discrimination in the family. Men and women should have equal rights to contract a marriage, equal rights during marriage and equal rights on the dissolution of the marriage and also equality with respect to ownership, acquisition, management, administration and enjoyment of property.

Cameroon should, by virtue of her international obligation, modify or abolish existing laws, regulations, practices and customs which constitute discrimination against women.²⁰¹ Furthermore, the Cameroonian Constitution places duly approved or ratified conventions and treaties above its national law.²⁰² This hierarchy implies that duly ratified treaties form part of her national law, without any further need for such treaties to be entrenched into local legislation.²⁰³

Despite the commitments mentioned above, there is still a plethora of statutory rules and customary practices which discriminates against women in Cameroon. For example, the husband is the head of the family.²⁰⁴ In addition, the choice of the family's habitual residence belongs to the husband who, as head of the family, decides where the matrimonial home should be.²⁰⁵ Moreover, the administration of family property is entrusted to the husband who may sell, transfer or mortgage family property without the consent of his wife.²⁰⁶ Even the right and freedom of the wife to engage in economic activities is limited. By virtue of article 74 of the CSRO, a married woman may exercise a trade different from that of her husband, but the husband could object to the exercise of such a trade in the interest of the family. There is also discrimination in the minimum age for marriage for boys (18 years) and girls (15 years).²⁰⁷ In addition, the law permits a man to have

²⁰⁰ Art. 2 para d.

²⁰¹ Article. 2 para f.

²⁰² Art. 45 of the constitution.

²⁰³ However, where the Treaty provides for criminal sanction, it would be necessary to incorporate it into the domestic legal system by an Act of Parliament.

²⁰⁴ Article 213 of the Civil Code.

²⁰⁵ Article 215 of the Civil Code.

²⁰⁶ Article 1421 of the Civil Code.

²⁰⁷ CSRO art. 52.

more than one wife at the same time, but a woman cannot have more than one husband at the same time.²⁰⁸ These discriminatory laws subjugate the wife to an inferior position *vis-à-vis* the husband. The wife's state of inferiority is made worse by customary practices such as: early and forced marriages, female genital mutilation, limited access for women to productive resources, sexual abuse, abusive widowhood rites,²⁰⁹ levirate,²¹⁰ food taboos,²¹¹ premarital virginity tests, canning (the 'right' of correction), domestic and other violence and restriction in practice to girls' access to an education.²¹² These obstacles to the full enjoyment of women's right is also accentuated by the role traditionally assigned to women by society²¹³ and women's own perceptions of their social status.

As regards the role that society assigns to women, Cameroonian stereotypes and cultural practices portray women as integral to the fulfilment of men (fathers, husbands, brothers and so on), hence the difficulty of accepting the fact that women not only have rights but the same rights as men. Some women have interiorised this subordinate view of women and perceive equality legislations to be antisocial. To maintain peace and social solidarity, they willingly surrender their rights.²¹⁴ The challenge therefore is to ensure that everyone (including women) feel that it is important for the rights guaranteed in the Constitution to be implemented. While legal reform is a

²⁰⁸ CSRO art. 63.

²⁰⁹ This is the practice whereby a woman is obliged to sit and sleep on the floor for days or even weeks when her husband dies. In some traditions she is not allowed to have a bath during that period.

²¹⁰ This is the practice whereby a woman is forced to marry a relative of her deceased husband.

²¹¹ Women (especially those of child-bearing age) are not allowed to eat certain food. It is believed that if they eat the prohibited food, they may not be able to become pregnant or if they do become pregnant they will give birth to deformed babies. Such food includes the gizzard of a chicken.

²¹² See Report of the Committee on the Elimination of Discrimination against Women, *Consideration of Reports submitted by States Parties under Article 18 of the Convention on the Elimination of Discrimination against Women-Cameroon* (CEDAW/C/CMR/1) May 1999; Report of the Committee on the Elimination of Discrimination against Women, *Consideration of Reports submitted by States Parties under Article 18 of the Convention on the Elimination of Discrimination against Women, Combined Fourth and Fifth periodic report of States Parties due in 2011-Cameroon* (CEDAW/C/CMR/4-5) November 2012. See also R Danpullo, 'Islamic Law and the Education of the Girl Child' (2000)4 *Annales de la Faculté des Sciences Juridiques et Politiques* p157-160.

²¹³ This situation is not peculiar to Cameroon. See A Griffith, *In the Shadow of Marriage: Gender and Justice in an African Community* (University of Chicago Press 1997) Chapters Five and Six, p134-182 for a similar situation amongst the Bakwenas in Botswana.

²¹⁴ My empirical findings in March 2015; See also Cameroon-CEDAW report 2012 (n212).

necessary tool in changing mentalities, legal reform does not suffice. Change will only occur if men are gender sensitive and women are empowered. One method for empowering women is to educate them.

To educate is to 'develop a person by fostering to varying degrees the growth or expansion of knowledge, wisdom, desirable qualities of mind...'.²¹⁵ Education therefore aims at bringing about an improvement in someone's powers of reasoning to be able to make a value-judgement. The importance of education cannot therefore be underestimated. It is a means of combatting most of the social problems that prevail in the Cameroonian society. Education is thus a stepping-stone towards wider social, political and economic reforms. It is an irreplaceable tool in the struggle for the acquisition of rights, for the empowerment and the emancipation of women.²¹⁶ The right to education is therefore a fundamental right.

The Constitution guarantees compulsory primary education and the right of all, without discrimination, to receive an education.²¹⁷ However, despite the importance of education and the constitutional safeguards, there are still children in Cameroon, especially girls, who are denied access to education.²¹⁸ Some parents and families favour the education of boys to the detriment of the education of girls on the grounds that the latter are unproductive and destined to establish families elsewhere.²¹⁹

In keeping with its constitutional guarantee and its obligation under CEDAW, the State has made primary education free.²²⁰ Public primary schools have been opened in almost all villages and public secondary schools have also been opened in almost all sub-divisions where students pay only minimal fees upon admission. The State has also developed programmes that encourage girls to attend and remain in school by identifying priority education zones, with special support for school-age girls, providing

²¹⁵ Webster's Third New International Dictionary on the English language (Unabridged) Philip Babcock Gove and The Merriam Webster (eds) (G and C Merriam Company Massachusetts U.S.A.1971) p723.

²¹⁶ A V Tabi, 'The Problematics of Women's Rights: The Imperativeness of Education' (2000)4 *Annales de la Faculté des Sciences Juridiques et Politique Université de Dschang* p94.

²¹⁷ Preamble to the Constitution.

²¹⁸ R Danpullo (n212) p155.

²¹⁹ See Cameroon CEDAW Report 1999 (n212).

²²⁰ Decree No 2001/641 of 19th February 2001.

scholarships to female pupils and students etc.²²¹ But the government points to a lack of resources to explain why the provisions of the convention have not been applied fully. The government reported that:

*The state's general budget does not allow it to realize all its goal for optimal development. The funds allocated to the promotion and protection of women's rights, already insufficient for accomplishing the scope of the mission, have tended to decline over the years as a result of the international financial crisis.*²²²

However, despite the insufficiency of government funds, the government has, with the support from the United Nations Centre for Human Rights and Democracy in Central Africa, put in place a human rights education programme in all schools, universities and vocational schools with a view of instilling the culture of human rights in Cameroonian youths.²²³ These efforts by the government are an important move towards the empowerment of women and towards the establishment of a human rights culture in Cameroon. Nevertheless, discrimination against women continues to exist. The committee on the elimination of all forms of discrimination against women (CEDAW) on 12th February 2014²²⁴ expressed its concern about the discriminatory legal provisions and customary practices that still exist in Cameroon and recommended that the government of Cameroon repeal all discriminatory provisions. These including those related to marriage and family relations such as polygamy, the role of the husband as the head of the family, the choice of the place of residence by the husband alone, and raise the legal minimum age of marriage for girls to 18 years in line with the minimum marital age for boys.

For CEDAW to be fully implemented, all discrimination against women should be eliminated. To eliminate these discriminatory rules, the government should intensify its awareness-campaign for women's rights. Awareness-raising campaigns should be carried out in all villages in

²²¹ See Cameroon CEDAW Report 2012 (n212).

²²² *ibid.*

²²³ *ibid.*

²²⁴ CEDAW/C/CMR/Q/4-5/Add (n212).

Cameroon and not just in a few places.²²⁵ Such awareness-campaigns should take the specifics of each community into account. The chiefs and 'king makers' are the custodians of the Cameroonian culture and traditions. They should therefore be involved in the process. However, respecting culture does not mean listening only to the chiefs or cultural leaders. It also means listening to women. The liberation of Western women 'is a product of discursive self-representation which contrasts Western women's enlightenment with the suffering of the third world woman.'²²⁶ Women should therefore be actively involved in the process. Such campaigns should target women as well as men and should reach all social strata, the ultimate goal being that women know their rights, that they feel entitled to claim them and that they instil in their children the idea of gender equality, from an early age.²²⁷ Parliamentarians and all law enforcement personnel should be involved in this campaign if Cameroon is serious about its international and constitutional obligations.

ii) The Draft Family Code

In 2004, Cameroonian policy makers drafted a family code. This code offers some improvements to the current law. It took account of human rights and pluralistic concerns. For example, the minimum age for marriage for girls was raised from 15 years²²⁸ to 18 years²²⁹ (which is also the minimum age for boys). Under the CSRO, although a married woman may exercise a trade different from that of her husband,²³⁰ the husband may still object to the exercise of such a trade in the interest of the marriage or the family.²³¹ The draft code gives the woman full legal capacity²³² and the right to exercise a profession without the consent of the husband.²³³ While the husband could petition the court to restrain her from exercising the profession, if it is

²²⁵ In 2001 one awareness campaign was carried out in Mbalmayo and in 2002 another was done in Buea. CEDAW report 2007 p24. This is far from being sufficient.

²²⁶ L Volpp, 'Feminism versus Multiculturalism' (June 2001) 101 Columbia Law Review p1198 – 1199.

²²⁷ Cameroon CEDAW Report 2012 (n212).

²²⁸ CSRO s.52 (1).

²²⁹ S. 219.

²³⁰ S.74 (1).

²³¹ S.74 (2).

²³² Draft Family Code s. 257.

²³³ S. 258.

prejudicial to the interest of the family, the wife could also petition the court to restrain her husband from exercising his profession if it is prejudicial to the interest of the family.²³⁴ This is an improvement compared to the CSRO under which the right was conferred to the husband alone.

Under the draft code, the basis for jurisdiction in divorce matters is found in section 59 according to which '*The High Court shall have exclusive jurisdiction to hear and determine all matters relating to the status of persons.*' Having a single court with jurisdiction over divorce will solve problems of conflict of jurisdiction²³⁵ and multiplicity of proceedings.²³⁶ The section should therefore be maintained.

Despite the above, the draft code has failed because it still contains discriminatory provisions. For example, polygamy which is allowed in the present law²³⁷ has been maintained.²³⁸ Moreover, the husband is still the head of the family²³⁹ and the one entitled to choose the matrimonial home.²⁴⁰ Should this draft code become law as it is, then Cameroon would go against its constitutional obligations and would flout its commitments towards the International community by not respecting its obligations under CEDAW.

The draft code failed in divorce matters for lack of a balanced content. It kept a few archaic provisions and failed to consider positive cultural values. The grounds for divorce are found in section 264 (1) - (4). Under this section, any spouse may petition for divorce on any one of the following grounds:

- 1) *That the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent.*
- 2) *That the respondent has behaved in such a way that the marriage and welfare of the children have been gravely jeopardized, in particular, by the frittering away of property or the moral or material desertion of the family home.*

²³⁴ S. 259.

²³⁵ See Chapter Two p130 - 132.

²³⁶ This is examined in Chapter Two p138 – 142.

²³⁷ CSRO s. 49 para 8.

²³⁸ Draft Family Code s. 240.

²³⁹ S. 254 (1).

²⁴⁰ S. 254 (3).

3) That the respondent has been convicted of acts which are inimical to the honour and esteem of the petitioner.

4) That the respondent has deserted the petitioner for a continuous period of at least three (3) years.

Section 264 (1) of the draft code is worded exactly as section 1(2) (a) of the Matrimonial Causes Act. As will be shown,²⁴¹ problems relating to the interpretation of section 1 (2) (a) of the MCA 1973 have not yet been resolved by the courts in Anglophone Cameroon. It is likely that if the draft code is adopted as it is, such problems will creep into the new law and may even be worse because the law would then be applied not only by the courts in Anglophone Cameroon but also by the courts in Francophone Cameroon, where adultery so far has been a peremptory ground for divorce.

Moreover, under section 264 (2), the respondent's behaviour must be unreasonable. The respondent must therefore commit a fault for the petitioner's petition to succeed. In other words, where the respondent's behaviour is reasonable but is such that the petitioner cannot reasonably be expected to live with, the petitioner will not succeed. Besides, the phrase 'in particular, by the frittering away of property or the moral or material desertion of the family home' is not very clear. It could be taken to indicate the limits of the unreasonable behaviour, but it could also be construed as examples of unreasonable behaviour. If it is construed as examples of unreasonable behaviour (which I think should be the right interpretation) and therefore the unreasonable behaviour of the respondent is not limited to those two instances only, then sections 1 and 3 would not be necessary as they all deal with unreasonable behaviour. Although section 4 also deals with the respondent's unreasonable behaviour, it adds a period within which a petition cannot be made. The grounds for divorce should be clear. Ambiguous grounds give room for different interpretations which make it more difficult for parties to predict the outcome of their petitions.

²⁴¹ This is discussed in Chapter Three p182 - 187.

Moreover, the draft code does not take account of the more liberal rules that exist in Anglophone Cameroon and under customary law.²⁴² Although the draft code seems to combine some aspects of the law in Anglophone Cameroon with others from Francophone Cameroon, it is essentially based on the fault system which reflects the law applicable in Francophone Cameroon. Such Francophone influence could be construed as an imposition of the laws that exist in Francophone Cameroon to the rest of the nation. Cameroon has inherited two systems of law in addition to its customary laws, and it would be unreasonable and objectionable to rely on one of the inherited systems alone to the exclusion of the other. Such attempt could spark off a new Anglophone/ Francophone conflict.

Some provisions of the draft family code (and also the current laws on divorce²⁴³) go contrary to the constitution and human rights. Beyond the content of legal provisions however, compatibility with human rights will depend on how these provisions are construed and implemented by the courts.

iii) Application of human rights norms by the courts.

As will be examined in chapter two,²⁴⁴ judges in Cameroon do not have the powers to declare enacted legislations unconstitutional. However, judges may to some extent refuse to enforce legislations that are not constitutional, and must as far as possible interpret legislation consistently with international obligations.

Judges in Francophone Cameroon have not been reluctant to exclude customs that are contrary to public policy (*ordre public*) or good morals (*bonnes moeurs*)²⁴⁵ or are contrary to the general principles of law. The tendency for the courts in Francophone Cameroon has been to compare the applicable custom with the corresponding provision of the civil code and where the custom contradicts the provision of the civil code or is against the

²⁴² See Chapter Four p205 - 211 for a discussion of the liberal rules.

²⁴³ The current laws on divorce are examined in Chapters Three and Four.

²⁴⁴ P147.

²⁴⁵ *Procureur Général c. Ntsimi Augustine* (1960) Bulletin p25; *Bessala Awnodo c. Bidzogo Genevieve* (1962) Bulletin p290; *Nomom Gilbert c. Mbezele Pauline* (1963) Bulletin p671; *Bebey Ekoume c. Marie Ebenye* (1979) *Rev. Cam. de Drt* p366; Articles 42 and 51 of decree of 31st July 1927 applicable in Francophone Cameroon.

notion of *ordre public* or *bonnes moeurs*, to apply the related provision of the civil code instead.²⁴⁶ As a result, Francophone courts have rejected customary law rules which are gender discriminatory. In particular, they have rejected the customary law rule which classifies the woman as property as being contrary to the notion of public policy.²⁴⁷

By contrast, judges in Anglophone Cameroon are sometimes so determined to apply the relevant customary law that they are blind to its discriminatory nature and the negative consequences of its application. This disregard for the discriminatory nature of customary rules is noticeable in both Customary Courts and Modern Courts in Anglophone Cameroon. In the case of *Mary Umaru v Asopo Makembe*,²⁴⁸ Inglis J. in the South West Court of Appeal, for example, ruled that a deceased husband's estate includes his widow 'who under customary law can be regarded as property.' Similarly, the Bamenda Court of Appeal held in the case of *Sikibo Derago v Ngaminyem Etim* that, 'the law is that a customary law wife can neither inherit nor administer the property of her deceased husband because she is part of the chattels of her deceased husband to be inherited or administered.'²⁴⁹ The Constitution recognises the right of everyone without discrimination to own property. Yet the woman in the above-mentioned cases was equated to property. Her action therefore failed because the court held that as property, she could not contest or administer property. These Courts of Appeal did not invoke the spirit of the Constitution or the Universal Declaration of Human Rights. They equally failed to apply section 27(1) of the Southern Cameroons High Court Law which allows them to put aside native law and customs which are repugnant to 'natural justice, equity and good conscience'. The courts had tools available to them for setting aside such obnoxious custom. Yet the courts in Anglophone Cameroon have applied this discriminatory customary rule extensively. The rule was extended to the distribution of property after divorce. For example, in the case of *Achu v Achu*,²⁵⁰ the wife after divorce

²⁴⁶ *Procureur Général c. Onana Zoachim*, (1960) Bulletin p24; *Mbakop Lea c. Njapo Isaac* (1985) Rev Cam Drt p328; *Safack Tamono Plassode c. Tajeuissou* (Jugement n° 21/CIV/TGI/du 09 mai 2005) unreported.

²⁴⁷ *Procureur Général c. Veuve Avoulou Jeanne* 1962 (Bulletin) p311.

²⁴⁸ (1981) CASWP/cc87/81 unreported.

²⁴⁹ (1982) BCA/36/81 unreported.

²⁵⁰ (1988) BCA/62/86 unreported.

demanded the right to a share in some plots which were in the husband's name because she had indirectly contributed to the purchase of these plots. The Court of Appeal stated that 'customary law does not countenance the sharing of property, especially land property, between husband and wife. The wife is still regarded as part of her husband's property.' This situation has been described as 'traditionalism run riot'.²⁵¹ However, in a later case, this same Court of Appeal (although differently constituted) held in the divorce case of *Fomara Regina Akwa v Fomara Henry Che*²⁵² that the custom whereby a married woman is the property of the husband is 'repugnant to natural justice and equity'. In this case the parties decided to divorce after 30 years of marriage based on accusations and counter-accusations of adultery, cruelty and desertion. The respondent's counsel had argued that as the marriage was polygamous and customary, the wife (appellant) was part of the husband's estate. The North-West Court of Appeal showed its disapproval of the statement by characterising it as being 'primitive'. The court referred to article 1 of the Universal Declaration of Human Rights and further stated that it expected that 'at this point in time when the declaration's golden jubilee has just been celebrated, a lawyer should defend its provisions.' It was therefore not right for the husband to argue that his wife was an integral part of his property.

There is no statutory definition of the phrase 'natural justice, equity and good conscience,' and the courts have not attempted to define the phrase. Because this phrase was left undefined, it is unclear how a judge is to identify the customs which are 'repugnant to natural justice' and 'good conscience' and as such should not be enforced. As Allot rightly puts it, 'it would be erroneous to try to dissect these compound phrase and give a precise differentiated meaning to each component.'²⁵³ The High Courts in Anglophone Cameroon have not attempted to define these phrases and decisions on the matter have not been consistent, even though 'natural justice' has specific meaning in English law. However, any custom which is

²⁵¹ N Enonchong, 'Public Policy and *Ordre Public*: The Exclusion of Customary Law in Cameroon' (1993)5 Afr. J. Int'l & Comp. L. p516 <http://heineonline.org> accessed 11th December 2013.

²⁵² *Formara Regina Akwa v Formara Henry Che*, (2002) CCLR p33-39.

²⁵³ A Allot, *New Essays in African Customary Law* (1970 Butterworths London) p159.

contrary to fundamental human rights should in my view be held to be 'repugnant to natural justice, equity and good conscience'. Unfortunately, such has not always been the view adopted by the courts in Anglophone Cameroon as the above discussed cases indicate. Again, the custom that allows a man to marry more than one woman (polygyny)²⁵⁴ is not held to be repugnant to natural justice and good conscience. This endorsement is curious because polygyny is discriminatory. Women are not allowed to marry more than one man. Polygyny has nevertheless been confirmed by legislative enactments²⁵⁵ and is seen as natural because it has been in practice from time immemorial in all African and Muslim countries. On the other hand, the custom of the refund of the marriage symbol²⁵⁶ has been held to be repugnant²⁵⁷ although some courts still enforce it.²⁵⁸ Under that custom, if a woman leaves her husband and has a child with another man while in separation, the husband could claim paternity of that child, unless the marriage symbol had been refunded. Yet, despite legislative²⁵⁹ and even judicial²⁶⁰ condemnation of the practice, the custom is still adhered to. The people have accepted this custom and women often attempt to pay back the marriage symbol because it is still perceived as the right thing to do.²⁶¹ It is interesting to contrast some judges' repugnance towards the custom of the marriage symbol with their acceptance of polygyny. In my view, both these customs are repugnant to natural justice. Polygyny is contrary to natural justice as it is a clear example of discrimination on the ground of sex. Yet it is legally accepted in Cameroon. It is also repugnant to natural justice

²⁵⁴ Polygyny is the state or practice of having more than one wife at the same time. This is different from polyandry which is the state or practice of having more than one husband at the same time.

²⁵⁵ CSRO S. 49 para 8.

²⁵⁶ This is money or other property given by the groom's family to the bride's family as a condition for the marriage. The payment of the marriage symbol was a substantive condition for the validity of any marriage under customary law. Various other names such as bride-price, marriage-gift, bride-wealth and dowry have been used as synonyms to marriage symbol.

²⁵⁷ *Buma v Buma* (Appeal No. BCA/20/81) unreported; *Ngeh v Ngome* (1962-64) WCLR 321.

²⁵⁸ *Dorothy Mojoko Liwonjo v Samuel Moka Liwonjo* (CRB 3/87-88 p25) unreported.

²⁵⁹ CSRO article 70 (1).

²⁶⁰ *Buma v Buma* (Appeal No. BCA/20/81).

²⁶¹ During my interviews, 15 of the interviewees (both men and women) explained that if the marriage symbol is not refunded, some calamities may befall the woman and/or her children. See also M Kiye (n28) p79.

to deny a child his/her biological father (if known) simply because the marriage symbol had not been refunded.²⁶² Even the English presumption of paternity in favour of the husband does not sacrifice the biological father's rights.²⁶³ It can be rebutted.

In Anglophone Cameroon therefore, it is difficult to predict whether a specific customary law rule which is normally applicable to a case will be excluded on the ground that it is 'repugnant to natural justice, equity and good conscience' or contrary to a treaty obligation. Until the courts have ruled, there is no certainty as to its applicability.

The differences I have noted in the application of similar customary rules by Anglophone courts and Francophone courts could be attributed to the different colonial policies experienced in each part. Under the French policy of assimilation and direct rule, the French intended to convert Cameroonians into Frenchmen.²⁶⁴ The French policy of direct rule meant that African rulers had to take instructions from the administrators (French) and apply these instructions. The *assimilés* were brought up to appreciate that everything French was superior to everything African. Consequently, they drifted away from African values and became more attached to French values. These *assimilés* eventually became the administrators in French Cameroon and inculcated similar reasoning to the rest of the masses (French-speaking Cameroonians). On the other hand, under the policy of indirect rule instituted by the English in Anglophone Cameroon, local affairs were managed by the natives. Thus, Anglophone Cameroonians were brought up to cherish their customs. This attachment to tradition has however now gone over-board to the extent that customs are not questioned at all. Of course, judges may not go beyond their powers. Their hands are sometimes tied because some discrimination and inequality of treatment are perpetuated by statutory laws.

²⁶² Before the 1981 Cameroon Civil Status Registration Ordinance (CSRO) was enacted, the payment of the marriage symbol constituted a substantial element in the celebration of a customary marriage. Where the marriage symbol was not refunded (even though the parties considered the marriage has ended) the marriage remained valid. Consequently, any child born during this period was deemed to be the legitimate child of the husband.

²⁶³ The question has been asked why such a custom should be deemed repugnant to natural justice when under English law there is a presumption that a child born to a married man is deemed legitimate. E.N Ngwafor, *Family Law in Anglophone Cameroon* (The University of Regina Press Saskatchewan Canada 1993) p10.

²⁶⁴ D Gardinier (n52) p8.

If the law, whose main function is to render justice, becomes the very instrument of discrimination, what is to be expected from society?

In her book, *Gender Approach to Court Action*, Ngassa Vera J. remarked that, 'Our laws and judicial structures are becoming impotent, archaic and wanting on gender issues'²⁶⁵ and need overhauling. 'The legislator must get to work before the courts can act.'²⁶⁶ Although the statement is not false, the Courts of Appeal in the North West and South West regions in the cases of *Mary Umaru v Asopo Makembe*, *Sikibo Derago v Ngaminyem Etim* and *Achu v Achu* had all the powers at their disposal to fight discrimination (just as their Francophone colleagues) but still failed to do so. The decisions in these cases clearly go against the Constitution which guarantees the right of everyone to own property.²⁶⁷ If the woman herself is regarded as property, then she cannot own property because property cannot own property. These examples show the level of attachment of judges towards customs. Although customary law is the signet of the people,²⁶⁸ it need not be stagnant. It evolves and grows and can adapt to new norms. In view of their constitutional obligations, it is surprising that the Courts of Appeal in the two Anglophone regions did not recognise this but instead enforced a custom repugnant to human rights and natural justice, equity and good conscience. When the ghosts of the past stand in the path of justice beckoning on the judge, the judge ought to ignore them.

The discriminatory application of laws does not only relate to customary laws but also extends to enacted legislations. The Cameroonian Constitution guarantees human rights to its citizens through treaties and international agreements that she has duly ratified. Once these treaties are approved or ratified, they override national laws.²⁶⁹ Any local legislation which does not conform to a provision of a duly ratified treaty is therefore inapplicable. Although judges in Cameroon do not have the powers to declare enacted legislations unconstitutional, they may to some extent refuse to enforce legislations that violate the

²⁶⁵ V N Ngassa, *Gender Approach to Court Action*, (Editions Saagraph and Friedrich-Ebert-Stiftung 1998) p59.

²⁶⁶ *ibid.*

²⁶⁷ Preamble of the Constitution.

²⁶⁸ J Reid, *A Law of Blood; The Primitive Law of the Cherokee Nation* (New York University Press 1970) p1.

²⁶⁹ Art. 45.

Constitution and must as far as possible interpret legislation consistently with international obligations. However, judicial practice is inconsistent on the matter. The cases below illustrate that despite constitutional safeguards to avoid discrimination, judges are not consistent in the application of the constitutional guarantees where discriminatory national laws are contrary to a treaty obligation. Some courts prefer to apply discriminatory national legislations contrary to duly ratified treaty provisions. Examples abound. In the case of *Dame Njomou née Kapawo Jeanne contre Zebaze Jules Flaubert*,²⁷⁰ for example, Dame Njomou brought an action before the Mfoundi High Court against Zebaze Jules Flaubert for the annulment of an agreement between her husband and Zebaze Jules Flaubert for the sale of a building that belonged jointly to her husband and her. The plaintiff stated that the property was acquired during their marriage. It was only after the death of her husband in 2004 that she was informed that the husband had sold the property to the defendant by an 'acte notarié' on 20th October 2003 without her consent. She based her action on article 16 of CEDAW, which stipulates that husband and wife should have equal rights during marriage with respect to ownership, transfer and disposition of property. The defendant argued that CEDAW had no application in Cameroon and the judge should base his decision on local laws (article 1421 of the civil code) which authorises the husband to administer, transfer or sell family property without the consent of the wife. The judge concluded that Cameroon had not yet conformed its internal laws to CEDAW and therefore CEDAW was inapplicable. The wife's action therefore failed. The court did not consider article 45 of the Constitution, which placed duly ratified treaties above its national laws.

Similarly, in the case of *Liman Saibou, Mamoudou Saibou contre Dame Yonkeu née Nsei Christine*,²⁷¹ where similar facts and legal issues were raised, the judge refused to apply the provisions of article 16 of CEDAW raised by the wife. He took the view that only article 1421 of the civil code which permits the husband to administer, transfer or sell family property without the consent of the wife was applicable. On appeal by the wife

²⁷⁰ Jugement civil No 224 du 17 janvier 2007 du TGI du Mfoundi.

²⁷¹ Jugement No 368/CIV du 27 février 2006 du TGI du Mfoundi

however, the Court of Appeal reversed the decision and applied article 16 of CEDAW.²⁷²

In *Ndongo Olou'ou Eric contre Ndongo Olou'ou née Bilo'o Léa Corine*,²⁷³ although the parties did not raise the application of CEDAW, the judge did not apply the discriminatory provisions of the civil code which permits the husband, as head of the family, to choose the matrimonial home without the consent of the wife, thus implicitly complying with the provisions of CEDAW. However, on appeal by the husband, the decision was reversed. The Court of Appeal applied the discriminatory provision of the civil code²⁷⁴ and held that, as head of the family, the husband alone chooses the matrimonial home.²⁷⁵

The cases above show that judges in Cameroon are not consistent in enforcing constitutional provisions relating to the human rights of women except where those provisions also feature in locally enacted legislations. They seem to rely more on enacted legislations even where such legislations go contrary to the Constitution. It is not therefore sufficient to have legally guaranteed rights in the constitution. The effective protection of human rights requires that those rights be justiciable and enforceable. In my view, the starting point for eliminating the injustice and ensuring a coherent application of the law should first be to unify the laws so that the same law is applicable to everyone. Secondly, pending the unification of the laws, obnoxious and discriminatory rules should be eliminated. Discrimination is embedded in Cameroon but, this discriminatory culture is accentuated by the pluralistic nature of its laws. If the laws are unified, and all the discriminatory provisions eliminated in the unified law, Judges will be faced with only one law to apply and will lose any legal basis for applying discriminatory rules. Thirdly, while the entire community should be educated on such a new law, and new ways of living in families may become more acceptable, those responsible for applying the law should also receive in-depth training on the new law and be made more aware of equality rights and other constitutional human rights

²⁷² Arrêt No 615/civ/06-07 du 17 octobre 2007 de la Cour d'Appel du Centre.

²⁷³ Jugement civil No 548 du 13 juin 2007 du TGI du Mfoundi.

²⁷⁴ The husband is the head of the family (article 213 of the Civil code) and as head of the family he chooses the matrimonial home (article 215 of the Civil code).

²⁷⁵ Arrêt No 161/Civ du 17 avril 2008.

obligations. Education alone may not suffice. Judges are generally persons who have obtained a high level of general and legal education²⁷⁶ and it is to be expected that they should be fair in their decisions. Sometimes however, their local environment and upbringing²⁷⁷ may cloud their reasoning. As Chief Justice McLachlan explains 'jurists are human beings, and, as such, are informed and influenced by their backgrounds, communities, and experiences.'²⁷⁸ In judging, a judge is not to introduce personal preconceived notion about what is right. However, it is impossible for human beings to do so absolutely, but judges should try as far as they can, not to interject their own personal interest, preconceived assumptions and beliefs in rendering judgements.²⁷⁹ This is however more difficult in a system where multiple laws of divorce, some of which go against the constitution and human rights exist. Thus, a judge who has been brought up by his parents (and local community) under the expectation that children should take care of their parents in their old age may not think it unjust to deny divorce to a petitioner where the respondent's parents complained that they were old and blind and needed the assistance of both the petitioner and the respondent.²⁸⁰ Similarly, a boy child who has been brought up by his parents (and local community) to accept that a wife should take responsibility for laundry and housework while the husband relaxes on a couch or goes out with friends, may accept such a situation as the norm. He may see no reason for not enforcing discriminatory customary rules. The risk of the judge being influenced by his/her background and beliefs would be greatly reduced if there were a single law to apply. Judges would have no other option but to apply that single law regardless of their own upbringing. Besides, a single law would solve problems of conflict of laws and would reduce state expenditure, by cutting down the cost of running multiple systems of law and courts. Finally,

²⁷⁶ See page for the requirements of becoming a magistrate in Cameroon.

²⁷⁷ Upbringing is the treatment and instruction a child receives from his/her parents or guardian throughout childhood, that is, the way the child is raised.

²⁷⁸ Lady Hale, 'Making a difference – Why We Need a More Diverse Judiciary' (2005) 56 N. Ir. Legal Q. p288 <http://heineonline.org> accessed 30th May 2018. See also Etherton T, 'Liberty, the Archetype and diversity: A Philosophy of judging' (2010) Public Law p740 <http://heineonline.org> accessed 30th May 2018.

²⁷⁹ Baroness Hale, 'A Minority Opinion?' Maccabaeen Lecture in Jurisprudence (Proceedings of the British Academy,2008)154 p 333. <http://heineonline.org> accessed 30th May 2018.

²⁸⁰ See the case of *Paul Anya v Helen Bih Anya* discussed in Chapter Four p217.

international human rights standards should be put into practice by states. Efforts should be made by Cameroon to embody in its national laws the principles of human rights that she has accepted under international human rights treaties. Although law and law reform is not a panacea for eliminating inequality and discriminatory treatment against women, it is an invaluable tool and a good starting point in the attainment of these objectives.

There can be no genuine development when one part of the population (mostly women) is being discriminated against. The current legal pluralism only increases the vulnerability of women.

CHAPTER TWO

OVERCOMING THE COMPLEXITIES AND INEQUALITIES OF THE CURRENT LAW OF DIVORCE: A CASE FOR THE UNIFICATION OF DIVORCE LAWS IN CAMEROON.

INTRODUCTION

I noted earlier that there are different ways to overcome the complexities and inequalities of the present law of divorce. As has become clear, I aim to overcome the complexities and discrimination that exist in the present law of divorce in Cameroon by putting in place a uniform system of law which complies with the Constitution and modern values of equality. In this chapter I will explore Cameroon's pluralistic legal system, explaining why legal pluralism makes it more difficult to render justice, the problems involved in having several courts with original jurisdiction in the same matter, before advocating a unified system of courts and law on divorce. I enhance my case for unification by assessing it alongside other techniques such as harmonisation, integration and the provision of constitutional overrides. I will consider constitutional review mechanisms which would ensure that the plurality of laws in Cameroon at least all conform to constitutional principles, even if they do not resolve all the issues about conflict and complexity. I will explore different forms of constitutional overrides and consider how constitutional review mechanisms might best be reformed and improved in Cameroon. However, even the best mode of constitutional review will be ineffective if it is not enforced properly. Given the risk of Cameroonian judges not applying their constitutional powers effectively,¹ I will argue that constitutional compatibility must be sought beyond constitutional overrides mechanisms.

I will examine harmonisation of the law which would address conflict difficulties and ensure that the same conflict rules are applied throughout Cameroon but would not address its content and the possible violation of

¹ This statement is made in light of decisions on cases such as *Mary Umaru v Asopo Makemba*, *Sikibo Derago v Ngaminyem Etim* and also *Achu v Achu* discussed in p95 – 96 and 99 - 101.

human rights. The same goes for integration. Finally, I will look at the difficulties that might be encountered in unifying the laws.

A) LEGAL PLURALISM AND THE CASE FOR UNIFICATION

1) The complex nature of legal pluralism

Legal pluralism is a situation in which in a social field 'more than one source of law or, more than one legal order is observable'.² Legal pluralism can be contrasted with legal centralism which refers to the situation in which 'law is and should be the law of the state, uniform for all persons, exclusive of all other law and administered by a single set of state institutions'.³ Legal pluralism exists in many forms. Vanderlinden considers an approach to legal pluralism which is centred on the legal system 'fairly pointless' and one centred on the '*sujet de droit*' (person or subject) more fruitful.⁴ Indeed he considers that systems which recognise special rules for specific persons and/or purposes based on religious or ethnic affiliations are in fact unitary systems, as the minority legal order only intervenes for confirmed matters. The fact that different mechanisms apply to similar situations within a single legal order is not according to Vanderlinden a true situation of 'legal pluralism' but one of 'plurality of laws'. Retaining the notion of a pluralistic system 'can only be a source of confusion'. Thus, it is 'self-contradictory or redundant' to speak of a pluralistic legal system.⁵ According to him, legal pluralism is 'pluralism limited to the legal regulatory orders with which the *sujet de droit* can be confronted'.⁶ It seems that Vanderlinden did not envisage the situation such as that in Cameroon where two legal systems (common law and civil law) actually exist with none being superior or inferior to the other.

Legal pluralism within the context of Cameroon, particularly as concerns divorce or family law, is even more complex than the dual system described

² J Griffiths, 'What is legal Pluralism?' (1996) 24 *JLPU* p38 <http://heineonline.org> accessed 10th January 2014.

³ *ibid* p3.

⁴ J Vanderlinden, 'Return to Legal Pluralism: Twenty years later' (1989) 28 *JLPU* p152 <http://heineonline.org> accessed 10th January 2014.

⁵ J Vanderlinden (n4) p154.

⁶ *ibid*.

above. The pluralism can be related to the law as well as to the individual. In the case of divorce, a plaintiff in the Francophone section of the country has the choice to seek either the jurisdiction of the High Court or the Customary Court. If he/she seeks the jurisdiction of the High court, the civil law is applicable to him/her, but if he/she seeks the jurisdiction of the Customary Court, customary law becomes applicable. This is a clear situation of what Vanderlinden envisages as legal pluralism because the 'sujet de droit' finds him/herself in a pluralistic situation. However, in Anglophone Cameroon, the petitioner has not got such a choice. His/her choice is limited depending on the type of marriage celebrated. If his/her marriage is a statutory marriage, the High Court is competent and common law is applicable. But if the marriage is a customary marriage, since 2007 both the Customary Court and the High Court are competent and customary law is applicable to him/her.⁷ Vanderlinden's definition does not seem to envisage a situation in which more than one legal order is applicable to a given territory but an individual is subject only to one. A more general and more appropriate definition for the Cameroonian context is given by Woodman who says that legal pluralism is 'the state of affairs in which a category of social relations is within the fields of operation of two or more bodies of legal norms.' And it may equally be said to exist 'whenever a person is subject to more than one body of law.'⁸ This definition envisages the situation in which the pluralism relates to the *sujet de droit*, as well as to the norms, and thus better reflects the situation in Cameroon than Vanderlinden's focus on the individual.

Legal pluralism could also mean the co-existence of different officially recognised state laws.⁹ This kind of legal pluralism, in which differently recognised state laws co-exist and which therefore includes legal centralism is known as state legal pluralism or weak legal pluralism.¹⁰ This narrow interpretation of pluralism is based on the positivist view that 'law consists of

⁷ As from 1st January 2007, the High Court also has jurisdiction over customary marriages but customary law is still the applicable law.

⁸ G Woodman, 'Legal Pluralism and the Search for Justice' (1996) 40 *J. Afr.L* p159 <http://heineonline.org> accessed 27th January 2014.

⁹ G J van Niekerk, 'Legal Pluralism' in JC Bekker, C Rautenbach and N M Goolam (eds) *Introduction to Legal Pluralism in South Africa* (2ndedn Lexis Nexis Butterworths 2006) p5.

¹⁰ J Griffiths (n2) p8.

norms that are created and sanctioned by state organs'.¹¹ Within the Cameroonian context, these laws are the locally enacted legislations and the received common law and civil law. The Constitution of a State may provide different bodies of laws for different groups of people within the State. The groups concerned are usually defined in terms of their characteristics such as ethnicity or religion. Legal pluralism here flows from the recognition by the State of pre-existing customary law of the groups concerned.¹² Vanderlinden calls this situation 'recognised legal pluralism since these other legal orders only exist by virtue of their 'toleration' or 'recognition' by the State.¹³ They are therefore inferior or subordinate orders and applicable only to the extent that they are recognised by the State. This sort of legal pluralism exists in Cameroon where customary laws (which include religious laws) are only recognised to the extent that they are not repugnant to natural justice, equity and good conscience or are not contrary to public policy, good morals or any of the other state laws. When other 'regulatory orders are generated in semi-autonomous social fields other than that of the State' it creates a situation of deep legal pluralism,¹⁴ as illustrated when customary rules that are not recognised by the State are nevertheless enforced. In Cameroon, under customary law, no matter how old a girl may be, parental consent is always required and the marriage symbol is a prerequisite for the validity of her marriage, despite the provisions under the 1981 Civil Status Registration Ordinance stating that parental consent is compulsory only when the child is a minor¹⁵ and the payment of marriage symbol is non-obligatory.¹⁶ Notwithstanding these legislative provisions, in most cases when a civil marriage (and a fortiori a customary one) is being celebrated, the civil status officer will ask if everything is in order (meaning whether all the customary formalities have been fulfilled including parental consent and payment or at least an agreement on the payment of the marriage symbol). Similarly, in

¹¹ *ibid.*

¹² *ibid.*

¹³ J Vanderlinden (n4) p153.

¹⁴ C Himonga, 'State and Individual Perspective of a Mixed Legal System in Southern African Contexts with Special Reference to Personal Law' (2010) 25 *Tul. Eur and Civ. LF* p26 <http://heineonline.org> accessed 10th January 2014.

¹⁵ CSRO s. 49 (para 4).

¹⁶ *ibid.* s. 70 (1).

divorce matters, the court may ask the person who received the marriage symbol to pay it back in total or in part.¹⁷ In most customary divorces, it will be the woman who will be asked to refund the marriage symbol as a prerequisite for the dissolution of the marriage. Cameroon came to exhibit more than one type of legal pluralism because of colonisation. When Cameroon became an independent State the two colonial laws were maintained with equal status. State legal pluralism thus became implanted in Cameroon. These received laws will continue to apply until a local legislation is enacted to replace them. Yet, because customary laws were maintained and continued to be applicable in their different ethnicity so long as they were not repugnant to 'natural justice, equity and good conscience' or contrary to public policy or any state law, Cameroon also exhibits what Vanderlinden calls recognised legal pluralism. Some of the customs which have been prohibited by enacted legislations and therefore not regarded as forming part of the customary laws of Cameroon are still enforced by the local communities and even the courts. This has created a situation of deep or strong legal pluralism. This confluence of laws has proven inadequate in protecting individual rights in Cameroon.

2) Inadequacy of legal pluralism in protecting individual rights

The present complexities of the law of divorce in Cameroon is largely due to its legacy and continued commitment to different forms of legal pluralism. Legal pluralism has thus added another layer of complexity and has created a situation of internal conflict of laws in Cameroon.

a) Legal pluralism and internal conflict of laws

Mobility of people from one part of the country to another has created a situation of conflict of laws within Cameroon. The diversity of legal systems has raised problems relating to jurisdiction and choice of law. A situation involving internal conflict of laws could arise between the different received laws, the different customary laws, and between customary laws and the received laws. These situations will now be explained.

¹⁷ S. 66

i) Conflict between the received laws

Judges in the High Courts of Anglophone Cameroon have been called upon to render justice in divorce matters between parties from Francophone Cameroon who were resident in Anglophone Cameroon such as in *Ngaleu Jean Baptiste v Pouambe Kouaney Justine*,¹⁸ *Nseke v Nseke*,¹⁹ *Noumessi v Noumesi*²⁰ and *Mahop v Mahop*.²¹ Similarly, judges in Francophone Cameroon have also been called upon to render justice between two persons from Anglophone Cameroon who were resident in Francophone Cameroon such as in *Dame Che Née Labah Florence v Che Peter Fuh*,²² *Awa Gilbert Ndip v Mebong Ernestine Efon*,²³ and *Arrêt Lantum*.²⁴ In the above cases, the judges (from Anglophone Cameroon and Francophone Cameroon) have accepted jurisdiction if either the petitioner or the respondent or both are resident in their jurisdiction. Once the courts accept jurisdiction, they apply their internal laws irrespective of the origins of the parties. As a result, the civil code is applied to Anglophone Cameroonians who are resident in Francophone Cameroon while the common law is applied to Francophone Cameroonians who are resident in Anglophone Cameroon. This is an unfortunate situation because it ruins the expectations of Francophone Cameroonians who got married in Francophone Cameroon and who expect that their status will be governed by the civil code. Thus, a wife (or a husband) may expect that her husband (or his wife) may not be able to divorce her/him unless she/he commits a fault. But she/he will be greatly disappointed if the other party moves to Anglophone Cameroon and petitions for divorce under the MCA section 1(2)(e). The same goes for Anglophone Cameroonians who expected that their status would be governed by the common law. Expectations at the time of the marriage matters. They are based on law fixed in time which ensures predictability of the rules governing the marriage. If habitual residence is the connecting factor, a party may change from one part of the country to another, in order

¹⁸ Suit No HCSW/32MC/85 (unreported).

¹⁹ Suit No HCSW/108MC/84 (unreported).

²⁰ Suit No HCSW/8MC/82 (unreported).

²¹ Appeal No CASWP/12MC/79 (unreported).

²² Jugement No 43/CIV/TGI/du 09 juin 2003 Dschang (unreported).

²³ Jugement No 251ADD/1012 (unreported).

²⁴ 23/CC du 13 decembre 1979.

to obtain a more favourable law. This could open the way for fraud. If people should lose their status or rights within the same country because of a change of residence, their confidence in the authority of the law will be undermined. Pluralism of law can thus create conflict and undermine the rule of law. This conflict situation does not only affect the grounds for divorce but also its consequences such as the sharing of property, where the rules under the received laws in Anglophone Cameroon and Francophone Cameroon differ.²⁵

The Cameroonian parliament has not enacted rules on conflicts of laws. As one of the functions of the Supreme Court is to see to the unity of case law, the Supreme Court could play an important role in the elaboration of the rules on internal conflict of laws, but so far it has failed to act. The functioning of the Supreme Court is such that some regional autonomy is maintained, and this does not ensure a uniform application of the law.²⁶ In the Supreme Court, only Anglophone judges will in effect examine cases coming from the two Anglophone regions while only Francophone judges will examine cases coming from the eight Francophone regions.²⁷ This structure makes a rapprochement of the two systems difficult. For the law to be certain and predictable, a uniform application of the law should be put in place and Anglophone and Francophone judges should examine the same cases together. Each benefits from the legal training and professional experiences of the other. The services of an interpreter could be used where language is a barrier.

ii) Conflict between customary laws

Anglophone Cameroon

Conflict between customary laws in Anglophone Cameroon is regulated by the 'Manual of Practice and Procedure for Court Clerks' in Customary Courts. Under this manual the applicable law is that of the girl's parents. This

²⁵This has not been analysed in this work because the thesis examines jurisdiction of the courts in divorce matters and grounds for divorce only.

²⁶ B Djuidje, *Pluralisme législatif camerounaise et droit international privé* (Éditions L'Harmattan 75005 Paris 1999) p189.

²⁷ *ibid.*

is advantageous because the law is fixed as opposed to the law of the forum which is based on residence and could therefore easily change. However, it could happen that the girl's mother and father are not from the same tribe. The manual does not say what law will be applicable in a situation where the girl's parents are not from the same tribe. Will it be the law of her mother or that of her father? Under customary law, a married woman is regarded as the property of her husband. On marriage, she leaves her village and settles in her husband's village. If she no longer belongs to her village of origin, it could logically follow that the custom of her home village is no longer applicable to her. Seen in this light, the customary rules of her husband could govern the divorce. However, this reasoning should not be accepted because the woman should not be considered as the property of the husband.

Francophone Cameroon

In Francophone Cameroon, conflict between customary laws is regulated by the 1969 Law on the Organisation of the Judiciary and Procedure before Traditional Courts in East Cameroon and its 1971 modification.²⁸ Under this law, divorce is regulated by the customs in light of which the marriage was contracted and where the custom cannot be ascertained, by the general principles of the modern law.

Accepting that divorce be regulated by the law upon which the marriage was contracted has the advantage of predictability since it is based on a fixed law, known from the first day of marriage. Nonetheless where a marriage is celebrated under the combined customs of both the bride and the groom, doubts may arise as to the specific applicable custom. The 1969 Law mentions that in case of doubt or uncertainty, the custom on which the marriage was celebrated will be replaced by general principles of modern law. The law in both Anglophone and Francophone Cameroon is that once the court has jurisdiction (which is based on residence) it applies its internal laws. The Traditional Court in Francophone Cameroon will therefore apply the received laws that are applicable in Francophone Cameroon.

²⁸ Article 1 (3).

iii) Conflict between the received laws and customary law

There is no enacted legislation applicable to the whole of Cameroon that regulates conflicts between customary law and the modern law. Solutions to these conflicts therefore differ in Francophone Cameroon and Anglophone Cameroon.

Conflicts between the received law in Francophone Cameroon and customary law

In Francophone Cameroon, choice of jurisdiction goes with choice of law. It is therefore irrelevant that a marriage is customary or statutory. This *lex fori* principle could lead to an unpredictable result because it may be difficult to predict which court (modern or customary) will handle the matter. First it cannot be predicted whether the petitioner will take the matter to the modern court or to the customary court. Secondly, as the respondent is entitled to reject the jurisdiction of the customary court, the petitioner may not know in advance whether, if the matter is taken to the customary court, the respondent will accept or reject the jurisdiction of that court. Finally, even if the respondent accepts the jurisdiction of the customary court, the judge may set aside the customary law rule which would normally be applicable on grounds of public policy or because it is against the general principles of law or because the law on which the customary marriage was celebrated cannot be ascertained. Parties may thus find it difficult to predict the possible outcome of a case before trial. Predictability in divorce is essential. Predictability of the outcome of a case could facilitate settlement between the parties. In order to predict the law that will govern a case and thus establish certainty in the law, a uniform system of law should be put in place.

Conflicts between the received law in Anglophone Cameroon and Customary law

In Anglophone Cameroon, either the marriage is a customary marriage and both the High Court and Customary Court have jurisdiction and apply customary law or it is a statutory marriage and the High Court alone has jurisdiction and will apply the modern law (Common law). Jurisdiction will therefore revolve around the characterization of the marriage as either

statutory or customary. The concern therefore, is to determine whether a marriage is statutory, (and the High Court alone has jurisdiction) or whether it is customary, (and both the High Court and the Customary Court have jurisdiction).²⁹ Unlike in Francophone Cameroon, the type of marriage contracted plays an important role on the jurisdiction of the court and also on the choice of applicable law.

Customary law ought to apply where the marriage is a customary marriage, whether divorce is sought before the Customary Court or the High Court. However, there are times when the High Court and the Customary Court may not apply the same law. This is because if the marriage involves parties from two different tribes, the High Court will be governed by the rules laid down in section 27 of the SCHL 1955. This law governs the High Court and not the Customary Court. Section 27 states that:

'the High Court shall observe and enforce the observance of every native law and custom which is not repugnant to natural justice, equity and good conscience, nor incompatible either directly or by implication, with any law for the time being in force'.³⁰

The section further states that:

'in cases where no express rule is applicable to a matter in controversy, the court shall be governed by the principles of justice, equity and good conscience.'³¹

Consequently, in cases where the girl's parents are not from the same tribe, and because there is no express customary rule applicable, the court will be governed by 'the principles of justice, equity and good conscience.' Will justice and good conscience direct the judge to apply the customary law of the girl's father or the received common law, or some other law? Since the notion of justice may differ from judge to judge, similar cases could result in different judgments. Thus, even where the case is governed by customary law, the High Court may still apply the received law depending on where 'justice, equity and good conscience' leads the judge. This creates a discrepancy with parties who took their case to the Customary Court (and

²⁹ The problem in determining whether a marriage is statutory or customary is examined in p124 - 125.

³⁰ S. 27(1).

³¹ S. 27(4).

even from the High Court) to institute proceedings. The above complexity makes it more difficult to render justice. To avoid such awkward and unpredictable outcomes both the courts and the laws should be unified.

Legal pluralism also makes the work of jurists more difficult as in every case they have the additional duty to find out which of the several laws is applicable. A unified system of courts and law will ensure that only one court has jurisdiction in divorce matters and the same law is applicable to everybody. This will eliminate internal conflict of laws and offer more just and predictable outcomes for individuals.

b) Legal pluralism and discriminatory rules

Discrimination and gender inequality within some cultures have been institutionalised by the State by giving them formal recognition. S. Moller Okin suggests that 'we might be better off if these cultures (that she sees as harmful to women) were to become extinct and become integrated into the dominant culture.'³² The approach adopted in this thesis however is not to extinguish an entire culture by assimilating it into a western human right based system. I therefore refrain from rejecting legal pluralism as such. Like others, such as Prinsloo, I argue against the crude rejection of indigenous laws. As Prinsloo puts it, the depiction of indigenous laws as 'uncivilised, primitive and inferior' and in conflict with 'good morals, justice and Christian principles, indicates both ignorance of and contempt for customary law.'³³ Although some indigenous laws are 'primitive' and conflict with 'good morals, justice and Christian principles,'³⁴ customary law need not be rejected as a whole. Nonetheless, I take position against legal pluralism as it currently stands in Cameroon.

Accepting legal pluralism as such would be just as crude as its outright rejection. The refusal to critically assess particularly egregious aspects of customary law shows disregard for the vulnerable in traditional communities.

³² S Okin, 'Is Multiculturalism Bad for Women?' in J Cohen, M Howard and M Nussbaum (eds) *Is Multi-culturalism Bad for Women?* (Princeton University Press New Jersey 1999) p22-23.

³³ M Prinsloo, 'Pluralism or Unification in Family Law in South Africa' (1990)23 *Comp. and Int'l L. J. S. Afr* p327.

³⁴ Examples abound in customary law. See some examples mentioned in this work p95 - 87.

My aim is not to take a theoretical posture for or against pluralism but to critically assess legal pluralism as currently in force in Cameroon.

In carrying out this assessment, I take the more nuanced approach advocated by Brenda Opperman. While admitting that, 'recognising and applying traditional law that discriminates against women serves as a detriment to women in their daily lives and further weakens their overall status', Brenda Opperman submits that 'legal pluralism alone does not necessarily disadvantage women.'³⁵ But vice versa, while I recognise that culture is important, especially in family matters, it cannot run roughshod over the rights and wellbeing of the vulnerable. An equilibrium is therefore to be found.

To that end, I adopt a contextual approach. I hereby largely join authors such as Abdullahi An-Na'im and L. Volpp. Abdullahi An Na'im recommends that 'it is preferable to adopt a constructive approach that recognizes the problems and addresses them in the context of each cultural tradition.'³⁶ In a similar way, L. Volpp suggests that we 'should examine the particular contexts in which the culture appears in order to ascertain whether justification of practices based on the culture should be maintained or not'.³⁷

I adopt what might be called a minimalist method. I examine individual cultural practices with the aim of eliminating their discriminatory aspects but retain in my proposed unified law as many traditional practices as possible. The hope is therefore to obtain a broadly compliant human rights law which does not alienate people's attachment to their traditional practices.

Maleiha Malik noted that religious communities (and this could include customary communities) exercise significant authority over their members and thus 'have the potential to cause harm over their individual members'.³⁸ She nevertheless suggests that, within the English context, legal powers should be delegated to religious courts in matters of divorce to embrace

³⁵ B Opperman, 'The Impact of Legal Pluralism on Women's Status: An Examination of the Marriage Laws in Egypt, South Africa and the United States' (2006) *HWLJ* p65-66 <http://heineonline.org> accessed 10th January 2014.

³⁶ A An-Na'im, 'Introduction' in A An-Na'im (ed) *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus* (University of Pennsylvania Press 1992) p3.

³⁷ L Volpp, 'Feminism versus Multiculturalism' (June 2001) 101 *Columbia Law Review* p1217.

³⁸ M Malik, 'Minorities and Law: Past and Present' (2014) *Current Legal Problems* p71.

individuals' multiple senses of belonging. The same conclusion may not be transferable to Cameroon. Malik argues that, as Western legal systems are increasingly secular, 'minority legal orders based on religious norms will have less power and significance.'³⁹ However, Religious or Customary Courts in Cameroon may apply discriminatory rules and such discriminatory rules may be endorsed by the modern courts. These will only foster discrimination which this thesis seeks to eliminate. Women in Cameroon hardly challenge decisions taken by traditional institutions, not because of their respect for those laws, but because of the fear of undesirable consequences which may affect them or their children.⁴⁰ A few women who are bold enough to appeal in the hope that the discriminatory customary rule will be turned down are often disappointed.⁴¹ A blind acceptance of deep legal pluralism thus undermines respect for individuals and the cultural groups with which they identify and secular constitutional principles. A system of unified law would ensure that enacted legislation takes its obligations to each of these seriously and will provide judges with a clear way of doing so.

3) Legal pluralism versus unified laws

Cameroon can go a long way in fulfilling its constitutional and international obligations by unifying its laws, eliminating those that go against the Constitution and international obligations. The unified law will be acceptable if people from different cultural and linguistic groups are involved in the reform process and if it is done in good faith, in a spirit of 'fraternity, justice and progress.' Writing about South Africa, Prinsloo remarked that 'to reject indigenous law because it was recognised under the apartheid regime ... is senseless.'⁴² I agree that it is senseless to reject a law just because it was recognised under an unacceptable regime without examining the importance and value of that law, and whether the law suits the social and cultural context in which it is to be applied. However, the method of unification which is proposed in this work does not entail giving up one system of law in favour

³⁹ *ibid.*

⁴⁰ T Nyambo, 'Female Inheritance between Customary Law and Modern Jurisprudence' in E Vubo (ed) *Gender Relations in Cameroon: Multidisciplinary Perspectives* (LANGAA, BP 902 Bamenda, North West Region-Cameroon 2012) p98.

⁴¹ *Achu v Achu* (1988) BCA/62/86 unreported

⁴² M W Prinsloo (n33).

of another. It is not simply a matter of giving up customary law in favour of state law or vice versa. It is rather a question of examining all the different laws, identifying convergence and divergence among them, and by focusing on their utility, select those that best promote constitutional, human rights and family values in Cameroon. Where, because of deep differences in the legal systems and cultures of the different groups, two or more entrenched rules exist over the same matter, both or all the rules could be maintained. For example, in Cameroon both polygamous and monogamous marriages are recognised. It is for the parties at the time of celebrating their marriage to choose either monogamy or polygamy. The fact that different options are available does not necessarily mean that the law is not unified. There will be uniformity of law so long as those options are available to everyone irrespective of religion or ethnic origin.

As Prinsloo observed, 'greater legal certainty cannot be achieved without the agreement and cooperation of the relevant communities'. Caution should therefore be exercised against cosmetic legal unity.⁴³ Hasty unification will only lead to an ineffective and superficial endeavour. Aware of this risk, this work proposes a commission for the elaboration of a uniform code composed of representatives from customary communities (including religious communities); Anglophone community (common law); Francophone community (civil law); comparative law experts and representatives from the government.

As mentioned above, Cameroon is a unitary state which is one and indivisible. Originally a Federal Republic, it became a United Republic in 1972⁴⁴ and a Republic in 1984.⁴⁵ To be truly 'one and indivisible', the unity must transcend all areas. Its current form of legal pluralism does not advance this course. Clearly unified laws will promote greater unity, justice and progress if done in the 'spirit of fraternity'. Although Cameroonians are proud of their 'linguistic and cultural diversity, a feature of its national personality which it is helping to enrich', they are equally aware that 'they constitute one and the same nation, committed to the same destiny' hence 'the imperative

⁴³ *ibid* p328.

⁴⁴ Article 1 (1) of the 1972 Constitution.

⁴⁵ Law no. 84-1 of 4th February 1984.

need to achieve complete unity'. For there to be complete unity there should be legal unity. Furthermore, only those traditional values that conform 'to democratic principles, human rights and the law' are recognised in the Constitution. Hence constitutional principles, human rights and democratic principles should therefore be the points of reference in any unification process. Any genuine law reform must therefore consider human rights standards as well as traditional values.

Due to its pluralist nature, the law, particularly the law of divorce in Cameroon is complex, conflicting and inconsistent. This complex, conflicting and inconsistent situation does not relate only to the grounds of divorce but extends to the jurisdiction of the courts to grant divorce as well.

B) CONFLICTING STATUTORY ENACTMENTS ON JURISDICTION

Considerations of the type of marriage customary/statutory may have an effect in Anglophone Cameroon on the jurisdiction of the court but in Francophone Cameroon the type of marriage has no bearing on the jurisdiction of the court.

The basis of jurisdiction in divorce matters in Francophone Cameroon depends on the choice of the parties. If the petition is before the High Court the judge must accept jurisdiction. However, if the petition is before the Customary Court the respondent could decline jurisdiction. If this happens, the petitioner must take the matter to the High Court. In Anglophone Cameroon, the jurisdiction does not depend on the choice of the parties but on the type of marriage (statutory or customary) celebrated. Customary Courts have jurisdiction over customary marriages only. Before 1st January 2007 the High Court had jurisdiction over statutory marriages only. However, it is not always easy to determine whether a marriage is statutory or customary. This has given rise to problems relating to the jurisdiction of the court in Anglophone Cameroon and hence the applicable law. In 2006 a law was enacted⁴⁶ which gave a partial solution to the problem. This law gave the High Court jurisdiction in all divorce matters. However, it did not take

⁴⁶ Law n° 2006/015/29th December 2006. This law came into force on 1st January 2007.

away the jurisdiction of the Customary Court. This means that as concerns customary marriages both the High Court and the Customary Court in the entire country have jurisdiction. This could create a situation of multiplicity of proceedings (in Anglophone Cameroon) which could best be resolved by unifying the courts.

1) Tradition versus modernity

The multiple systems of courts in Cameroon have created a conflict in determining which court has jurisdiction in divorce matters. This problem is more acute in Anglophone Cameroon. In Anglophone Cameroon, jurisdiction depends on the type of marriage (customary or statutory) celebrated, but it is not always easy to ascertain whether a marriage is customary or statutory. While it is accepted that monogamous marriages are statutory, the question of whether a polygamous marriage could be statutory is unclear.

a) Customary Court versus High Court

In Cameroon two types of courts exist (traditional courts and modern courts). There is also an informal court- The Traditional Council- found in the different customary communities, whose decisions are not legally binding but have great persuasive value and are highly respected within their communities.

By virtue of former section 16 (1) (b) of the Judicial Organisation Ordinance of 1972, the High court had jurisdiction

*in civil, commercial and labour matters to hear and determine suits and proceedings relating to the status of persons, civil status, marriage, divorce, filiation, adoption and inheritance subject to the *ratione personae* jurisdiction of the traditional courts.*

However, this law was modified in 2006. The new law grants the High Court jurisdiction in all divorce matters without taking away the jurisdiction of the Customary Court.⁴⁷ What is subject to the jurisdiction of Customary Courts in Anglophone and Francophone Cameroon varies as it is governed by different laws. In Francophone Cameroon, it is governed by the 1969 law on Judicial

⁴⁷ Section 18 (1) (b) merely states that the High Court is competent 'in civil commercial and labour matters to hear and determine suits and proceedings relating to the status of persons, civil status, marriage, divorce, filiation, adoption and inheritance.'

Organisation and Procedure of Traditional Courts in East Cameroon.⁴⁸ Article 2 (1) of this law is to the effect that:

*The jurisdiction of traditional courts is subject to the acceptance of all the parties to the case... and the jurisdiction of the modern court becomes competent where one of the parties declines the jurisdiction of the traditional court.*⁴⁹

In Anglophone Cameroon, it is governed by the Southern Cameroons High Court Law 1955. Section 9 (1) (b) of this law states that:

The High Court shall not exercise original jurisdiction in any suit or matter which... is subject to the jurisdiction of the Native Court relating to marriage, family status, guardianship of children, inheritance or the disposition of property on death.

These two provisions do not convey the same meaning. In Francophone Cameroon, by virtue of the 1969 law, the High Court will have jurisdiction in two instances: where the respondent rejects the jurisdiction of the Customary Court and where the High Court is first seized. If the respondent rejects the jurisdiction of the Customary Court, the court must decline jurisdiction and the modern court (High Court) becomes competent. This reasoning has been confirmed by a Supreme Court judgement in the case of *Ndigo Ndzie née Nsingni Agnes v. Ndigo Ndzie Samuel*.⁵⁰ As long as the objection to the jurisdiction of the Customary Court is raised before any substantive issues, the court must decline jurisdiction.⁵¹ However, if objections are put forward after substantive issues have been raised, the court will not decline jurisdiction.⁵² The nature of the marriage has therefore no bearing on jurisdiction in Francophone Cameroon. It is therefore immaterial that the marriage was celebrated by a civil status registrar. Likewise, if the matter is

⁴⁸ This law came into force by virtue of Decree N° 69-DF-544 of 19th December 1969.

⁴⁹ The above translation is mine. Article 2 (1) states that, 'La compétence de ces juridictions est subordonnée à l'acceptation de toutes les parties en cause.... La juridiction de droit moderne devient compétente dans le cas où l'une des parties décline la compétence d'une juridiction de droit traditionnel.'

⁵⁰ Arrêt no 60 du 28 février 1974.

⁵¹ *Simo Felicite v Gousson Joseph Miterrand* (Jugement n°170/c du 18 août 2011) unreported; *Tchoudjia Djanbou Jimmy Rostan v Nguemssap Dloko Irene Noelle* (Jugement n° 261/c du 13 octobre 2011) unreported; *Momo Leone v Mme Momo née Manedong Marie Helen* (Jugement n° 309/c du 10 novembre 2011) unreported.

⁵² *Awa Gilbert Ndip v Mebong Enerstine Efon* (Jugement n° 251/ADD du 18 octobre 2012) unreported.

before the High Court, that court cannot decline jurisdiction on the ground that the marriage was celebrated under native law and custom. It must accept jurisdiction. As a result, both the Grade 1 Courts (*tribunaux du premier degré*) and the High Courts in Francophone Cameroon will have jurisdiction to entertain any matter that deals with both customary and statutory marriages.

In Anglophone Cameroon, the High Courts have on several occasions declined jurisdiction in cases where the marriages had been contracted under native laws and customs. In *Kemgue v Kemgue*⁵³ for example, Njamsi J., in striking out a petition for divorce, stated that:

I have found from the papers filed by the petitioner, particularly the marriage certificate ... that the marriage for which the divorce proceedings are being sought, was a marriage contracted under native law....

Where the High Court accepted jurisdiction in cases that dealt with marriages contracted under native law and custom, its decision was set aside on appeal. Accordingly, in *Sandjo v. Sandjo*⁵⁴ the Court of Appeal reversed the decision of the High Court because the parties were married under the Bangante Native law and Custom, and the proper court to hear the divorce petition was therefore the Customary Court and not the High Court. The basis of jurisdiction in Anglophone Cameroon thus depended on the type of marriage celebrated.

However, as from 1st January 2007, the High Courts in Anglophone Cameroon have had jurisdiction over both statutory and customary marriages. The 2006 law did not divest Customary Courts of their customary jurisdiction. Before the 2006 law went operational, Customary Courts had exclusive jurisdiction over customary marriages and the High Courts had exclusive jurisdiction over statutory marriages.⁵⁵ Even before the 2006 amendment, there was evidence of convergence of Anglophone and

⁵³ (Suit n° HCB/16MC/83) unreported.

⁵⁴ (CASWP/50/83) unreported.

⁵⁵ *Ebako v Ebako* (Suit n° HCSW/42MC/77) unreported; *Kemgue v Kemgue* (Suit n° HCB/16MC/83) unreported; *Tufon v Tufon* (Suit n° HCB/59MC/83) unreported; *Ngwa v Ngwa* (Suit n° HCB/100MC/87) unreported.

Francophone law. In *Mokwe v. Mokwe*,⁵⁶ for example, (Anglophone Cameroon) Inglis J., stated that, 'in divorce cases, if one of the parties simply declines the competence of the traditional court before any defence on the merit, the modern court then becomes competent.' The reason for his decision is not clear but the statement could have been based on a Supreme Court decision in the case of *Ndigo Ndzie née Nsingni Agnes v. Ndigo Ndzie Samuel*⁵⁷ which originated from a Francophone court and in which the Supreme Court held that the competence of the Traditional Court is subject to the acceptance of all the parties in the case. Although one of the functions of the Supreme Court is to see to the unity of case-law, it is rather surprising that a Supreme Court decision based on Francophone Cameroon laws should serve as a precedent in Anglophone Cameroon, where entirely different laws and principles apply. The Supreme Court was merely clarifying the law on judicial organisation and procedure of Traditional Courts of former East Cameroon (Francophone Cameroon). It should not be relevant for Anglophone Cameroon especially as the legislative enactments in Anglophone and Francophone Cameroon on this point conflict. Nonetheless, the decision in *Mokwe v Mokwe* shows that the courts in one section of the country could be influenced by decisions taken by the courts in the other part of the country. This influence is already a move towards convergence. However, a more rigorous approach would be to unify the courts as well as the law. Beyond the High Court and the Customary Court is the Traditional Council which is found in the different customary communities.

b) Traditional Council versus Customary Court

The Traditional Council is an informal court which is found in all the different customary areas but which is not officially recognised by the State. While the Customary Court is a formal court set up by the State to apply customary law, the Traditional Council is set up by the community and one of its functions is to settle disputes in its community in light of the customs of that community. The primary role of the Traditional Council in disputes between husband and wife is to reconcile the parties and not to grant a divorce. The

⁵⁶ (Suit n° HCB/14MC/89) unreported.

⁵⁷ Arrêt no 60 du 28 février 1974.

Traditional Council however, will reluctantly accept divorce if one or both parties refused the reconciliation and insist on divorce. Although decisions to pronounce divorce lies with the Customary Courts, decisions taken by the Traditional council are important in the eyes of the community and will be respected even though they are not legally binding. Moreover, when a Customary Court is faced with a case, it will usually enquire if the Traditional Council has examined the problem and has tried to reconcile the parties.⁵⁸ Sometimes the matter might even be dismissed by the Customary Court to enable the parties to first seek reconciliatory measures by the Traditional Council. The Customary Court will consider efforts at reconciliation made by the Traditional Council before granting the divorce.⁵⁹ Thus, although not a formal state court, decisions from the Traditional Council have persuasive force and are respected by the parties, their communities and Customary Courts which, while not bound to accept decisions from the Traditional Council, usually do. There are also practical reasons for the success of Traditional Councils. Some villagers take their matter to the Traditional Council because Customary Courts do not exist in all the villages. Customary Courts are mostly found in sub divisional headquarters. The poor state of the roads in most of the villages and the fact that some of the villagers can understand and speak only their local language make access to the Customary Court difficult. Furthermore, some married couples in the villages do not have marriage certificates. In the absence of a marriage certificate proving that the parties are married, the Customary Court will be reluctant to entertain matters from them as married persons. The parties will not face such obstacles before the Traditional Council. At local level, everyone will know who is married to whom and common knowledge will suffice before the Traditional Council. Once it is confirmed by fellow villagers that the marriage symbol was given, the Traditional Council will proceed with the case. Nevertheless, because of the discriminatory nature of the rules applied by both the Traditional Councils and Customary Courts, a unified system of

⁵⁸ *Joseph Mbohbenh of Bamunka v Begwia Nganda Helen of Bamuka* (Ndop Customary Court-Civil Suit No 01/2012) unreported.

⁵⁹ The case of *Joseph Mbohbenh of Bamunka v Begwia Nganda Helen of Bamuka* was suspended more than five times for reconciliation before the divorce was finally granted to the husband.

court would in my view be welcome. The role of Traditional Councils in reconciliatory matters could however be maintained. As a body familiar to the parties, Traditional Councils could play a valuable part in supporting the institution of marriage and helping parties to reach an agreement. When reconciliation fails, parties must be able to access the courts. More state courts should be opened for easy access. The problem of language could be solved by the State employing an interpreter. In the long run, compulsory primary education should improve linguistic skills throughout Cameroon.

While it is currently accepted that in Anglophone Cameroon, Customary Courts have jurisdiction over customary marriages and only the High Courts have jurisdiction over both customary and statutory marriages, it is not always easy to determine whether a marriage is customary or statutory especially where the marriage is polygamous.

c) Customary marriages versus statutory marriages: Where do polygamous marriages fit in?

There is no doubt that customary marriages are polygamous. Although they may remain potentially polygamous forever, the husband has a right to marry another woman if he so desires, but uncertainty relates to the nature of statutory marriages. Can a statutory marriage ever be polygamous or are all statutory marriages monogamous? A related concern is the difficulty to distinguish between a statutory marriage and a customary marriage. This distinction is important because it determines if the customary court will have jurisdiction and the law applicable in divorce matters in Anglophone Cameroon. This distinction is less relevant in Francophone Cameroon because both the High Courts and Customary Courts have original jurisdiction in statutory and customary marriages.

In pure and simple terms, a customary marriage is a marriage celebrated according to the customs of a particular tribe. It is a marriage that is celebrated under native law and custom, while a statutory marriage is one that is celebrated in accordance with the formal and substantive rules laid down by a statute. Despite this simple definition, academic and judicial views bring out conflicting interpretations of the statute. I will set out the debate below and then propose a solution. While my preferred ultimate solution

would be to unify the law, I will hereby consider what improvements could be made short of or pending achieving unification.

The main statute that governs marriage in all parts of Cameroon is the Civil Status Registration Ordinance (CSRO) 1981. This statute provides for both monogamous and polygamous marriages. It permits parties who wish to celebrate their marriage by virtue of this statute to choose either polygamy or monogamy. Article 49 of the CSRO expressly mentions that 'the marriage certificate shall specify the following: ... the mention of the type of marriage chosen: polygamy or monogamy.' According to the terms of the CSRO a statutory marriage can therefore be either polygamous or monogamous, depending on the choice of the parties. Unfortunately, some writers hold the view that a polygamous marriage cannot be statutory,⁶⁰ thereby granting Customary Courts jurisdiction over all polygamous marriages. The conception that statutory marriages are necessarily monogamous probably stems from the Nigerian Marriage Ordinance⁶¹ which used to govern marriages in Anglophone Cameroon prior to the enactment of the CSRO. Only a monogamous marriage could be celebrated under the Nigerian Marriage Ordinance.⁶² All polygamous marriages were therefore customary marriages and statutory marriages were necessarily monogamous marriages. This viewpoint has been read into the CSRO against the express words of the new statute. Accordingly, if parties opt for monogamy, the marriage is statutory and therefore the High Court has jurisdiction, while if they opt for polygamy, their marriage becomes a customary marriage, irrespective of the fact that the marriage was celebrated by a Civil Status Registrar. Such interpretation has become the accepted position by the majority within the academic community in Anglophone Cameroon⁶³ and by

⁶⁰ E Ngwafor, *Family Law in Anglophone Cameroon* (University of Regina Press 1993) p39, E Mbah, 'The Conflict of Laws Dilemma: Divorce in the Conflict of Law in Cameroon' (2000) 44 *Juridis Périodique* p70.

⁶¹ Marriage Ordinance (Chapter 115 – Volume iv: Revised Laws of the Federation of Nigeria 1958).

⁶² S. 35.

⁶³ Ephraim Ngwafor is the only one that has written a textbook on 'Family Law in Anglophone Cameroon'. Consequently, this is the main textbook that has examined this aspect of the law and which is being used by students and law lecturers in Cameroon and both the students and lecturers have come to accept this position.

some courts.⁶⁴ This contrary position in my view goes against the words of the CSRO and creates potential conflict in jurisdiction.

i) The view is against the words of the statute

The first criticism against the majority academic trend is that such an interpretation is contrary to the words of the statute.

*No principle of interpretation of statutes is more firmly settled than the rule that the court must deduce the intention of Parliament from the words used in the Act. If those words are in any way ambiguous-if they are reasonably capable of more than one meaning-or if the provision in question is contradicted by or is incompatible with any other provision in the Act, then the court may depart from the natural meaning of the words in question; but beyond that we cannot go.*⁶⁵

Therefore, where the words of a statute are clear and not ambiguous, they should not be dismissed through judicial interpretation or construction. Technically speaking, interpretation and construction do not have the same meaning. Interpretation is 'the process whereby a meaning is assign to the words in a statute' while construction is 'the process whereby uncertainties or ambiguities are resolved.' Hence 'every statute that comes before the court is interpreted, whereas only uncertain or ambiguous provisions require construction.'⁶⁶ The need for interpretation or construction may arise as a result of carelessness in drafting the Act or of the uncertainty of the words used.⁶⁷ 'Ambiguity arises when words used in a statute are found to be capable of bearing two or more literal meanings' while uncertainty arises when 'the words of the statute are intended to apply to various factual

⁶⁴ In *Motanga v Motanga* suit n^o BCA/22/76 (unreported) where the parties contracted their marriage by a Civil Status Registrar but did not mention whether it was monogamous or polygamous, the High Court construed the marriage as polygamous and therefore customary and thus declined jurisdiction. The same reasoning could be inferred from the case of *Chumboin née Nikieh Prudencia v Chumboin Pius Akom* (1998)1 CCLR p53 in which the North-West Court of Appeal stated that 'it is now settled law that whereas customary law courts have jurisdiction over polygamous marriages, [not customary marriages] only the High Courts are competent to entertain suits relating to monogamous marriages.' This has been reiterated in other cases and other courts for example by the High Court of Fako division in *John Dinga Forbang v Pauline Nanyongo Liote* Suit N^o HCF/71/MC/96 (unreported).

⁶⁵ Per Lord Reid in *Westminster Bank Ltd v Zang* (1966) AC 182 at p222.

⁶⁶ R Ward and A Akhtar, *Walker & Walker's English Legal System* (Oxford University Press, 10th edition 2008) p45.

⁶⁷ *ibid.*

situations and the courts are called upon to decide whether the set of facts before them was envisaged by the Act'.⁶⁸

A statute could be interpreted using the literal method. The literal approach allows a judge when interpreting a statute to ascertain the intention of the legislator, and the intention of the legislator can best be ascertained by the ordinary meaning of the words used in the statute.⁶⁹ Where, the words of a statute are clear and unambiguous as with the CSRO, a literal interpretation of the statute should therefore be encouraged. However, where a strict application of the literal rule would lead to an outcome which is absurd or contrary to public policy, the literal interpretation should give way to the 'golden rule'. Under the golden rule, 'judges may depart from the ordinary meaning of the word(s) in favour of the interpretation which avoids the absurdity'.⁷⁰ As Lord Blackburn said:⁷¹

We are to take the whole statute and construe it altogether, giving the words their ordinary signification, unless when so applied they produce an inconsistency or absurdity or inconvenience so great as to convince the court that the intention could not have been to use them in their ordinary signification, and to justify the court in putting them in some other signification, which, though less proper, is one which the court thinks the words will bear.

As the principal duty of the judge is to apply laws enacted by the legislature, to deviate from the ordinary meaning of a word or words could be taken as 'unacceptable judicial activism'.⁷² As Lord Bridge explains:⁷³

It is one thing to abstain from giving to the language of a statute the full effect of its ordinary grammatical meaning in order to avoid some positively harmful or manifestly unjust consequence. This I would describe as a legitimate process of construction to avoid a positive

⁶⁸ *ibid* p46.

⁶⁹ *ibid* p48; F Lawson, A Anton and L Brown, *Amos and Walton's Introduction to French Law* (Oxford Clarendon Press, 3rd edition 1967) p51. This method is applicable in both England and France.

⁷⁰ R Ward and A Akhtar (n66) p45.

⁷¹ *River Wear Commissioners v Adamson* (1877)2 App Cass 743 at 764-5 in R Ward and A Akhtar (n66) p48-49.

⁷² R Ward and A Akhtar (n66) p49.

⁷³ *R v Central Criminal Court, ex parte Francis & Francis* (1989) AC 346 at 375, (1988) 3 All ER 775 at 783 in R Ward and A Akhtar (n66) p50.

absurdity. But it is quite another thing to read into a statute a meaning which the language used will not bear in order to remedy a supposed defect or shortcoming, which, if not made good, will make the statutory machinery less effective than the courts believe it ought to be in order to achieve its proper purpose.

As Lord Simon of Glaisdale said, 'in a society living under the rule of law citizens are entitled to regulate their conduct according to what a statute has said rather than by what it was meant to say...'.⁷⁴ Judges should therefore give effect to the 'grammatical and ordinary or, where appropriate, the technical meaning of words in the general context of the statute.'⁷⁵ By giving effect to the ordinary meaning to the words in a statute 'judges are giving effect to the normal expectations of citizens' and are thus upholding the conception of the rule of law.⁷⁶ However, if the application of the words in their grammatical or ordinary sense would produce a result which is contrary to the purpose of the statutes, the judge may apply a secondary meaning which the words are capable of bearing.⁷⁷

Should the words of a statute be ignored to prevent an injustice which could not have been contemplated by Parliament?

Another approach to interpreting statutes would be the mischief rule as set out in the Heydon's case.⁷⁸ Under the mischief rule, if a statute is passed to remedy a mischief, the court should interpret the statute in a way that will remedy the mischief. The rule is generally used to resolve ambiguities where the literal rule would produce an unsatisfactory outcome.⁷⁹

Under English law, it is possible to examine the legislative history of the statutes to get the intention of parliament.⁸⁰ As Lord Goff stated in *Pepper v Hart*:⁸¹

⁷⁴ *Stock v Frank Jones (Tipton) Ltd* (1978) ICR 347 at p354.

⁷⁵ J Bell and G Engle, *Statutory Interpretation* (by the late Sir Rupert Cross Butterworths, 3rd edition 1995) p49.

⁷⁶ *ibid* p29.

⁷⁷ *ibid* p49.

⁷⁸ (1584)3 Co Rep 7a in R Ward and A Aktah (n66) p50-51.

⁷⁹ *ibid* p51.

⁸⁰ In Cameroon, parliamentary records are not opened to the public.

⁸¹ (1993)1 All ER 42 at p50. Before the decision in *Pepper v Hart*, the rule was that Parliamentary debates reported in Hansard could not be cited as an aid to the construction of statutes. See, *Davis v Johnson* (1979) AC 264; *Hadmor Productions Ltd v Hamilton* (1983)1 AC 191.

The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted.

It is possible that such reasoning prompted the interpretation that all polygamous marriages are customary marriages.

However, the rule in *Pepper v Hart* is only applicable where the wordings of the act is 'ambiguous or obscure, or leads to an absurdity,' or, where 'the material relied on consists of one or more statements by a minister or other promoter of a Bill...' and 'the statements relied on are clear.'⁸²

Should statutes be interpreted *contra legem*? In Switzerland, the judge has the power to declare and insert into legislation 'rules which he would lay down if he had himself to act as a legislator.'⁸³ However, this is not just a blanket power. The Swiss judge can only do this where there is no existing customary law⁸⁴ and he must be guided by approved legal doctrine and case law.⁸⁵ 'The law must be applied in all cases which come within the letter or the spirit of its provisions'.⁸⁶ Therefore, 'where the law expressly leaves a point to the discretion of the judge... he must base his decision on principles of justice and equity.'⁸⁷

Unlike a Swiss judge, 'judicial legislation is not an option open to an English judge' nor consequently to a judge in Anglophone Cameroon, but English courts can give effect to the intention of parliament. An English judge has a limited power 'to add to, alter or ignore statutory words in order to prevent a provision from being unintelligible, absurd or totally unreasonable, unworkable, or totally irreconcilable with the rest of the statute.'⁸⁸

Where the ordinary words of the statute will lead to injustice, are ambiguous or absurd, a secondary interpretation which will remove the injustice, ambiguity or absurdity could be used. In this light, statutes could be

⁸² Lord Browne-Wilkinson in *Pepper v Hart* (n81) at p69.

⁸³ I Williams, *The Swiss Civil Code English Version* (Oxford University Press 1925) art. 1 (2) p1.

⁸⁴ *ibid.*

⁸⁵ Art. 1 (3) p1.

⁸⁶ Art. 1 (1) p1.

⁸⁷ *ibid* art. 1 (2) p2.

⁸⁸ J Bell and G Engle (n75) p49.

interpreted *contra legem* in the interest of fairness, but within the spirit of the law. This interpretation is however not strictly *contra legem*.

There is no flaw or shortcoming in interpreting the CSRO using the literal rule, and there is nothing unjust, ambiguous, absurd or contrary to public policy in allowing parties to a statutory marriage to opt for polygamy. On the contrary, a literal interpretation of the CSRO is respectful of the terms of the statute and creates certainty in the law. One of the consequences of a literal interpretation of the CSRO is that more divorce petitions will move to the jurisdiction of the High Court and as such will be governed by the English received law. As the English received law is uniform throughout, this interpretation would have a unifying effect on the law applicable to divorce.

Consequently, while all customary marriages are polygamous, all polygamous marriages should not necessarily be customary. The Customary Courts only ought to have jurisdiction over those polygamous marriages celebrated in accordance with native law and custom.

While the literal interpretation of the CSRO would not solve all the complexities inherent in the diversity of applicable laws in Cameroon, it would restrict the number of divorce petitions governed by diverse customary laws and would therefore be a welcome step towards greater harmony in the regulation of divorce. The second objection to the dominant academic standpoint is that it could create conflicts in jurisdiction

ii) The view creates potential conflicts in jurisdiction

The confusion that exists over the jurisdiction of the court in Anglophone Cameroon as regards polygamous marriages is also found in court decisions. In *Motanga v Motanga*,⁸⁹ the petitioner brought an action for the dissolution of their marriage before the High Court in Bamenda (Anglophone Cameroon). The marriage was celebrated by a Civil Status Registrar but the parties did not mention whether they intended the marriage to be polygamous or monogamous. Having failed to declare their intentions, the judge presumed that the marriage was polygamous because (as he mentioned) “a Cameroonian is polygamous by birth.” In any case, section

⁸⁹ (Suit n° HCB/2/76) unreported.

43(d) of the Civil Status Registration Ordinance of 1968 which was the statute applicable to the case obliges the parties to make an express declaration if they intend their marriage to be monogamous. Consequently, the default characterisation, in the absence of declaration, should be that the marriage is polygamous. The judge went on to consider the issue of jurisdiction. He declined jurisdiction even though the marriage was celebrated by a Civil Status Registrar thus implicitly linking the jurisdiction of the Customary Court to the polygamous nature of the marriage. The fact that the marriage was celebrated by a Civil Status Registrar was ignored. For Customary Courts, the issue of characterising the marriage will not be raised. Either the marriage symbol is given and the marriage is deemed to be customary or the marriage symbol is not given and the marriage is not customary. In my view, Customary Courts should ignore the issue of the marriage symbol if the marriage is clearly statutory, otherwise a marriage could be statutory and customary at the same time. The courts are not consistent in their approach. The *Motanga* case can be contrasted with the case of *Dinga Forbang v Pauline Nanyongo Liote*⁹⁰ where similar legal issues were raised, but the High Court of Fako division (Anglophone Cameroon) relied on section 47(1) of the English Matrimonial Causes Act 1973⁹¹ and accepted jurisdiction. However, a later case, *Dima Gladys Marie Gabrielle v. Bendegue Nyama Germain*⁹², added another layer of confusion. In this case, the petitioner raised an issue of jurisdiction. The petitioner alleged that the Limbe Customary Court lacked jurisdiction to dissolve her marriage because she had contracted a monogamous marriage. She consequently asked the High Court of Fako Division to declare the dissolution of her marriage by the Limbe Customary Court null and void, set aside the divorce certificate⁹³ and grant her divorce. The High Court judge stated that

⁹⁰ Suit n° HCF/71/mc/96.

⁹¹ The section states that, 'a court in England and Wales shall not be precluded from granting matrimonial relief in making a declaration concerning the validity of a marriage by reason only that the marriage in question was entered into under a law which permits polygamy'.

⁹² (Suit n° HCF/0039/MC/08) unreported.

⁹³ Although the petitioner abandoned this aspect of her petition, the court nevertheless declared that, even if the petitioner did not abandon the aspect of setting aside the divorce

under the provisions of section 18(1) (b) of Law N° 2006-015 of 29th December 2006 on Judicial organisation the High Court remains the only competent court to try issues relating to probate, matrimonial causes and divorce.

The statement is in line with the reform I proposed but does not accurately reflect the current state of the law. Under the current law the High Court shares jurisdiction with Customary Courts. Another statement by the judge whereby he said, '*whereas Customary Courts have jurisdiction over polygamous marriages, only the High Courts are competent to entertain suits relating to monogamous marriage*' could also create confusion for parties. If what is meant is that Customary Courts have jurisdiction over polygamous marriages celebrated under native law and custom, then the statement is innocuous but if what is meant is that Customary Courts have jurisdiction over all polygamous marriages irrespective of whether they are celebrated by the Civil Status Registrar or under customary law, then it is submitted that the statement is inaccurate. In *Achu Christopher Mokom v. Tezeh Judith Nanga*⁹⁴ the High Court of Mezam division (Anglophone Cameroon) dissolved a polygamous marriage celebrated by a Civil Status Registrar according to the native law and custom of the Pinyin people. In this case however, the issue of jurisdiction was not raised.

The contradictions and confusion within the case-law as to how to characterise the type of the marriage and the resulting issue of jurisdiction are problematic. It can create positive conflict where both courts will recognise their jurisdiction. These conflicts will be solved by the Supreme Court if the case is brought to its attention. However, considering both the length of time it takes for matters to be dealt with by the Supreme Court and the financial burden to be incurred by the parties, the parties are not likely to bring the issue to the Supreme Court. A further source of confusion stems from the fact that customary marriages celebrated under customary law

certificate emanating from the Customary Court the court would not have even contemplated setting it aside because the said certificate is in the eyes of the law 'only a reminiscent of a blank sheet of paper and of no effect' as the decision by the Customary Court is in law a nullity. A decree of divorce was thus granted to the petitioner by the High Court.

⁹⁴ (Suit n° HCB/14MC/05-06) unreported.

should be registered as required under the CSRO⁹⁵ by a Civil Status Registrar. The intervention of the Civil Status Registrar for registration purposes should not affect the nature of the marriage.

d) Distinction between Celebration and Registration of marriages before the Civil Status Registrar

Marriages celebrated under customary law will fall within the jurisdiction of the Customary Courts even when they have been registered by the Civil Status Registrar. This reasoning is buttressed by the fact that 'customary marriages are only to be *recorded* in the Civil Status Registers.'⁹⁶

i) Intention of the parties

Some parties to a marriage do mention during the celebration of their marriage by a Civil Status Registrar that their statutory marriage is *in accordance with the customs of a particular tribe*. The courts have interpreted this declaration to mean that the marriage is customary and therefore polygamous even if the parties had opted for monogamy.⁹⁷ In my opinion, however, one cannot convert a statutory marriage into a customary marriage because of mere reference to customs. If the parties have entered into a statutory marriage, allusion to customs should not outweigh this decision. Similarly, if the marriage is a customary marriage, one should not convert it into a monogamous marriage, at the time of registration of the marriage. In *Kumbogsi v Kumbogsi*,⁹⁸ the parties married in 1960 according to custom. By 1970, the husband had married two other women. For the purpose of receiving some financial benefit, the parties declared their marriage before the Buea Court of First Instance and obtained a declaratory judgement. A marriage certificate was later issued which mentioned that the type of marriage was 'monogamy with common property'. The husband alleged that when the marriage certificate was issued, he had failed to notice the mistake and had only noticed the wrong entry later. He brought an action

⁹⁵ Section 81(1).

⁹⁶ My emphasis. Inglis J in *Diana Ahone Enongenekang v Andrew Enonkenekang*, (Suit n° HCSW/28mc/82) unreported; *Grace Misi Tufon v TufonTosewum Samson*, (Suit n° HCB/59 mc/83) unreported.

⁹⁷ *Ambe Anastasia Bih v Wamunang Samuel Suh* (Suit n° BCA/4cc/2008) unreported.

⁹⁸ (Appeal n° CASWP/4/84) unreported.

before the Court of First Instance to have the marriage certificate changed to a polygamous marriage, but failed. On appeal, the judge ordered that the certificate be rectified. The judge declared that the parties could not have opted for a monogamous marriage, even if it was their intention to do so because 'no one man can opt for two different forms of marriage'⁹⁹ and his customary marriage was automatically polygamous. This case can be contrasted with that of *Nganso v Nganso*¹⁰⁰ where the parties were married under customary law and had lived together as husband and wife before registering their customary marriage, choosing monogamy as an option. The judge refused to follow the previous case and held that 'by going to the civil status registry and opting for monogamy, the parties had gone a step further than a mere customary union.' She therefore concluded that the marriage between the parties was monogamous. Amid this confusion, a unified system of law is indispensable. In my view however, where no previous customary marriage has been celebrated and the parties appear before the Civil Status Registrar, the Civil Status Registrar should be both celebrating and registering the marriage. Such a marriage should therefore be characterized as a statutory marriage and, whether it is polygamous or monogamous, it should fall within the jurisdiction of the High court.

Formalities may be required under customary law for the validity of customary marriages. Customary marriage is a long process which can take weeks, months or even years. The required customary formalities will differ from tribe to tribe. But as will be shown in Chapter Four, once the marriage symbol has been given, it will be considered that a customary marriage exists. What would happen if a couple starts off the process of contracting a customary marriage and in the middle of it, celebrates the marriage at the Civil Status Registry before completing the customary requirements? In such a situation, it will be difficult to determine whether the marriage is statutory or customary. Having a single jurisdiction (and a single law) applicable will solve the above problem. In any case, where it is difficult to determine

⁹⁹ *ibid*; because this case is unreported there is no formal pagination, and this is same for most unreported cases in Cameroon.

¹⁰⁰ CSWP/cc/95.

whether a marriage is statutory or customary, the intention of the parties should prevail.

The intention of the parties could be inferred from the option chosen (monogamy or polygamy) by the parties. Where they opt for monogamy it could be inferred that they intend to contract a statutory marriage as the notion of monogamy is not known under customary law. However, where they opt for polygamy, the inference of a customary marriage should not be drawn as polygamous marriages could be statutory. Another decisive factor is the date of celebration/registration of the marriage.

ii) Dates of celebration/registration

If the marriage was celebrated and registered by the Civil Status Registrar on the same date, then this should lean in favour of a statutory marriage, because if the marriage is a civil (statutory) marriage, the parties and the registrar must sign on the same day the marriage was celebrated. If the date on which the marriage was celebrated and the date on which it was registered are different, it will conversely lean in favour of a customary marriage. The different dates would imply that the parties had first celebrated a customary marriage and had then registered it by the Civil Status Registrar on a later date.

Another solution, which could serve as a mid-term solution to the problem of jurisdiction¹⁰¹ would be for the courts in Anglophone Cameroon to apply the rules on jurisdiction which are applicable in Francophone Cameroon. The rule enables the petitioner to make a choice of jurisdiction, although if the choice is for Customary Courts, the respondent can object to it. If this happens the petitioner must take the matter to the High Court. This rule is preferable to the rules applicable in Anglophone Cameroon. First, jurisdiction does not depend on the type of marriage celebrated, thus avoiding all the difficulties in ascertaining the type of marriage. Secondly, the Customary Court cannot on its own accord decline jurisdiction. Finally, there are no risks of positive conflicts because the Customary Court must decline jurisdiction if its jurisdiction is contested by the respondent. As we have seen, some

¹⁰¹ The ultimate solution is to have a unified system of courts.

judges in Anglophone Cameroon have (probably wrongly in law) shown support for the Francophone solution.¹⁰² However, the ultimate solution is to have a single court that will handle divorce issues and apply a uniform law. If multiple jurisdictions are left to operate and only the laws are unified it will be unlikely that the courts will respect the unified laws. As will be shown in the next chapter, both Customary Courts and the modern courts have applied customary rules that are contrary to enacted legislations.

Some Anglophone judges have failed to adhere to common law principles and the rules of statutory interpretation. Hence the 2006 reform has not remedied the complexities involved in distinguishing statutory marriages from customary marriages and hence the jurisdiction of the court. It has also created a risk of multiplicity of proceedings.

2) The effect of the 2006 modification of the Judicial Organisation Ordinance 1972

The 2006 modification of the Judicial Organisation Ordinance gave the High Courts in Anglophone Cameroon original jurisdiction over both statutory and customary marriages and divorce. The 2006 law has created a situation in which multiplicity of proceedings could arise.

a) Jurisdiction of the court by virtue of the 2006 modification

By virtue of article 18 (1) (b) of the 2006 modification of the Judicial Organisation Ordinance, the High Court is competent: 'in civil commercial and labour matters, to hear and determine suits and proceedings relating to the status of persons, civil status, marriage, divorce, filiation, adoption and inheritance.'

The phrase, 'subject to the *ratione personae* jurisdiction of the Traditional Court' which is found in the 1972 ordinance has been repealed. This means that as from 1st January 2007¹⁰³ the High Court in Anglophone Cameroon has jurisdiction over all marriages and divorces. While parties to a statutory marriage must go to the High Court, parties to a customary marriage have a

¹⁰² In *Mokwe v Mokwe*, Inglis J (Anglophone Cameroon) applied this rule instead of the rule that exists in Anglophone Cameroon.

¹⁰³ The 2006 law entered in force on 1st January 2007.

choice between the High Court and the Customary Court. However, the problem of determining whether a marriage is statutory or customary remains because choice of jurisdiction does not absorb choice of law issues. Thus, even where the High Court has jurisdiction, the issue of the nature of the marriage will matter for choice of law purposes. The High Court in Anglophone Cameroon will apply customary law to customary marriages but it will apply the English received law to statutory marriages. By contrast, in Francophone Cameroon, choice of jurisdiction absorbs choice of law. If the High Court in Francophone Cameroon has jurisdiction, customary law will not apply.

A welcome solution to the problems of jurisdiction and applicable law in Anglophone Cameroon was provided by the Court of Appeal of the North-West Region (Anglophone Cameroon) in *Mburu Stephen v. Mbiekwi Grace Tabah*.¹⁰⁴ The case concerned a petition for divorce of a polygamous marriage celebrated by a Civil Status Registrar. The appellant appealed against the rulings of the High Court on the ground that the trial judge had erred in law when he had overruled the preliminary objection that the High Court lacked jurisdiction to entertain the petition for dissolution of a polygamous marriage between the parties. The question put before the court by counsel for the appellant deals with the following:

Whether the trial judge was right both in law and fact to hold that the High Court had jurisdiction;

Whether the option for polygamy by the parties to a marriage renders, translates and transforms the marriage to a customary law marriage; whether insertion into the marriage certificate of the word 'polygamy' above gives jurisdiction to the Customary Court in case of dispute; and

Whether marriages contracted under the 1981 Civil Status Registration Ordinance is statutory or customary.

The court noted that the above issues turned around one main issue which was: 'whether the insertion of the word polygamy in a marriage certificate gives exclusive jurisdiction in case of a divorce to the Customary Court.'

¹⁰⁴ (Suit n° CANWR/9/2012) unreported.

In response, the Court of Appeal pointed out that a marriage celebrated by a Civil Status Registrar, 'whether it is monogamous or polygamous, is not a customary marriage'. Consequently, disputes arising from them are exclusively within the jurisdiction of the High Court. The insertion of the word 'polygamy' does not therefore make the marriage customary. However, even if it did, the High Court would still have jurisdiction. The Court of Appeal further declared that by virtue of section 18(1) (b), 'the High Court has jurisdiction to hear and determine any matter relating inter alia to marriage and divorce that is brought before it, even when it concerns a purely customary marriage.' However, the court cautioned that in relation to a purely customary matter, the High Court must apply the customs of the parties, in so far as they are not 'repugnant to natural justice, equity and good conscience.' This ruling therefore gives the High Court in Anglophone and Francophone Cameroon the same competence, but confirms the difference in applicable laws. To remedy this inconsistency in decisions, a unified system of courts and law will be welcome.

As well as failing to remedy the complexities resulting from the distinction between monogamous and polygamous marriages, the 2006 reform has not resolved the complexities flowing from potential multiple proceedings.

b) Multiplicity of divorce proceedings

The 2006 law has not solved the problem of the complexities of the jurisdiction of the courts in divorce matters. Placing customary divorces under the jurisdiction of both the High Court and the Customary Court could create a situation of multiplicity of proceedings. It is possible for the same petitioner to petition for divorce against the same respondent in the High Court as well as the Customary Court. If both courts are seized, the petitioner should be asked to choose either the High Court or the Customary Court. If he chooses the High Court, the proceedings in the Customary Court should be discontinued and vice versa. Alternatively, the second court could simply decline jurisdiction. In Francophone Cameroon, the respondent could refuse to submit to the jurisdiction of the Customary Court. When this happens, the Customary Court must decline jurisdiction. The petitioner will then be obliged to pursue only the proceedings in the High Court. It could

also happen that the petitioner in the High Court is not the petitioner in the Customary Court. In other words, in a divorce dispute involving the same persons, the petitioner in the High Court might be the respondent in the Customary Court while the petitioner in the Customary Court is respondent in the High Court. In such a situation, the petitioners could not be asked to choose between the High Court and the Customary Court. In such cases parties will incur double the cost of legal proceedings and will be faced with a risk of conflicting judgements.¹⁰⁵ By contrast, such a problem would easily be solved in Francophone Cameroon because the defendant in the Customary Court could reject the jurisdiction of that court and the matter would then be discontinued. However, the situation in Anglophone Cameroon is more complex because the defendant in the Customary Court cannot reject the jurisdiction of the Customary Court if the marriage is a customary marriage. There are several possible solutions to this problem. Under the traditional English rule, cases of multiplicity of proceedings or *lis alibi pendens* are subsumed under the broad doctrine of *forum non conveniens*. Under this doctrine, an English court will stay its proceedings if it is satisfied that 'there is some other available forum, having jurisdiction, which is the appropriate forum for trial of the action, i.e. in which the case may be tried more suitably for the interest of all the parties and the ends of justice.'¹⁰⁶ Thus where there is some other forum which is more appropriate for the trial of the action, the court will ordinarily grant a stay 'unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted.'¹⁰⁷ In general, the burden of proof will be on the defendant 'to persuade the court to exercise its discretion to grant a stay.'¹⁰⁸ However, each party will seek to establish the existence of certain matters which will assist him in persuading the court to exercise its discretion in his favour and in respect of any such matter the evidential burden will rest on the party who asserts its

¹⁰⁵ P North and J Fawcett, *Cheshire and North's Private International Law* (Oxford University Press 2004, 13th edition) p347; D McLean and V Abou-Nigm, *The Conflict of Laws* (Sweet & Maxwell Publishers 2012, 8th edition) p98.

¹⁰⁶ Lord Goff of Chieveley in *Spiliada Maritime Corpn v Cansulex Ltd*, (1987) AC 460 at p476. This principle was formulated by Lord Kinneir in the Scottish case of *Sim v Robinow* (1892) 19 R. 665 at p668.

¹⁰⁷ Lord Goff of Chieveley (n106) at p478.

¹⁰⁸ *ibid* p476.

existence.¹⁰⁹ If the court is satisfied that there is some other available forum which is 'the appropriate forum for the trial of the action, the burden will shift to the plaintiff to show that there are special circumstances by reason of which justice requires that the trial should nevertheless take place in England.'¹¹⁰ Since the question is whether there exists some other forum which is clearly more appropriate for the trial of the action, the court will examine factors which point in the direction of another forum. Where jurisdiction is founded as of right, the court will look for the 'natural forum' which is that with which 'the action has its most real and substantial connection.'¹¹¹ It is not enough for the defendant to show that England is not the natural forum or appropriate forum for the trial. The defendant must establish that there is another available forum, which is clearly or distinctly more appropriate than the English forum.'¹¹² The court will look for connecting factors such as those affecting 'convenience and expense' and also the law governing the relevant transaction and the place where the parties reside or carry on business. If the court concludes that there is no other available forum which is clearly more appropriate for the trial of the action, it will ordinarily refuse a stay¹¹³ but, if the court concludes that there is some other available forum which is clearly more appropriate for the trial of the action, it will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted.¹¹⁴

A slightly different rule applies where the court exercises its discretionary power under the R.S.C., Ord. 11, r. 1 to serve the defendant out of the jurisdiction. While in both groups of cases the aim is to 'identify the forum in which the case can be suitably tried for the interest of all the parties and for the ends of justice', Lord Goff made a threefold distinction in the two groups of cases. The first is that 'in the Order 11 cases the burden of proof rest on

¹⁰⁹ *ibid.*

¹¹⁰ *ibid.*

¹¹¹ Lord Keith of Kinkel in the *Abidin Daver* (1984) AC 398 at p415.

¹¹² *Spiliada Maritime Corp v Cansulex Ltd* (n106) p477; see also Lord Salmon in *MacShannon v Rockware Glass Ltd* (1978) AC 798.

¹¹³ *Spiliada Maritime Corp v Cansulex Ltd* (n106) p478; see also *European Asian Bank A.G v Punjab and Sind Bank* (1982) AC 2 Lloyd's Report 356.

¹¹⁴ *Spiliada Maritime Corp v Cansulex Ltd* (n106) p478

the plaintiff, whereas in the *forum non conveniens* cases that burden rest on the defendant.’ Secondly in the Order 11 cases, the plaintiff is seeking to persuade the court to exercise its discretionary power to permit service on the defendant outside the jurisdiction¹¹⁵ while in the *forum non conveniens* cases, jurisdiction is exercised as of right. Finally, the jurisdiction exercised under Order 11 is an exorbitant jurisdiction¹¹⁶ and must therefore be exercised with extreme caution. Although this doctrine was initially developed in a commercial context, it has been extended to divorce cases.¹¹⁷ The multiplicity of proceedings in England and another country is a factor to be taken into account under the doctrine of *forum non conveniens*.¹¹⁸ While the doctrine is advantageous to the respondent because the petitioner will be forced to take the matter to another court, it is disadvantageous to the petitioner who will now have to submit the matter in another jurisdiction which is not the jurisdiction of his/her choice.

Litigation is an expensive way of solving disputes. Litigation to determine the appropriate forum before trial of the action can take place increases this expense. The rules on jurisdiction should therefore be made simple with few jurisdictional grounds. Ideally a unified system of court within a single nation will eliminate the problems inherent in the *forum non conveniens* doctrine.

A second solution to *litis pendens* can be found under French law and the EU Regulations. Under French law, there is no general doctrine of *forum non conveniens* but a plea of *litis pendens* exists. Under article 100 of the new French Civil Procedure Code, the second court seized of the matter must decline jurisdiction, if asked to do so by one of the parties or on its own motion. Thus, if a party raises the plea of *lis alibi pendens*, it becomes incumbent on the French judge to stay its proceedings if it is the second court seized. This could be an unfortunate situation because the second court seized might be the more appropriate court for the trial of the action.

¹¹⁵ That power may only be exercised under particular circumstances provided for by statute, and in the exercise of its discretionary power, the court will not grant leave unless it is made sufficiently clear ‘to appear to the court that the case is a proper one for service out of the jurisdiction. See R.S.C., Ord 11, r.4 (2).

¹¹⁶ *Spiliada Maritime Corp v Cansular Ltd* (n106) at p481. See also Lord Diplock in *Amin Rasheed Shipping Corp v Kuwait Insurance Co* (1984) AC 50 at p56.

¹¹⁷ *De Dampierre v De Dampierre* (1988) AC 92.

¹¹⁸ Lord Goff in *De Dampierre v De Dampierre* (n117) AC 92 at p108.

However, the French judge will have discretion to stay the proceedings if the plea is not raised by any of the parties. A similar procedure has been adopted by the EU. Within the EU, 'where proceedings relating to divorce, legal separation, marriage or annulment between the same parties are brought before courts of different member states, the court second seized must of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established.'¹¹⁹ Where the jurisdiction of the court first seized is established, any court other than the court first seized shall decline jurisdiction in favour of that court.¹²⁰ Whether or not the plea is raised in court, the court second seized must stay its proceedings¹²¹ which seem even more stringent than under French domestic law.

Although the above discussed situations deal with conflict of jurisdiction involving more than one State, the rule could be transposed to domestic conflicts of jurisdiction. The disadvantage of applying this solution is that it undermines the importance given to reconciliation in divorce disputes, as parties might have to rush to court to be the first to petition. There will be an 'increase in pressure and tension at a time when spouses should be afforded time for reflection'¹²² and thus 'eliminating or minimising attempts at reconciliation or conciliation.'¹²³ Another solution to the problem of internal conflict is to consider the type of marriage (statutory or customary) contracted. If the marriage is a customary marriage, the Customary Court should have jurisdiction as issues involving customary law could arise. The Customary Court is likely to resolve such issues better than the High Court since Customary Court judges are more versed with customary law than High Court Judges.¹²⁴ As we have seen customary law is the applicable law to customary divorce in Anglophone Cameroon. Judges in the High Courts

¹¹⁹ Article 19 of Brussels II bis. See also 27 of Brussels I Regulation. The same provision is also found in article 21 of the Brussels and Lugano Convention.

¹²⁰ In *Re v N* (Jurisdiction [2007] EWHC1274 (Fam), (2007) 2 FLR the French court was first seized, while in *Leman-Klammers v Klammers*, [2007] ECWA Civ 919, (2008) 1 FLR p692-698 the English court was first seized.

¹²¹ H Gaudemet-Tallon, 'France' in J Fawcett, *Declining Jurisdiction in Private International Law* (Reports of the XIVth Congress of the International Academy of Comparative Law, Athens, August 1994 Clarendon Press Oxford 1995) p175.

¹²² P McEleavy, 'The Communitarization of Divorce Rules: What Impact for English and Scottish law?' (2004) 53 *ICLQ* p627.

¹²³ Thorpe LJ in *Wermuth v Wermuth* [2003] EWCA Civ 50, (2003) 1 WLR p944.

¹²⁴ This solution is similar to the solution under English law where preference is given to the more appropriate forum

are not presumed to know the rules on customary law. Customary law will be treated as foreign law before the High Court. Consequently, in Anglophone Cameroon, the party relying on customary law must plead and prove the custom that he/she is relying on before the High Court. Failure to do this could lead to the application of the received law.¹²⁵ If the marriage is a statutory marriage, the High Court should have jurisdiction as the matter will be governed by the received law, the law applicable in the High Court. However, the difficulties of determining whether a marriage is customary or statutory must first be resolved. The above difficulties justify my choice for a unified system of court.

A slightly different but related problem is raised by the SCHL 1955, according to which the High Court is not to 'enforce' customs that are 'repugnant to natural justice, equity and good conscience'.¹²⁶ Apart from the issue of whether a provision falls within these terms or not, which I discussed in chapter one, the provision leaves open the question of which law should be applied if the normally applicable customary rule is set aside because it is considered 'repugnant to natural justice, equity and good conscience'. The SCHCL could have stated that the received law then becomes applicable, but it does not. Instead it merely states that 'in cases where no express rules are applicable to the matter in controversy, the court shall be governed by the principles of justice, equity and good conscience.'¹²⁷ The phrase 'justice, equity and good conscience' could be subject to different interpretation hence different application of the law. For example, in exercising 'justice, equity and good conscience' a judge could apply the received law to cases governed by customary law. On the other hand, 'Justice, equity and good conscience' could also require that the discriminatory aspect of the customary rule be removed to make the rule non-discriminatory. Which of these two methods better reflects 'justice, equity and good conscience' will depend on the particular rule in question and the particular judge. In *Alice*

¹²⁵ *Bumper Development Corp v Metropolitan Police Commissioner* (1991)4 All ER 638.

¹²⁶ In my opinion, any law that is discriminatory is 'repugnant to natural justice, equity and good conscience' hence the High Court should not apply the customary rule. This notwithstanding, the High Courts in Anglophone Cameroon have, in some cases, applied customary law rules that are 'repugnant to natural justice equity and good conscience'.

¹²⁷ S 27(4).

*Fodje v Ndansi Kette*¹²⁸ the parties were married under customary law in 1952. In 1981 the wife (appellant) left the matrimonial home. In 1983 the respondent petitioned for divorce in the Customary Court and the divorce was granted to him. No order as to property adjustment was made by the court. The parties had three houses. Under customary law, all the property went to the husband as the wife herself is property and 'property cannot own property'. Dissatisfied with the judgement, the wife appealed. The respondent argued that he owned all the houses but the wife claimed that the first house was jointly built by both. In a judgement which has been described as 'famous first'¹²⁹ and 'a bold step which, regrettably, goes towards the wrong direction'¹³⁰ the judge held that the appellant should occupy one of the houses and collect rents from the other two houses. Clearly the judge did not apply customary law which would have denied the woman a share in the property. She equally did not apply the English received law which would have given the husband a share (and probably a greater share) of the property. Did the judge apply justice, equity or good conscience in depriving the husband of the property? While the judge was bold in deciding to allocate property to a woman who was married under customary law, I would think that it is in the right direction in the sense that, the discriminatory customary rule which considers the woman as property was set aside. It is however regrettable that as a result the husband was denied a share in the property. This case can be contrasted with the case of *Joyce Ndumu v John Ndumu*¹³¹ in which the man (a Cameroonian) got married to a woman (an American) in the USA. One year after they returned to Cameroon, the wife petitioned the High Court for divorce. As the marriage was monogamous and celebrated in the USA, the received law ought to have applied. The judge, Inglis J, cited section 15 of the SCHL 1955¹³² but

¹²⁸ (1989) Appeal N° BCA/45/1986.

¹²⁹ E Ngwafor, 'Cameroon: Property rights for women-A Bold Step in the wrong direction?' (1990-1991)29 J. Fam. L p298.

¹³⁰ *ibid* p302.

¹³¹ (1989) Suit N° HCB/97mc/86, unreported.

¹³² This section provides that, 'the jurisdiction of the court in probate, divorce and matrimonial causes and proceedings may, subject to the provisions of this law and in particular of section27 and to rules of court, be exercised by the court in conformity with the law and practice for the time being in force in England.'

refused to apply ‘the law and practice for the time being in force in England’ because;

Having regard to the obvious fact that the socio-economic character of this country is not the same as in England, it would be unjust to the parties to conform strictly with Part II of the Matrimonial Causes Act 1973 which deals with financial provision and property adjustments. In the light of this we can fall behind section 27.

The judge therefore applied discriminatory customary law rules to parties to a monogamous marriage celebrated in the USA and thus deprived the woman of her own share of property. This same judge, Inglis J, ‘has been given the credit for coming out with the pronouncement that a woman is property and property cannot own property’¹³³ in the case of *Achu v Achu*.¹³⁴ It is interesting to know that this same judge in writing his foreword on ‘Family law in Anglophone Cameroon, by E. Ngwafor’ stated that,

Here now in the light of the Constitution and of section 70(1) of Ordinance N° 81/02 of 29th June 1981 which ordains that the partial or non-payment of dowry should not affect the validity of a marriage, we have to rethink the question of the wife being herself property in terms of native law and custom.

Yet, in the above cases of *Joyce Ndumu v John Ndumu* and in *Achu v Achu*, he classified women as property and thus deprived them of their property even though the CSRO had been enacted. Certainly, the multiplicity of laws in Cameroon increases the risks of such erroneous interpretations. A unified system of law would imply that the judge will not have a choice in the applicable laws and will then be obliged to apply the unified law. Pending unification, my preference would go for the rules applicable in Francophone Cameroon. In Francophone Cameroon, as we have seen, jurisdiction already dictates the applicable law. More generally, I would argue that conflict of jurisdiction should conflate with conflict of law issues. Such absorption would ensure that law is applied in its environment by judges well versed in the normative system from which it derives. The law is therefore likely to be

¹³³ V Ngassa, *Gender Approach to Court Action* (Editions Saagraph and Friedrich-Ebert-Stiftung 2002) p107.

¹³⁴ (1988) BCA/62/86 unreported.

applied more consistently and coherently. Besides, this approach would ensure that the same solution is applied in both parts of Cameroon. Anglophone Cameroonians might resist the solution as amounting to an imposition of a Francophone rule. However, the alignment of the conflict of laws rules on jurisdiction also matches the English law system¹³⁵ from where the received laws in Anglophone Cameroon are derived. Short of my ultimate preferred solution of a unified system of law and courts across Cameroon on divorce matters, this alignment of conflict of laws on jurisdiction would be a welcome step towards increased harmony and simplicity.

The above analysis reveals that some of the substantive rules and the rules on the jurisdiction of the court to grant divorce are discriminatory, contradictory and confusing. A court will declare that it has jurisdiction over a polygamous marriage in one case, yet in another it will declare that it has no jurisdiction over a polygamous marriage. This is more obvious in the Anglophone section of the country. Although the law has been modified by the 2006 law on judicial organisation so that today both in the Anglophone and Francophone parts of the country, the High Court can entertain petitions from customary marriages and statutory marriages, the problem has not been solved completely. In Anglophone Cameroon, if the marriage is a customary marriage and the matter is before the High Court the judge must apply customary law. By contrast, whether the marriage is a customary marriage or a marriage celebrated by a civil status registrar, the judge in the High Court in Francophone Cameroon will apply the civil law because choice of jurisdiction implies choice of law in Francophone Cameroon. However, if the matter is before the Customary Court, customary law will be applicable, but even that is treated differently in the two parts of the country.

The next section will examine alternatives to unification and will establish that these alternatives are insufficient.

¹³⁵ In divorce matters, once the English courts accept jurisdiction, English law is applicable. See Matrimonial Causes Act 1973 s. 46 (2).

C) ALTERNATIVES TO UNIFICATION

In this section, I will examine various alternative possible remedies, namely constitutional overrides (drawing examples from South Africa and Botswana)¹³⁶ and harmonisation/integration of conflict of law rules. Throughout, I will compare these techniques to unification.

1) Insufficiency of constitutional overrides

The Constitution of Cameroon is the most important law of the land from which all other laws derive their validity. By virtue of article 46 of the 1996 Constitution, constitutional review should be carried out by the Constitutional Council, a centralised and specialised body which is different from the ordinary courts of law and whose rulings on the constitutionality of laws are final¹³⁷ and binding on all public, administrative and judicial authorities as well as on corporate bodies and natural persons.¹³⁸ However, the Constitutional Council only went operational on 06th March 2018 when the members appointed by Decree no 2018/105 of 07th February 2018 took oath of office. Hitherto, its duties were carried out by the Supreme Court. Ordinary courts have no jurisdiction over issues of constitutionality of laws. However, constitutional review by the Constitutional Council is only preventive. It must be done before the promulgation of legislation.¹³⁹ The advantage of this system is that it acts as a filter to proposed laws thereby theoretically reducing the number of unconstitutional laws which are promulgated.¹⁴⁰ However, once these laws have been promulgated, the Constitutional Council can no longer declare them unconstitutional nor can ordinary courts. Until now, including the period when the Supreme Court exercised its functions, the Constitutional Council has not declared any bill or pre-

¹³⁶ I do not aim to carry out a comparative analysis with South Africa and Botswana but I have chosen these two countries as illustrations because like Cameroon they are African countries where legal pluralism exists with a dual system of received laws and customary law. But unlike Cameroon, constitutional review in these countries is being used by the courts.

¹³⁷ Art. 47 (1).

¹³⁸ Art. 50.

¹³⁹ Art. 47 (3).

¹⁴⁰ The numerous discriminatory laws that exist in Cameroon put a question mark on the effectiveness of the Constitutional Council.

promulgated law unconstitutional. Given the multiplicity of overlapping laws, particularly in the context of divorce, it is possible for conflicting and contradictory bills to be promulgated. Unfortunately, once contradictions become apparent after promulgation, post-promulgation constitutional review cannot be exercised.

There are many possible solutions to this problem. The first is to introduce an additional mode of constitutional review post promulgation. Any discriminatory law which would have escaped review by the Constitutional Council prior to promulgation could then still be reviewed by the Council post promulgation. However, restrictive access to the Council would still be a limitation. The Constitutional Council can only be seized by the President of the Republic, the President of the National Assembly, the President of the Senate, one-third of the members of the National Assembly, one-third of the Senators or Presidents of regional executives.¹⁴¹ The Council cannot on its own declare a law unconstitutional. Individuals whose rights have been infringed by an enacted legislation are not entitled to bring an action before the Constitutional Council. They will be left with no remedy unless one of the persons or bodies above mentioned takes the matter to the Council. The Council could be opened to individual petition but with the risk of flooding it with requests and making its work too cumbersome.

The current system of constitutional review is derived from the French system. In France however, a 2008 reform¹⁴² introduced an additional post-promulgation mode of review to the existing pre-promulgation review. The reform has been implemented in France with satisfactory results but because the protection of human rights in France was already adequately carried out by ordinary courts. Article 55 of the French Constitution provides for the 'direct application of ratified international treaties by French courts.' The provision has been construed to allow a review of the compatibility of legislative texts with international obligations notably the European Convention on Human Rights (ECHR).¹⁴³ The 2008 reform has therefore

¹⁴¹ Art. 47 (2) of the Constitution.

¹⁴² *Loi constitutionnelle* n° 2008-724 of 23 July 2008 relating to the modernisation of the institutions of the Republic.

¹⁴³ For an analysis, see M Hunter-Henin, 'Constitutional Development and Human Rights in France: One step forward, two steps back?' (2011) 60 *ICLQ* p2.

only slightly increased the powers of ordinary courts to review existing legislation. By virtue of the French Constitutional Act of 10th December 2009 ordinary courts do not have powers to review legislations for compatibility with the French Constitution. Their role is restricted to filtering constitutional issues and forwarding them to the Constitutional Council which is the only body entitled to make decisions on constitutionality. A 'double filter' is put in place. If the issue is raised at first instance or on appeal, the judge will need to refer the issue first to the *Conseil d'Etat* or the *Cour de Cassation*. The *Conseil d'Etat* or the *Cour de Cassation* will then decide whether to forward the issue to the Constitutional Council.¹⁴⁴ This process with a double filter could be long and time-consuming and may delay justice. It may serve some purpose in France given the fact that there is an alternative route available to litigants provided the violated right is also protected under a treaty obligation.¹⁴⁵ A similar system should be avoided in Cameroon where no other direct route is in place for protecting human rights. The introduction of an additional post-promulgation review by the Constitutional Council would therefore be insufficient in Cameroon. Should direct constitutional review by ordinary courts be considered instead as in South Africa?

In the Republic of South Africa, Constitutional review is carried out by a special body, the Constitutional Court whose jurisdiction is limited to constitutional matters but the ordinary courts also have jurisdiction on constitutional issues affecting individual litigants' rights.¹⁴⁶ The ordinary courts are empowered to invalidate common law and customary law rules that are unconstitutional. Any other matter on the constitutionality of law will then be forwarded to the Constitutional Court,¹⁴⁷ either by an appeal from any ordinary court to the Constitutional Court in some cases or by an

¹⁴⁴ *ibid* p6.

¹⁴⁵ *ibid*.

¹⁴⁶ Under s 167(4) the Constitutional Court has exclusive jurisdiction on disputes between State organs in the national or provincial sphere concerning the constitutional status, powers or function of any of those organs of the State;

- a) the constitutionality of any parliamentary or provincial bill;
- b) applications envisaged in 80 or 122;
- c) the constitutionality of any amendment to the Constitution;
- d) deciding whether Parliament or the President has failed to fulfil a constitutional obligation; or
- e) certifying a provincial Constitution.

¹⁴⁷ *Gardener v Whitaker* 1996(6) BCLR 775 (CC).

individual. Individuals may also seize the Constitutional Court directly when it is in the interest of justice and with leave of the Constitutional Court.¹⁴⁸ Where the Supreme Court does not develop the common law in line with its obligations under the Constitution, the Constitutional Court would step in to ensure compliance with the Constitution.¹⁴⁹ However, for the time being, the South African method of judicial review of the Constitution may not be the best method for Cameroon as Cameroonian judges (especially judges in Anglophone Cameroon) often exercise their constitutional interpretation powers in widely diverging and often flawed ways. Judges in Anglophone Cameroon have been known to apply discriminatory customary rules even against enacted legislations. In cases such as *Mary Umaru v Asopo Makembe*, *Sikibo Derago v Ngaminyem Etim* and *Achu v Achu*,¹⁵⁰ and *Joyce Ndumu v John Ndumu*¹⁵¹ judges had all the powers not to enforce customary law rules that were repugnant to natural justice, equity and good conscience but they failed to exercise those powers. If they are given the power to invalidate customary laws that are unconstitutional, it is uncertain that they would exercise the power fully. Another solution would be to maintain pre-promulgation by the Constitutional Council as it is in Cameroon but allow full post-promulgation constitutional review by the ordinary courts. This method of post-promulgation constitutional review by ordinary courts alone produces quicker results as there is no appeal to another body. In addition to the fact that reliance cannot be placed on judges in Cameroon who have been upholding discriminatory customary rules, invalidation of governmental acts by ordinary courts is generally not accepted by governmental bodies in Africa. It is likely that the government would be reluctant to conform to the court's decision. Such a system has however been adopted by some African countries amongst which Botswana.

Botswana, like Cameroon, inherited two legal systems. While Cameroon inherited the English and the French legal systems, Botswana inherited the

¹⁴⁸ Section 167(6) (a).

¹⁴⁹ *Boesak v The State* CCT 2001(1) BCLR 36 (CC). For a discussion, see Z Motala and C Ramaphosa, *Constitutional Law- Analysis and Cases*, (Oxford University Press 2002) p51-92.

¹⁵⁰ See thesis p95 and 99.

¹⁵¹ See thesis p144-145.

Roman-Dutch and the English legal systems.¹⁵² In both countries, in addition to these legal systems, customary law is also applicable. In Botswana, the High Court has original jurisdiction and the Court of Appeal appellate jurisdiction to deal with matters concerning the fundamental rights and freedoms of individuals as well as constitutional issues.¹⁵³ Any citizen whose constitutional rights have been violated or are likely to be violated by an enacted legislation can apply to the High Court for a remedy.¹⁵⁴ The provision deals with laws that have been enacted and not with pre-promulgated laws as in Cameroon. In *Petrus and another v The State*,¹⁵⁵ the Botswana Court of Appeal had to decide amongst other things, whether section 301(3) of the Criminal Procedure and Evidence Act conflicted with section 7 of the Constitution. Section 301(3) of the Act prescribed repeated and delayed infliction of corporal punishment, while section 7 of the Constitution prohibited any person from being subjected to torture or to inhuman or degrading treatment. The Court of Appeal held that the corporal punishment prescribed by the Act was *ultra vires* and infringed section 7 of the Constitution.

Another important case is *Attorney-General of The Republic of Botswana v Unity Dow*¹⁵⁶ in which the respondent applied for an order declaring section 4 of the Citizenship Act *ultra vires*. The respondent, a citizen of Botswana, was married to a citizen of the United States. Prior to their marriage in 1984, a child had been born to them and during the marriage, two other children were born. Following the Citizenship Act, only the child born before the marriage qualified as a Botswana citizen. The respondent contended *inter alia* that she was prejudiced by section 4(1) of the Citizenship Act because of her gender from passing citizenship to two of her children; that the law in question had a discriminatory effect in that her two children were aliens in her own land and the land of their birth; and that this discriminatory effect offended section 3(a) of the Constitution. The Court of Appeal held that section 4 of the Citizenship Act infringed the fundamental rights and

¹⁵² While the French legal system dominates in Cameroon, the English legal system dominates in Botswana.

¹⁵³ Sections 18, 104 and 105 of the Botswana Constitution.

¹⁵⁴ Section 18 (1).

¹⁵⁵ (1984) *BLR* 14.

¹⁵⁶ (1992) *BLR* 119.

freedoms of the respondent conferred by sections 3, 14 and 15 of the Constitution and were therefore *ultra vires*. These cases indicate that the High court and the Court of Appeal in Botswana will not hesitate to declare any law which they consider a violation of the Constitution *ultra vires*. However, the courts in Cameroon, especially Anglophone Cameroon tend to protect traditional/cultural practices over the human rights of individuals. As examined in chapter one of this thesis,¹⁵⁷ these courts have not been diligent in their duties against the application of rules which are repugnant to 'natural justice equity and good conscience'. Some judges in Anglophone Cameroon are so tied up to customary practices that they will not set aside discriminatory customary rules even when they have the power to do so.¹⁵⁸ While the Botswana courts are willing and have in fact exercised their constitutional review power, it is doubtful whether the Cameroonian courts would exercise similar powers fairly. As Charles Manga Fombad commented, decisions like that taken in Botswana 'are simply unthinkable in the Cameroonian system.'¹⁵⁹ The same writer alluded that constitutional review by ordinary courts has proven successful in Botswana. It should be noted however, that three years after the Court of Appeal's decision in the *Unity Dow case*, the government of Botswana had not taken any of the necessary action which should follow, namely it had 'not granted Botswana citizenship to Unity's children'; it had 'not amended the Citizenship Act to provide gender equality in access to citizenship'; it had 'not moved to amend all the other laws which are, by implication, similarly made unconstitutional by the court's decision in the Unity Dow case'.¹⁶⁰ The trial which started in 1990 and lasted for two years was not an easy one for Unity Dow despite the fact that she was an Attorney General of The Republic of Botswana. This puts a question mark on the success of constitutional review by the ordinary courts in Botswana. Even with more audacious courts, constitutional review by ordinary courts would not therefore be a sufficient guarantee of constitutional compatibility

¹⁵⁷ p95 - 97.

¹⁵⁸ *ibid.*

¹⁵⁹ C Fombad, 'Cameroonian Bi-juralism: Current challenges and future prospects', (5 *Fundamina* 22 1999) p94.

¹⁶⁰ *U Dow, The citizenship case; The Attorney General of The Republic of Botswana v Unity Dow* (Lentswe La Lesedi (Pty) Ltd 1995) p viii.

Constitutional overrides are provided for in the Cameroonian Constitution. However, the organ responsible for the constitutionality of laws is yet to exercise its powers. Even if it did, its limited access would in many cases leave aggrieved individuals without a remedy. Ordinary courts are not empowered to set aside unconstitutional legislations. The Constitution should override all other laws and there can be no genuine constitutional democracy in the absence of an efficient constitutional review mechanism. The mechanism in place in Cameroon (the Constitutional Council) has not been effective. Should a constitutional review mechanism before ordinary courts be introduced? Considering their present record, it is to be doubted whether ordinary judges would be more diligent than the Constitutional Council. Besides, even if they were, governmental bodies might not respect decisions from ordinary courts against enacted legislations. What is therefore the best constitutional option for Cameroon?

The pre-promulgation method presently in Cameroon could be maintained. However, post-promulgation review by the Constitutional Council should be created. In addition, a specialised court, the Constitutional Court, should be created for individuals whose rights have been violated by an enacted legislation which is unconstitutional. Ordinary Courts should also be given the powers to declare received laws and customary laws *ultra vires*. However, where the ordinary courts fail to act,¹⁶¹ the individual should be given the right to petition the Constitutional Court through the ordinary court. The ordinary court would then need to forward the petition with its comments. The Constitutional Court would then step in to ensure compliance with the Constitution. The Constitution should not be seen only as an instrument to regulate the relationships between state organs. It is also a crucial tool for the protection of human rights. The non-respect by the government of decisions from ordinary courts against governmental acts calls for the maintenance of the Constitutional Court as a higher body for post-constitutional review. When the laws would have been unified any issue of constitutional compatibility raised before the ordinary courts would be forwarded by the ordinary court to the Constitutional Court either on its own

¹⁶¹ The ordinary courts, especially those in Anglophone Cameroon, could fail to act by not considering customary rules that are 'repugnant to natural justice' unconstitutional.

motion or at the request of the individual. The rights of litigants will have greater chances of being enforced by the government if the decision comes from the Constitutional Court since the government would be more willing to respect decisions coming from that court as opposed to those from the ordinary courts. As the main function of the Constitutional Court is to review enacted legislations, and considering that some of the anticipated discriminatory rule would have been eliminated by the Constitutional Council pre-promulgation and post-promulgation, the Constitutional Court will not be overburdened with work. Consequently, decisions could be taken within a reasonable time-frame. Courts in Cameroon have on many occasions recognised and enforced discriminatory laws. If these courts fail to act in accordance with their constitutional powers, the Constitutional Court could step in to ensure compliance with the Constitution. In any case, with a unified system of law, these judges would be free from the damaging effect of customary laws, and it is to be hoped that they would then at last develop a case-law respectful of equality rights and other constitutional guarantees. Improvements to constitutional overrides must therefore go along with reform of substantive law. Harmonisation and integration, whilst addressing the complexity created by the current state of legal pluralism, would fail to ensure a constitutionally compliant divorce law.

2) Insufficiency of Integration/Harmonisation of conflict of law rules

As explained at the beginning of this chapter, legal pluralism exists in Cameroon. Legal pluralism creates a situation of overlapping laws. With the increasing movement of persons from one part of the country to another, and of marriages between persons from different ethnic groups, problems of conflict of laws are more and more frequent between the Anglophone and Francophone parts of Cameroon. The complexities created by the various conflicts of laws make it more difficult to achieve justice.¹⁶² These difficulties could be solved by harmonisation, integration or unification of the laws.

Anthony Allot in his article 'Towards the Unification of Laws in Africa' explains that 'harmonisation is the removal of discord, the reconciliation of

¹⁶² This has been explained in p108 - 114.

contradictory elements between the rules and effects of two legal systems which continue in force as self-sufficient bodies of law.’¹⁶³ It is ‘a process in which diverse elements are combined or adapted to each other so as to form a coherent whole while retaining their individuality.’¹⁶⁴ It therefore aims at reconciling the ‘preoccupations and interests of the various systems so as to avoid conflict and clashes.’¹⁶⁵ Integration means ‘bringing together under one enactment the different laws with regards to a particular branch’ so that ‘the different system continues to exist but without conflict and that some elements thereof may be unified,’¹⁶⁶ whereas unification is the ‘creation of a new uniform legal system entirely replacing the pre-existing legal systems which no longer exist as autonomous systems.’¹⁶⁷

Harmonisation of the conflict of law rules would only give a partial solution to current problems by reducing the complexity of the law. By selecting one common connecting factor for the whole of Cameroon, it would ensure that the same law is applied throughout Cameroon on a given divorce issue. However, the discriminatory nature of the substantive rules would remain as harmonisation has no direct impact on substantive rules on divorce. Discrimination could be eradicated by removing the discriminatory elements in the unified rules. Within the European Union (EU), harmonisation was favoured over unification¹⁶⁸ but the reason why harmonisation was preferred in the EU context is not applicable in Cameroon. Within the EU, the aim was not to improve the law by removing inequality but to ensure a flow of free movement throughout Europe thus making ‘life simpler for European citizens’.¹⁶⁹ The harmonisation of rules on jurisdiction was enough to achieve the purpose of free movement.¹⁷⁰ Although harmonisation achieved in the EU has also had an impact on substantive law by making divorce much more

¹⁶³ (1965)14 *ICLQ* p366.

¹⁶⁴ M Boodman, ‘The Myth of Harmonization of Laws’ (1991) 39 *AJCL* p702.

¹⁶⁵ M T Meulders-Klein, ‘Towards a European Civil Code on Family Law? Ends and Means’ in K Boele-Woelki (ed) *Perspective for the Unification and Harmonisation of Family Law in Europe* (Intersensia 2003) p105.

¹⁶⁶ A N Allot, ‘Towards the Unification of Laws in Africa’ (1965) 14 *ICLQ* p366.

¹⁶⁷ *ibid.*

¹⁶⁸ N Dethloff, ‘Arguments for the Unification and Harmonisation of Family Law in Europe,’ in K Boele-Woelki (ed) (n165) p51-54.

¹⁶⁹ A Fiorini, ‘Rome 111-Choice of Law in Divorce: Is the Europeanization of Family Law going too far?’ *International Journal of Law, Policy and the Family* (2008) p179-180.

¹⁷⁰ P McEleavy (122) p605.

accessible, harmonisation in the EU context did not seek to address substantive questions.¹⁷¹ Harmonisation was also seen as the preferable option in the EU because of member States' sensitivities. EU unification of divorce laws would have encroached on national sovereignties. Although, there are differences between the Anglophones and the Francophones in Cameroon, Cameroon is a single nation with a single parliament and therefore no such restraint need to apply in Cameroon. Assessing the legitimacy of EU initiative would be beyond the scope of this thesis. My aim here is to show that if harmonisation could make sense within the EU, it would fail to redress the inequalities in the law of divorce in Cameroon. Harmonisation would not meet my objective of a constitutionally-compliant law on divorce nor would integration. Although integration touches on substantive laws since it aims to remove conflicting provisions, it does not eliminate the discriminatory nature of the rules. Unification therefore appears to be the best way forward in achieving equality. The Cameroonian legal system is becoming ineffective and obsolete and needs serious renovation. Harmonisation or integration will simply patch up these holes. The complexities and inequalities of the laws of divorce in Cameroon can best be overcome by a unified system of law. A unified law of divorce would eliminate the current complexities of the law by creating a single body of law applicable to the entire nation and, if properly devised, would eliminate inequalities and discriminatory provisions as well.

D) THE CHOICE OF UNIFICATION

1) Positive aspects of unification

Politically Cameroon is a unitary State which is 'one and indivisible,' yet it has a pluralist legal system. Originally a Federal Republic, it became a United Republic in 1972 and a Republic in 1984. To be truly 'one and indivisible,' unity must transcend all areas and legal pluralism does not advance this course. Clearly unified laws would promote this political aspiration to greater unity, justice and progress if done in the 'spirit of

¹⁷¹ M T Meulders-Klein, Towards a European Civil Code on Family Law? Ends and Means in K Boele-Woelki (ed) (n165) p366.

fraternity'.¹⁷² Although Cameroonians are proud of their 'linguistic and cultural diversity, a feature of its national personality which it is helping to enrich,' they are equally aware that 'they constitute one and the same nation, committed to the same destiny'. Hence 'the imperative need to achieve complete unity'.¹⁷³ Legal unity will enhance political unity. The existence of both a common law and civil law jurisdiction is a significant divide that creates discord, not only in the application of the laws per se but within the two communities. Unification of laws is an opportunity for the 'Cameroonisation' of the law that incorporates both. It will help breach the barrier between the Anglophones and Francophones and reinforce the Cameroonian identity. The new law may not be respected if existing customs are ignored. Speaking about unification, Allot writes that, 'the problems of tribalism and how one reduces the tensions caused by it are a sufficient justification for any attempt to reduce cultural or legal variations between communities or groups.'¹⁷⁴ In order to forge a truly 'Cameroonised' law, the customs of the people need to be incorporated in the unification process. In fact, they should be the starting point on any unification process that impinges on personal law. It has been said that 'the advancement of customary law though in line with the proclaimed goal of Africanization, could conflict with the aims of unification and modernization.'¹⁷⁵ No doubt customary laws have rules that are discriminatory. However, only those traditional values that conform 'to democratic principles, human rights and the law' would be considered. The unified law will lead to greater legal predictability and certainty. Besides, it will avoid forum shopping and the hazards of applying private international law in internal disputes. If properly addressed, the unified laws will be less complex, more consistent and non-discriminatory. Of course, there will be obstacles to unifying the laws. These obstacles will have to be surmounted.

¹⁷² Preamble to the Constitution.

¹⁷³ *ibid.*

¹⁷⁴ A Allott, 'Customary Law in East Africa' 9 (1969)3 *Afrika Spectrum* p12.

¹⁷⁵ G Spreen, 'Elements of East African Law' (1969)3 *Afrika Spectrum* p5.

2) Obstacles to unification

The major obstacles that need to be surmounted in the unification process in Cameroon are: the Anglophone and Francophone conflict or common law and civil law divides, the cultural roots of family law, the lack of adequate legal education and linguistic difficulties.

a) Anglophone/Common Law and Francophone/Civil Law divides

Unlike in many countries in Africa where legal pluralism consists of customary laws and the laws of one colonial master, in Cameroon, legal pluralism entails customary laws and the laws of two colonial masters: the English (common law) and the French (civil law). This dual colonial legal heritage is a serious obstacle towards unification. However, the traditional distinctions that exist between common law and civil law have been reduced in Cameroon because of continuous convergence between these legal systems. The series of unified and harmonised laws that are now applicable in the entire nation illustrates the trend towards convergence.¹⁷⁶ Even in the Western world, this trend towards convergence has been observed¹⁷⁷ although some have disputed it. Legrand thus maintains that there is no convergence between the common law and the civil law as they remain fundamentally distinct at heart.¹⁷⁸ The 'soul of the law' remains different. According to him, since the *legal mentalité* remains different, the 'legal systems, despite their adjacency within the European Community, have not been converging, are not converging and will not be converging.'¹⁷⁹ He therefore concludes that 'the civil law and common law world are not any closer than they have been since English law was last French.'¹⁸⁰ The fact remains however, that on divorce issues, European States have moved towards greater unity at all levels: choice of jurisdiction, choice of law and

¹⁷⁶ These laws include the criminal code, the criminal procedure code, the labour code, various land tenure legislation and the civil status registration ordinance.

¹⁷⁷ B S Markesinis, 'Learning from Europe and Learning in Europe', in B S Markesinis (ed) *The Gradual Convergence, Foreign Ideas, Foreign Influences and English law on the Eve of the 21st Century*, (Clarendon Press-Oxford 1994) p1-32; J Dainon, 'The Civil Law and the Common Law: Some points of comparison'(1967)15 *AJCL* 434; T M Cooper, 'The Common Law and Civil Law, A Scots View'(1950) 63 *HLR* 471.

¹⁷⁸ P Legrand, 'European Legal Systems are not Converging' (1996) 45 *ICLQ* 52.

¹⁷⁹ *ibid.*

¹⁸⁰ *ibid.*

substantive law.¹⁸¹ Convergence manifests itself in the divorce laws of most European States in the trend towards a unique ground for divorce based mostly on the irretrievable breakdown of the marriage.¹⁸² Besides, the harmonising effect of the case law of the European Court of Human Right (ECHR) and the European Court of Justice (ECJ) of the European Union show that convergence is actually taken place.¹⁸³ As Lawson mentions, ‘the more one studies French law, the more one realizes that in many ways it greatly resembles the common law.’¹⁸⁴

There is convergence in Cameroon,¹⁸⁵ but this has been slow because the legal system has been frozen for some time. The law of divorce in Francophone Cameroon has been stagnant. There has been no amendment in that law since Cameroon became an independent State. The reform that has taken place in France has had no impact in Cameroon. The differences between the two systems of law applicable in Cameroon could derail uniform application of the unified law. For example, in filling in gaps in the written law where the written law is silent, judges in Francophone Cameroon are not bound to follow decisions of superior courts in similar situations. Every judge in Francophone Cameroon is directed to the code (and not to previous cases) as the source of law. However, although not bound to do so, Francophone judges will follow decisions of superior courts in similar cases. They will simply avoid admitting that they do. If they openly referred to a previous decision as the legal basis of their reasoning, their decision would be quashed on appeal. By contrast judges in the common law system are bound by the doctrine of precedent. While accepting that the written law is without doubt the superior law, judicial interpretation is the binding

¹⁸¹ M Antokolskaia, ‘The Harmonisation of Family Law: Old and new dilemmas’ (2003) 2 *ERPL* p28; I Schwenzer, ‘Methodological Aspect of Harmonisation of Family Law’ in K Boele-Woelki (ed) (n165) p150.

¹⁸² This is relevant in this work because the grounds for divorce in Anglophone Cameroon and England are the same and as the ground for divorce in England changes, the ground for divorce in Anglophone Cameroon automatically changes.

¹⁸³ M Antokolskaia, *The Harmonisation of Family law: Old and new dilemmas* (n181) p27.

¹⁸⁴ F H Lawson, *A Common Lawyer looks at the Civil Law*, (University of Michigan law school 1955) p55.

¹⁸⁵ See fn 176.

authority.¹⁸⁶ If a judge in Anglophone Cameroon deviates from a principle laid down by a superior court in a similar case, his judgement will be set aside on appeal unless there are good reasons for departing from previous cases and those reasons are clearly explained in the decision.¹⁸⁷ Such divergence in legal reasoning in the common law and civil law traditions as well as differences in legal mentality could creep in and potentially derail uniform application of the unified divorce laws in Cameroon. However, this problem will be resolved with a unified system of courts and with sustained dialogue between judges trained in the common law and those trained in the civil law. The Supreme Court could intervene to reconcile the differences between Anglophone and Francophone courts. The Supreme Court in Cameroon is empowered to see into the unity of case-law but only a few cases ever reach the Supreme Court. Most litigants, even if they are not satisfied with the decision from the trial court, hardly go on to appeal to the Court of Appeal, let alone lodge a further appeal to the Supreme Court. An appeal to the Supreme Court is not only costly but lengthy. Some cases have been known to linger in that court for about ten years.¹⁸⁸ To overcome this barrier between the two parts of Cameroon, the point of focus should shift from legal norms to social problems. Law should be seen as a social fact that is linked to the environment where it is made. Cameroonians should therefore look beyond the debate of common law versus civil law and promote common values within the Cameroonian culture. Western concepts emanating from the parent system should only augment and supplement Cameroonian values where these prove to be insufficient and/or discriminatory.

The antagonism between the Anglophones and Francophones to protect their legal heritage (common law and civil law respectively) has posed a real problem in the path towards unification. Bias may therefore crop up but Cameroon should take advantage of having these two great systems of law

¹⁸⁶ In common law countries such as Canada and the United States, judicial review of the laws is entrenched in the Constitution, hence the courts can declare a statute unconstitutional.

¹⁸⁷ For example, where a new legislation has been enacted after the superior court's decision. For an understanding of the operation of the doctrine of binding precedence, see G Slapper and D Kelly, *English law* (3rd ed Cavendish publishing 2010) p49-77.

¹⁸⁸ *Bilong Marcelle Celestine v Bilong Augustine Roger* (file N° 051/CIV/08) unreported.

applicable in its territory and tap on the positive aspects of each in its drive towards a uniform system of law. Mixed systems 'offer experience on how courts and legislators are able to make use of materials of both the civil and the common law traditions.'¹⁸⁹ The systematic manner of expounding the law in a code, 'coherence, logical structure, absence of contradiction, conformity of codified and applied law, completeness, clarity, ease of use and publicity'¹⁹⁰ is an advantage which mixed systems derive from the civil law, and the common law approach to case law is also an advantage from that system. If properly devised, Cameroon will enjoy 'the advantages of the case law approach of English law coupled with a degree of civilian rigour.'¹⁹¹ However, there is fear amongst English-speaking Cameroonians that they are being drowned by French-speaking Cameroonians. This fear dates to the time of re-unification of the two territories.¹⁹² As soon as re-unification was achieved, a series of changes took place which made the Anglophones feel marginalised. Examples abound. In 1962, the pound in Anglophone Cameroon was replaced by the *Communauté Française d'Afrique* (CFA) at a very low exchange rate which caused the standard of living in Anglophone Cameroon to decline.¹⁹³ That same year, driving in West Cameroon was changed from the left-hand side to the right hand-side of the road, to conform to practice in East Cameroon. In 1964, West Cameroon's links with the Commonwealth of Nations were terminated. The metric system of weight and measure in East Cameroon replaced the British imperial system of weight and measure that existed in West Cameroon. The school year was streamlined to fit that of East Cameroon and the West Cameroon Electric

¹⁸⁹ J Smits, *Mixed Jurisdictions: Lessons for European Harmonisation?* in E Özücü (ed) *Mixed Legal Systems at New Frontiers* (Wildy, Simmonds & Hill Publishers 2010) p296.

¹⁹⁰ A Fiorini, *The Codification of Private International Law in Europe-Could the Community Learn from the Experience of Mixed Jurisdiction?* (2008)23 *Tulane European & Civil Law Forum* p98.

¹⁹¹ Lord Rodger of Earlsferry, 'Say Not the Struggle Naught Availeth': The Cost and Benefits of Mixed Legal Systems (2003)78 *Tulane Law Journal* p425.

¹⁹² The Francophones are not entirely to be blamed for the Anglophone problems. Anglophone political leaders are partly responsible for the Anglophone problems. When they realised that their influence within the Federation was decreasing, they started competing for President Ahidjo's favour and aspiring to positions of power within the single party and the Federal government and eventually within the unitary state, thus shamelessly abandoning the protection of the interests of West Cameroon (Anglophone Cameroon).

¹⁹³ P Konings and F Nyamnjoy, *Negotiating an Anglophone Identity: A study of the politics of recognition and representation in Cameroon*, Afrika-Studiecentrum series volume 1 (2003) p 54.

Power (Powercam) was replaced by the costlier *Société Nationale d'Electricité* (Sonel) which existed in East Cameroon.¹⁹⁴

For unification of divorce laws to work, it is important to avoid such imperialist methods. The Anglophones must feel part of the process from the start and not be passive recipients. So far, except for the criminal code,¹⁹⁵ and the criminal procedure code¹⁹⁶ all the unified laws have merely been a reproduction of French law with minor amendments. This situation has been made worse by negative comments concerning the common law system by high ranking officials in Cameroon. For example, in 1985, the minister of justice, a former senior judge, described the common law system operating in Anglophone Cameroon as archaic. Although he was subsequently dismissed, the statement remains in the minds of some Anglophones. Moreover, a university lecturer, while commenting on the 1974 uniform land law, which is based mainly on the French civil law, explained that by voluntarily opting to re-unite with the Francophones in 1961, the Anglophones 'must be considered to have implicitly undertaken to accept unconditionally and to adapt to the laws and legal systems of Francophone Cameroon'.¹⁹⁷ As one writer commented, 'such an irrational and supercilious attitude exhibited by an academic may be difficult to understand or excuse.'¹⁹⁸ Cameroonians, despite their cultural and legal differences are in favour of a uniform system of law but not at the expense of their legal tradition.

The Anglophones stand out from the Francophones today through their language and legal culture. The common law system is one of the most obvious and prized marks of difference between the Anglophones and the Francophones.¹⁹⁹ There will always be conflict but the manner of handling the conflict matters. Even among the Anglophones, there is also serious

¹⁹⁴ *ibid* p54-106.

¹⁹⁵ Law N° 65-LF-24 of 12th November 1965 and Law N° 67-LF-1 of 12th June 1967. It is important to note that the criminal code was elaborated by foreigners (two Frenchmen and one Englishman with no Cameroonian involved).

¹⁹⁶ Law N° 2005 of 27 July 2005.

¹⁹⁷ See Tjouen, *Droits domaniaux et techniques foncières en droits Camerounais (Etude d'une réforme foncière législative)* (1982) p69-71).

¹⁹⁸ C Fombad (n159) p11. For more on the Anglophone problems, see P Konings and F Nyamnjoy (n40) p76-106.

¹⁹⁹ Allot, 'Towards the Unification of Laws in Africa' (n166) p381.

division. Anglophones from the South West Region fear domination by Anglophones from the North-West Region. This row dates to the colonial period when the Anglophones from the North-West Region were brought to work in the coastal plantations of the South West Region. Many of the South Westerners view the North Westerners as strangers or settlers. Today they are called 'come no go'²⁰⁰ and are being referred to as former slaves which they do not want as their master.²⁰¹ These internal tensions have put a strain amongst the Anglophones and spark a debate as to how best to protect their minority rights. Amongst the North Westerners or amongst the South Westerners, further disagreements are to be found. For example, in 1993, the South West Elite Association (SWELA) which was founded in 1991 to promote the socio-economic and cultural development of the region and combat its domination by the North Westerners split.²⁰² Some factions showed strong anti-North-West sentiments while others wanted closer cooperation between the North West and South West elites as a necessary pre-condition for an effective representation of Anglophone interest.²⁰³ There will always be conflict at all levels. The disagreement between the Anglophones and the Francophones should not therefore be an adequate reason for rejecting unification. What matters is that the legal system transcends rather than exacerbates tensions.

b) Cultural roots of family law

Barely six years after unification of the two Cameroons, a uniform code on criminal law was already applicable in the territory; yet more than half a century has passed by without a single law on divorce being enacted. Many familiar policy debates draw on the distinction between 'instrumental rationales and fairness rationales.'²⁰⁴ An example is the criminal law. Are punishments set with the aim of deterring criminals or imposing on the offender his just dessert? Although the conceptual distinction between fairness and instrumental rationales remains useful, a single rule can be

²⁰⁰ This is a derogatory statement which implies that the North Westerners are visitors who have refused to go back to the North West when they are no longer wanted.

²⁰¹ P Konings and F Nyamnjoy (n40) p117.

²⁰² *ibid* p112-113.

²⁰³ *ibid*.

²⁰⁴ I Ellman, 'Why the Making of Family Law is Hard' (2003) 35 *Ari SLT* p701.

found to serve both functions very well. As concerns family law however, it is difficult to formulate a single rule that would serve both functions. Nevertheless, the main reason for the speedy unification of the criminal law in Cameroon had to do with the conditions surrounding the birth of the nation. On the eve of independence, opposition forces were terrorising the country. The immediate concern of the government was to restore peace in the country. Public interest required therefore that priority be given to public order. As a result, government in the period following independence directed their efforts towards fighting against rebellion hence the intensive legislative activity in the field of constitutional and criminal law.²⁰⁵ The Minister of Justice (Mr Joseph-Charles Doumba) explained in 1976 that 'it was relatively easy to adopt a penal code in view of the fact that in every country the moral conscience of man generally disapproves of the same act.'²⁰⁶ Besides, the criminal code was drafted by two foreigners (one French and the other British) who had no direct interest in Cameroon. There are many reasons why family law changes more slowly. It has been argued that harmonisation of family law (and a fortiori its unification) is impossible because family law reflects 'deeply embedded differences between states'²⁰⁷ or, as in the case of Cameroon, 'cultural and religious differences within a state.'²⁰⁸ Defenders of customary law generally strive to safeguard cultural heritage and maintain the *status quo* especially in areas of family law where customary law is intertwined with family values and family life. Besides, family law is characterised by its diversity, which is deeply rooted in the peoples' history, culture, mentalities and values.²⁰⁹ This situation is more obvious in Cameroon where there are over 250 tribes. In light of such diversity Cameroon was reluctant to seek a uniform system of family law to, 'avoid adventure and drift'.²¹⁰ Conscious of the fact that the reform of social

²⁰⁵ M Nkouendjin, *Le Cameroun à la recherche de son droit de la famille* (Librairie Générale de Droit et de Jurisprudence -Paris 1975) P19.

²⁰⁶ Quoted by A Munzu, Cameroon's Search for a Uniform Legal System: The Example of Criminal Justice (1989)46 *Afr. J. Int'l & Comp. L.* p56

²⁰⁷ D Bradley, 'A Family Law for Europe, Political Economy and Legislation' in K Boele-Woelki (ed) (n165) p65.

²⁰⁸ M T Meulders-Klein, 'Towards a European Civil Code on Family Law' in K Boele-Woelki (ed) (n165) p106.

²⁰⁹ *ibid* (n166) p109.

²¹⁰ M Nkouendjin (n205) P19.

institutions would be difficult because of traditional resistance to what is new, concerned that 'precipitations into fighting a customary law that is thousands of years old would be nothing than a 'Quixotic' fight or beating a dead horse', the authorities preferred applying the English adage 'wait and see'²¹¹ or time will tell. Time will tell when, why and how this discrimination should be tackled. Today is the time. Cultural embedment should not be taken to mean that we are embedded in a culture to such an extent that we give up our identity when cultural changes occur.²¹² Development in all fields is an on-going process. Today inter-cultural marriages, urbanisation and the emancipation of women have greatly eroded these cultural barriers/beliefs, thus paving the way for an easier unification of family law. Nevertheless, the culture of the people should form part of the unified law except where those customs are discriminatory or are contrary to the Constitution.

i) Customary law: A source of people's law

'Law is a symbol of cultural heritage' which 'evolves and grows.' It should not therefore 'fly free of its cultural foundation.' Besides it is highly respected because it is rooted from its culture.²¹³ It is therefore a reflection of the spirit of the people.²¹⁴ Cultural communities regard state laws as something imposed on them. Obedience to state laws relies on a fear of sanction. State law will be ignored as soon as the sanction becomes insignificant. By contrast, where the people are involved in the creation of the law, they will feel morally bound to obey the law. As people-made law, customary law is therefore the signet of the people and most state laws evolve from the customs of the people. Examples abound in history. My examples will be taken from French and English law, the two parent systems in Cameroon. These two countries (France and England) aimed at having a uniform body of laws and in both, customary law was included in attaining that objective. However, the method used in reaching the goal of unification was different in the two countries. In England, it was judge-made while in France it was done through codification.

²¹¹ *ibid*

²¹² W Pinterns, 'Europeanization of Family Law' in K Boele-Woelki (ed) (n165) p8.

²¹³ R Cotterrel, *Law, Culture and Society* (Ashgate Publishers 2006) p103.

²¹⁴ *ibid*.

The customs of the people as a source of the English common law

Before the Norman conquest in 1066 by William I, different areas of England were governed by different systems of customary law. There was no effective central government. The King had little control over the country. When William took over the throne, he established a strong central government. William was not concerned with changing English customary law entirely by imposing Norman law on England.²¹⁵ Instead his interest was to ensure greater uniformity in English law and this he did by the introduction of the General Eyre whereby representatives of the King were sent from Westminster to the countryside to check local administration. During their tour, they would also adjudicate local disputes in accordance with local customs. As this practice of adjudicating local disputes became frequent, the King's representatives finally took on a judicial rather than an administrative function and became known as 'justices in Eyre'.²¹⁶ By sifting and selecting the best customary rules and applying the rules outside their county of origin, the judges 'gradually moulded existing local customary laws into one uniform law common to the whole kingdom.'²¹⁷ During this period, the principle of *stare decisis* (let the decision stand) was also established. Whenever a new problem of law came to be decided, the decision formed a rule to be followed in all similar cases, making the law more predictable. The common law of England is thus historically a product of the customs of the various tribes in England.

The customs of the people as a source of French codified law

In a similar way, the French civil code was built on customs. Before the French revolution of 1789, there were many different laws applicable in France. Roman law was applicable to the Southern parts and customary laws to the Northern parts of France.²¹⁸ Each person was subject to the laws of a territory administered by the feudal lord. France was divided into more

²¹⁵ C Wild and S Weinstein, *Smith and Keenan's English Law* (Pearson Education Ltd 17th edition 2013) p6.

²¹⁶ *ibid* p7.

²¹⁷ *ibid*.

²¹⁸ A West, Y Desdevises, A Fenet, D Gaurier, MC Heussaff and B Levy, *The French Legal System* (Butterworths London 2nd edition 1998) p8-11.

than 60 regions with each region having many local laws applying to a locality within the region.

There was a great variety of regional laws which could be divided into two families (north and south). North of the river Loire, tribal customs, mostly from Germanic tribes, were applicable. South of the river, Roman law was the main source of law. Some laws were applicable in the entire nation such as Canon Law and the King's Law. 'Interaction between the different laws was very complex and unwieldy.'²¹⁹ For example, a couple getting married would arrange a wedding in accordance with Canon Law but their property ownership would be regulated by the law of the territory in which the marriage took place.²²⁰

Shortly before the revolution, France had about four hundred different local and regional customs. Before Napoleon came to power, the idea of a civil code had existed in France and works towards it had already commenced. When Napoleon came to power, he wanted the new order to be legitimised by the creation of a unified legal system. He thus revived the idea of a civil code and set up a new commission to prepare a draft code. It is important to note that the commission was composed of representatives and experts from different regions and customs. Tronchet came from a region with strong customary tradition and was a specialist in the customary law of Paris. Bigot de Preameneu was an expert in the custom of Brittany. Maleville and Portalis came from the South, with strong Roman law influences. Family law in the draft code largely reflects the customary laws of the north of France and some concepts from canon law.

*The code carefully absorbs the result of a long historical development, and most of it is a felicitous blend of traditional legal institution from the droit écrit of the south influenced by Roman law and the droit coutumier of the North, influenced by the Germanic-Frankish customary law.*²²¹

²¹⁹ *ibid* p8-20.

²²⁰ C Elliot, E Jean Pierre and C Vernon, *French Legal System* (Pearson Education Ltd 2006) p3.

²²¹ K Zweigert and H Kötz, *Introduction to Comparative law* (3rd ed. Clarendon Press Oxford 1996) translated from German by T Weir, P75.

Thus, the code was largely accepted because 'it included ideas of past legislation and custom.'²²²

This brief historical survey reveals that the argument that law is 'always out of phase with society'²²³ has been grossly exaggerated. During colonisation, the colonial masters were aware of the importance of the customs of the people and even though their laws were transplanted into the colonised territories, they did not discard the customary laws of the people. One of the reasons for maintaining the customs was 'fear of discontent'.²²⁴ In matters of personal law, many Cameroonians were and still are governed by customary law. While the received/enacted laws may have preference over customary law before the courts, the social reality is that customs are generally observed by the people, whether or not they are in accordance with the received laws or enacted laws. In devising a new unified law of divorce, the alternative is not however between incorporating and prohibiting a particular custom. A subtler approach is possible as illustrated by the example of the marriage symbol. In 1981, the Civil Status Registration Ordinance (CSRO), instead of prohibiting the payment of the marriage symbol, cautiously removed it as a requirement for the validity of customary marriages by stipulating that the payment or non-payment of the marriage symbol will have no effect on the validity of any marriage celebrated in Cameroon.²²⁵ This gave leeway for parents who feel that they should receive marriage symbol to go ahead and receive it for their own personal satisfaction.

The aim of the unification process is not to unify customary laws but to provide a single body of coherent and consistent law that is predictable and non-discriminatory throughout the entire nation. Customary rules that are contrary to the principle of equality or non-discrimination or in breach of any other human rights enshrined in the national Constitution and duly ratified international treaties should therefore be discarded. Given the extreme diversity of customary law in Cameroon, how will the unification project go about identifying all the relevant customary practices on a given issue?

²²² C Elliot, E Jean Pierre and C Vernon (n220) p7.

²²³ *International Encyclopaedia of Social Sciences* (Macmillan 1968) 9 p76, quoted by A Watson, *Society and Legal Change* (Scottish Academic Press 1977) p7.

²²⁴ A N Allot, *New Essays in African Law* (Butterworths 1970) p12.

²²⁵ S. 70 (1) of the 1981 CSRO.

Although customary law is diverse, there are many similarities between the different customary laws. Nevertheless, to avoid leaving out customs and marginalizing the corresponding community, it is of utmost importance that the commission on unification includes representatives from broadly different cultures and from all the different conflicting groups in Cameroon to ensure constant interaction and negotiation between them. This process of negotiation might however be impeded by a lack of sound legal education.

c) Lack of adequate legal education

Legal education especially in the field of human rights is a prerequisite to the elimination of discriminatory laws. Since the academic year 2008-2009, human rights is a subject taught in Cameroon from nursery-school to university level.²²⁶ It is also taught at the National Police Academy in Yaoundé (Ecole Nationale Supérieure de Police-Yaoundé) the National Gendermerie School (Ecole Nationale de Gendarmerie) the National School for Prison Administration (Ecole Nationale pour l'Administration Pénitentiaire) and the National school of Administration and Judicial Training (Ecole Nationale d'Administration et de Magistrature-ENAM). Continuing education of judges is done annually through seminars and workshops.²²⁷ These seminars are useful as they help to build capacities and serve as a reminder to the judges of their duties to protect and enforce human rights.

Sound legal education, which includes knowledge of comparative law, is also a necessary condition for the unification of laws. Unfortunately, courses in comparative law are not taught at the school of magistracy.²²⁸ In the process towards unification, materials and ideas developed in more than one legal system will need to be consulted as this will increase the supply of solutions from which one can choose.²²⁹ Consequently, lawyers will need to be 'equipped with the rudiments of coping with such materials.'²³⁰ Comparative

²²⁶ Report of the Committee on the Elimination of Discrimination against Women, *Consideration of Reports submitted by States Parties under Article 18 of the Convention on the Elimination of Discrimination against Women, Combined Fourth and Fifth periodic report of States Parties due in 2011-Cameroon* (CEDAW/C/CMR/4-5) November 2012 p10.

²²⁷ *ibid.*

²²⁸ C Anyangwe, *The Judiciary and the Bar in Cameroon* (Ceper 1989) p213.

²²⁹ K Zweigert and H Kötz (n221) p21.

²³⁰ W Twining, *Globalisation and Legal Theory*, (Butterworths 2001) p255.

methods should therefore be regarded as a central element of legal methods.²³¹ The importance of comparative law cannot be underestimated. It offers 'a whole new dimension' where one can 'learn to respect the special legal cultures of others and understand his/her own law better.' One learns that the rules in a given legal system is one of several possible rules and there may be a better rule in another legal system with which he/she can replace his/her own rules.²³² Such open-mindedness will go a long way in reducing the bias that exists between jurists of the common law and those of the civil law jurisdictions in Cameroon.

Comparative law is a necessary tool for members of the commission. However, it also needs to feature in the university syllabus. The importance of comparative law in legal education in Cameroon is of great value because of the bi-jural nature of the country couple with the multiplicity of customary laws. There are eight state universities in Cameroon, some mono-cultural (based either on the Anglo-Saxon system or the Civil law system), others bi-cultural (based on the two systems). In the law faculties of bi-cultural universities, Civil Law students only take elementary courses in Common Law. Their knowledge on the common law system is extremely limited. This is equally true of Anglophone students in the common law department. They too only take elementary courses in civil law. Their knowledge of civil law is equally very limited.²³³ Bilingual training, as the course is known, is graded very low. Even if the course was given more importance, there would be little room for it in the syllabus. A law degree in Cameroon takes three years. While it is possible to have adequate legal knowledge on a single legal system within a period of three years, it is doubtful that one can have adequate knowledge of two or more legal systems within that same time-frame. Successful unification would therefore require much more far-reaching change in Cameroon than simply legal reform. Reform of the content and approach to legal education is also needed.

Unification could also be slowed down because of linguistic difficulties.

²³¹ K Zweigert and H Kötz (n221) p21.

²³² *ibid.*

²³³ This is from my personal experience as a lecturer in the subject.

d) Linguistic Difficulties

Cameroon is a multilingual country with English and French as the official languages. While most Cameroonians can communicate in both languages, very few have adequate knowledge in both. The unification process will be slowed down if parties from the different linguistic territories are unable to grasp concepts advanced by each other due to language difficulties. To overcome this difficulty, interpreters and translators will be necessary. Poor translation or wrongly translated concepts might affect the uniform implementation of unified laws. These translators and interpreters should therefore be legal comparatists who are conversant with legal concepts from different legal systems.

In Cameroon, English and French have the same status, but there is no law which explains how enactments in English and French should be construed. Canada, like Cameroon, is bilingual and bijural.²³⁴ Section 8 (1) of the Canadian Official Languages Act makes both versions of the official languages authentic. Thus, where two versions of an enactment differ in their meaning 'regard shall be had to both its versions' so that 'the like effect is given to the enactment in every part of Canada in which the enactment is intended to apply, unless a contrary intent is explicitly or implicitly evident.'²³⁵ Where in the enactment there is a reference to a concept, the reference shall, in each version of the enactment, be construed as a reference to the concept applicable in both versions of the law.²³⁶ However, by virtue of section 8 (1) (c), if a concept expressed in one version of an enactment is incompatible with the legal system where the enactment is intended to apply, but is expressed in the other version such that it is compatible, a reference in the incompatible version shall be construed as a reference to the concept in its expression in that version of the enactment that is compatible. Nevertheless,

'if the two versions of the enactment differ in a manner not coming within paragraph (c), preference shall be given to the version thereof

²³⁴ The official languages are French and English and the official legal systems are the civil law and the common law.

²³⁵ S. 8 (2) (a).

²³⁶ S. 8 (2) (b).

that, according to the true spirit, intent and meaning of the enactment, best ensures the attainment of its objects.’

While it is important in a bilingual and bijural nation to have a law on how bilingual enactments should be construed, it is also necessary that the intended code be co-drafted simultaneously in French and English and not simply devised and written in one language and then translated into the other. The co-drafters should work together constantly and exchange their drafts. Where concepts are not understood, or understood differently by the co-drafters from the two legal systems, the comparatist will clarify the situation and an agreement will be reached as to which of the concept should be accepted or how the existing concept in any of the legal systems should be modified to suit the Cameroonian reality. The objective is to make sure that each version fully reflects the other. It will avoid the problems of poor translation from one language to the other²³⁷ and reduce the risk of applying the single law differently.

Conclusion

In the absence of a perfect model that will solve the problems of the complexities and inequalities of the laws of divorce in Cameroon, I have argued for a unified system of law. Unification of laws would not only make the law easier to ascertain and more predictable, it would also go a long way to repair the ‘miserable’ human rights record that Cameroon has.²³⁸ Naturally unification alone may not eliminate all discriminatory rules. But a unified divorce law will avoid the current discrepancies, contradictions and conflicts between the numerous applicable norms alongside broader changes in Cameroonian education and culture. Thus, while accepting that some form of

²³⁷ In the Uniform Act of the Harmonisation of Business Law in Africa (OHADA) which is basically civil law oriented, the procedure for seizing the competent jurisdiction is by *Assignation*. ‘Assignation’ has been translated in some Uniform Acts as writ of summons. However, as Tumnde M explained, ‘Assignation as a civil law concept has no direct equivalent in the common law. Unlike assignation which is an extra judicial act, a writ of summons is signed by a judge, magistrate or other officer empowered to sign summonses.’ M Tumnde, *Harmonisation of Business law in Cameroon: Issues, Challenges and Prospects* (2010) *Tur. Eur. & Civ L. F* p125.

²³⁸ S Dicklitch, ‘Failed Democratic Transition in Cameroon: A Human Rights Explanation’ (2002)24 *HRQ* p152-176. These poor human rights conditions exist in other African countries as well. See S Adelman, ‘Constitutionalism, Pluralism and Democracy in Africa’ (1999) 42 *JLPU* p73-87 <http://heineonline.org> accessed 10 January 2014.

constitutional review is necessary, I have argued for a unified system of courts and substantive law.

The next two chapters will turn to issues of substantive law of divorce and seek paths towards unification.

CHAPTER THREE

THE COMPLEXITIES AND INEQUALITIES OF THE CURRENT LAW OF DIVORCE: AN EXAMINATION OF THE DISCRIMINATORY RULES ON ADULTERY AS A GROUND FOR DIVORCE

INTRODUCTION

The previous chapters outlined the difficulties with the current system and its legacy. They also argued that Cameroon's constitutional and international obligations offered a way forward to provide justice for divorcing parties. In this chapter I offer further examples of the difficulties the current system presents. Considerations on the nature of a marriage (monogamy/polygamy) influence the ground for divorce.¹ The intertwining of the various normative systems including the different received laws in the different parts of Cameroon and the multitude of customary laws make the law of divorce complex. This complexity is heightened because of the two types of marriages (monogamy and polygamy) recognised in Cameroon. First as explained in the previous chapter the distinction between the two types of marriages are not clear. Secondly, the nature of adultery depends on whether a marriage is polygamous or monogamous.

The customary or statutory nature of the marriage determines the interpretation of the law that governs adultery. Moreover, the interpretation of adultery under most customs depends on whether the extra-marital sexual intercourse is carried out by the husband or the wife. Hence the outcome of a divorce based on adultery will depend on the nature of the marriage and whether the sexual intercourse is committed by the man or the woman.

There are four grounds for divorce in the civil code applicable in Francophone Cameroon² amongst which is adultery by the husband or the wife.³ Once adultery is established, the court must grant the divorce. Under the received law in Anglophone Cameroon there is only one ground for divorce, which is the irretrievable breakdown of the marriage, but there are

¹ Adultery as a ground for divorce is construed differently depending on whether the marriage is monogamous or polygamous.

² Articles 229-232.

³ Articles 229-230.

five ways of proving this single ground⁴ of which adultery is one.⁵ However, divorce based on adultery should be granted only if the petitioner also 'finds it intolerable to live with the respondent.' Adultery is also a ground for divorce under customary law, although it is a discriminatory ground.

Adultery is voluntary sexual intercourse between two persons of the opposite sex one or both of whom are married but not to each other.⁶Hence, sexual intercourse with another wife in a polygamous home will not amount to adultery. Thus, in *Nguessi Paul v Dame Nguessi née Dongmo Christine*⁷ in which the petitioner (first wife) claimed adultery because of sexual intercourse between her husband and his second wife, the High Court (Francophone Cameroon) made it clear that the parties having opted for a polygamous marriage, the husband had only acted in accordance with their marriage contract and that the duty of fidelity had not been violated. By contrast, as illustrated in *Dame Pamo nee Sabze Cecile v Pamo Tedonkeng Etienne*⁸ if the respondent, who was monogamously married, then contracted another marriage without dissolving the first, the court will presume adultery. Further, the interpretation of adultery under most customs depends on whether the sexual intercourse is committed by the husband or the wife. Hence the outcome of a divorce based on adultery will depend on which court is handling the matter and on whether the sexual intercourse is committed by the man or the woman. Adultery under customary law will now be examined.

A) ADULTERY UNDER CUSTOMARY LAW

The first point to note is that there is no uniform treatment of adultery under the different customs. Different customs treat adultery differently and Customary Courts are meant to apply the customs of the parties.

⁴ Matrimonial Causes Act 1973 s. 1 (2) (a-e).

⁵ Matrimonial Causes Act 1973, s 1 (2) (a).

⁶ *Dennis v Dennis* (1955)2 All E R 373and MCA 1973.

⁷ (Jugement n° 19/CIV/TGI du 14 Novembre 2011-Dschang) unreported.

⁸ (Jugement n° 43/CIV/TGI du 12 Juillet 2004-Dschang) unreported.

1) The nature of adultery under customary law

The definition of adultery for both man and woman is like the definition under the common law. However, the effect of having committed adultery differs between men and women. Adultery, if committed by a married woman, could lead to divorce. But, in some traditions, a married man is never guilty of adultery, unless the sexual intercourse occurred with another man's wife.⁹ Since polygyny is an accepted practice under customary law, the inference from the husband's extra marital relationship with a single woman is that he intends to marry her. The (first) wife will thus hardly be able to complain of the husband's infidelity. It is only where her husband neglects or abandons her, as is often the case in these circumstances, that she could complain, but the basis of her claim will then be neglect rather than adultery. In such a situation, the traditional council will then ask the husband to take up his responsibility as a married man by providing for his family. If he fails to do so and the wife complains again, the traditional council will try to reconcile them. If the reconciliatory attempt fails, the traditional council will then ask them to go home and settle the matter between them. In the end, if the woman insists on the divorce, it will be accepted by the traditional council¹⁰ so long as the marriage symbol is refunded.¹¹ If the marriage is not registered, the divorce will end at the level of the Traditional Council. But where the marriage is registered and the parties are in possession of a marriage certificate, they will have to go to the Customary Court and start the divorce process all over if they want the divorce to be official.

However, adultery is not given the same weight in all customs and the evidence required to prove it differs among customs. Amongst the Oku people of the North-West Region, for example, adultery with a married woman is a very serious wrong. A man might be committing adultery with a married woman and make friends with the husband to allay any suspicion. In

⁹ Even in such cases (in some tribes) the man could argue that he wants the woman to get a divorce for him to marry her.

¹⁰ Even though the Traditional Council is not a state court, its place in the informal legal system is accepted by the people.

¹¹ In some instances, the marriage symbol may not be refunded. When the grounds for divorce are sufficiently weighty (for example continuous violence and neglect by the husband), the wife may not be required to refund the marriage symbol. However, adultery by the man will never fall under that category of weighty grounds. The above information was obtained during an interview in March 2015.

Oku land, palm wine is never diluted. It is believed that if you share a glass of undiluted palm wine with a man who is having sexual intercourse with your wife, he is going to die. Therefore, if a man visits a married man and refuses to share a glass of palm wine with him, it might be inferred that he is having sexual intercourse with the man's wife. To clear the suspicion, the matter might be taken to the *Kwifon* (Traditional Council) and he will be asked to share a glass of undiluted palm wine with the married man. If he refuses, it will be concluded that he is having sexual intercourse with the man's wife. If he shares the glass of palm wine and falls ill or dies, it will be taken that he had had sexual intercourse with the man's wife. But if he shares the glass of palm wine and nothing happens to him, it will be considered that he did not have sexual intercourse with the man's wife. On the other hand, in some tribes in the Ndop plain in the same region, in particular in Babessi and Babungo, adultery, although not encouraged, is not considered a very serious wrong whether committed by a man or a woman. It is common practice among the Babessi people for the husband to start singing aloud when he is very close to his house from work. The reason for this is to scare away any intruder (especially the wife's lover) who might be in his house. The Ngies from Ngemba of the North-West region had what could be termed as 'lover's day'. On such a day, a married woman will prepare food and take it to her lover, while her husband also visits his lover. Although this tradition is dying out and although divorce can be granted on the ground of adultery, whether committed by a man or a woman, adultery is not seen as a weighty ground for divorce. With the Bassas of the littoral region, adultery is not a weighty ground for divorce, even if committed by the wife. If a woman commits adultery, some elders are convened and she is sent to the house of the adulterous partner. The adulterous partner will be asked to pay a fine before the wife can go back to her marital home.¹² 'A husband has exclusive rights to his wife's sexuality, and an adulterer is a thief who has stolen his property.'¹³ This, however, is not the same for a woman who may bring no complaint if her husband commits adultery with a woman outside the matrimonial home. Although, adultery is not given the same weight in all the

¹² The above information was obtained during my interviews in March 2015.

¹³ R Brain, *Bangwa Kinship and Marriage* (Cambridge University Press 1972) p155.

traditions, divorce is usually accepted by the Traditional Council if either of the parties wishes to divorce but on the condition that the marriage symbol is refunded and accepted by the husband or someone on his behalf.¹⁴

To summarise, in most if not all customs, adultery will be considered more serious when it is committed by the wife and a husband can rely on her adultery alone to obtain a divorce. A wife, on the other hand, must prove adultery by the husband as well as some other kind of intolerable behaviour. The customary rules are discriminatory. I will now examine how the courts (Customary Courts and modern courts) have applied these rules.

2) Application of customary rules on adultery by the Customary Courts

The application of the customary rules on divorce by the Customary Court in Anglophone and Francophone Cameroon seems to be inconsistent. For example, in *Safack Tamono Plassode v Taieuisson Bernard*,¹⁵ the petitioner (wife) brought an action before the Grade I Court Dschang in Francophone Cameroon for the dissolution of her marriage basing her claim on the husband's promiscuous adultery, desertion and insults. She claimed that her husband's behaviour made it impossible to maintain marital life. The facts she relied on covered articles 230 and 232 of the civil code.¹⁶ The adultery was corroborated by letters written by the husband's lover. The husband preferred to remain silent and thus did not refute the wife's allegations. The judge found that his silence proved that he acquiesced to what the wife said. Expert evidence was given which showed that the facts alleged were innocuous in the Bamileke custom, the custom of the parties, and therefore did not constitute a cause for divorce. The judge refused to apply this custom as being contrary to the general principles of law. He then turned to the civil code. By virtue of article 230 of the civil code a wife can petition for divorce on the ground of her husband's adultery. Relying mainly on this article, the court granted the divorce to the wife. However, in a later case between *Nangmo Pierre v Nangmo née Ntemwa Regine*,¹⁷ still involving the Bamileke custom and still before the Grade I Court in Dschang, the petitioner

¹⁴ The effect of the non-refund of the marriage symbol will be examined in the next chapter.

¹⁵ (Jugement N° 112/C du 19 Avril 2007) unreported.

¹⁶ See p181 for the provisions of articles 230 and 232 of the civil code.

¹⁷ (Jugement n° 01/c du 05 Janvier 2012) unreported.

(husband) brought an action for the dissolution of his marriage. His action was mainly based on the wife's adultery. The wife's adulterous relationship resulted in one (living) child and two still births. In granting a divorce, the judge held that according to Bamileke custom under which the parties had contracted their marriage, adultery by one of the spouses constitutes as in modern law, a ground for divorce. The expert evidence provided in this case thus contradicts the evidence in the previous case, in which it was said that adultery under Bamileke custom was not a ground for divorce. There was no explanation as to why the two decisions were different. Several factors could account for the conflicting decisions. First, it could be argued that adultery amounted to a ground for divorce in the Bamileke custom in the second case because the adultery by the wife had led to the birth of a child, while in the first case no children seem to have been born out of the adulterous relation. In the first case however, it is stated that the husband's adultery was promiscuous. Secondly, the expert who gave testimony concerning the custom of the Bamileke people might have misrepresented the custom in one of the cases. Since customary law rules are not written, it is possible for experts to explain the custom differently in similar cases to suit their own interest. Thirdly, the fact that in the first case the adultery was committed by a woman and in the second case it was committed by a man might have played a part. This third view is in line with my research on customary practices on adultery as a ground for divorce.¹⁸ Other customary court judgements from different regions have followed this pattern. For example, in *Teneng Lucas v Nchang Irene*,¹⁹ the petitioner (husband) brought an action before the Mankon Customary Court (North West region-Anglophone Cameroon) relying on adultery by the wife and succeeded. However, in

¹⁸ My empirical findings in March 2015 led me to this conclusion. Because of the contradictory evidence given by the expert witnesses I carried out further investigations in the Bamileke regions of the country but my findings were the same. All the persons interviewed on this aspect explained that a man can never be accused of adultery under customary law except the adultery is with a married woman or in some cases if it takes place in the matrimonial home. See also article 361 of the penal code which confirms this position. Adultery for a man is punished only when he has 'sexual intercourse in the matrimonial home 'or has it 'habitually' elsewhere 'with a woman other than his wife or wives. Whereas, for a woman, it suffices that she has 'sexual intercourse with a man other than her husband' whether in or out of the matrimonial home.

¹⁹ (Civil suit n° 257/85-86 CRB - Customary Court Mankon) unreported.

*Anderson v Anderson*²⁰ where similar issues were raised but the adultery was committed by the man, the petitioner (wife) failed in her divorce action brought before the Limbe Customary Court (South West region-Anglophone Cameroon) This divergence in the rules governing the grounds for divorce for men and women is discriminatory. It goes against the constitution which prohibits discrimination on the ground of gender. It also violates international convention ratified by Cameroon, particularly the Convention on the Elimination of all forms of Discrimination against women.²¹ Consequently such customary practices should not form part of the unified law which I propose.

Overall, adultery as a fault-based ground for divorce has an ambiguous place under customary practices. It is generally viewed as a fault if committed by a woman, but in most cases, will not amount to a fault if committed by a man. Adultery by the wife will constitute a peremptory ground for divorce by the husband. As will be shown, this is in line with adultery as a ground for divorce in Francophone Cameroon, but under the received French law it is not applied in a discriminatory manner. On the other hand, if the adultery is committed by the husband, the divorce will not be granted to the wife because adultery committed by a man is generally not considered as a fault. To obtain a divorce, the wife will therefore have to prove some other intolerable behaviour by the husband. This position is similar to the situation under the received law in Anglophone Cameroon where you should prove adultery and intolerability, the difference being that the customary rule is discriminatory because it does not apply to both men and women.

The Customary Courts in Anglophone Cameroon and Francophone Cameroon do not apply customary rules in the same way. While the Customary Courts in Anglophone Cameroon are willing and have in fact applied the discriminatory customary rule on adultery, the courts in Francophone Cameroon have refused to apply discriminatory customary rules that are contrary to the received law and have replaced such rules with the received law. This difference in the application of customary rules by the customary courts in Anglophone and Francophone Cameroon might be

²⁰ (Civil suit n° 36/82-83 - Customary Court Limbe) unreported.

²¹ Ratified 23rd August 1994.

explained by the differences in their colonial experiences.²² The next subsection will analyse the rules of adultery under the received laws.

B) ANALYSIS OF ADULTERY AS A GROUND FOR DIVORCE UNDER THE RECEIVED LAWS

The grounds for divorce in Anglophone Cameroon (Common Law jurisdiction) and Francophone Cameroon (Civil Law jurisdiction) are not from the same source. In Francophone Cameroon, the grounds for divorce are derived from the French law of 1884 known as the *lois Naquet*. These grounds which are embodied in articles 229-232 of the civil Code are:

*That the husband can petition for divorce on the ground of the wife's adultery;*²³

*That the wife can petition for divorce on the ground of the husband's adultery;*²⁴

*That the petitioner can petition for divorce where the respondent has been convicted and sentenced for a serious offence;*²⁵

*In addition to the cases provided in articles 229, 230 and 231 of the present code the judge can only pronounce a divorce at the instance of the petitioner where there is; excessive or habitual violence or abuse by the respondent and these acts constitute serious or repeated violations of the duties and obligations of marriage and renders intolerable the maintenance of marital life.*²⁶

Adultery by the husband and the wife constitutes two of the four grounds for divorce and it is a peremptory ground. Once it is established the court must grant the divorce. In Anglophone Cameroon, the rules are different.

²² See Chapter One p54 - 58 for the different colonial administration.

²³ Article 229 ('Le mari pourra demander le divorce pour cause d'adultère de sa femme').

²⁴ Article 320 ('La femme pourra demander le divorce pour cause d'adultère de son mari').

²⁵ Article 321 ('La condamnation de l'un des époux à une peine afflictive et infamante sera pour l'autre époux une cause de divorce').

²⁶ Article 232 ('En dehors des cas prévus aux articles 229, 230 et 231 du présent code, les juges ne peuvent prononcer le divorce à la demande de l'un des époux, que pour excès, sévices ou injures de l'un envers l'autre, lorsque ces faits constituent une violation grave ou renouvelée des devoirs et obligations résultant du mariage et rendant intolérable le maintien du lien conjugal'.)

In Anglophone Cameroon, the rules are essentially those that are applicable in England today²⁷ and are found in the Matrimonial Causes Act 1973. Section 1(1) of the Act states that, ‘...a petition for divorce may be presented to the court by either party to a marriage on the ground that the marriage has broken down irretrievably’. This is the only ground for divorce under English law, and thus the only one applicable under the received laws in Anglophone Cameroon. By virtue of section 1(2), the court hearing a petition for divorce shall not hold the marriage to have broken down irretrievably unless the petitioner satisfies the court of one or more of the five facts that are enumerated in section 1(2) (a)-(e). These facts are:

- a) *That the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;*
- b) *That the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;*
- c) *That the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition;*
- d) *That the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent consents to a decree being granted;*
- e) *That the parties to the marriage have lived apart for a continuous period of at least five years immediately preceding the presentation of the petition.*

And so, while adultery is only one of the five facts required to establish irretrievable breakdown of marriage (the sole ground for divorce in Anglophone Cameroon) in Francophone Cameroon, adultery is a peremptory ground for divorce. Once it is proven, the court must grant the divorce.

In Anglophone Cameroon, as in England, the petitioner must prove that the marriage has broken down irretrievably and that the respondent has committed adultery and he/she finds it intolerable to live with the respondent. Thus, adultery *simpliciter* is not enough to grant the divorce as in

²⁷ This is by virtue of section 15 of the Southern Cameroons High Court Law 1955.

Francophone Cameroon. The test of irretrievable breakdown however is subjective and therefore not difficult to prove.²⁸ But the uncertainty that hovers around the courts is whether the intolerability should be linked to the adultery or whether the two limbs should be independent. In England, case law does not require a connection²⁹ but the position in Anglophone Cameroon is not as clear.

In *Kimberg née Ruth Ambang Gyeh v Tendong kimberg Maxim*,³⁰ the respondent (husband) obtained a study grant in 2003 and travelled to Holland for that purpose with the consent of the petitioner (wife) and with the understanding that the petitioner and their only daughter would join him later. In 2004 the petitioner and their daughter travelled to Holland to meet the respondent. On arrival, the petitioner was received at the airport by the respondent and a woman. On arriving at the respondent's residence, the petitioner was shown to the guest room so that the respondent and the other woman would be sleeping together in the master bedroom. The petitioner protested to no avail and left the residence on the same day she arrived. She moved in with a relative while the respondent continued to live with the other woman. In October 2005, the petitioner tried to reconcile by visiting the respondent. The respondent refused to end his relationship with the other woman and reacted violently to the petitioner's reconciliatory attempt. She then petitioned and obtained a divorce against the respondent. As the respondent was living with another woman, it was presumed by the court that they were having sexual intercourse thus adultery was inferred. The problem was with the second arm of section 1(2) (a), the intolerability requirement which states: 'and the petitioner finds it intolerable to live with the respondent.' Having remarked that proof of sexual intercourse does not suffice, the judge went on to state that, 'the petitioner must prove that she finds it intolerable to live with the respondent as a result of the latter's adultery'. The issue with the second arm of section 1 (2) (a) is the interpretation of the conjunction "and". In the English case of *Goodrich v*

²⁸ *Goodrich v Goodrich* (1971)2 All E R 1340.

²⁹ *Cleary v Cleary* (1974)1 All E R.

³⁰ Suit N° HCB/2MC/05-06 (unreported)

Goodrich,³¹ Lloyds-Jones J. indicated that “the two phrases are in the context independent of one another.” However, a year later, Faulks J., in the case of *Roper v Roper*³² stated that:

I think that common sense tells you that where the findings that has got to be made is that the respondent has committed adultery, and the petitioner finds it intolerable to live with the respondent, it means and in consequence of the adultery the petitioner finds it intolerable to live with the respondent.

Thus, Faulks J. found a causal connection between the adultery and the intolerability whereas Lloyds-Jones J. did not. This controversy was finally settled by the English Court of Appeal in the case of *Cleary v Cleary* and another³³ in which it was held that the petitioner had established irretrievable breakdown of the marriage even though he found life with his wife intolerable not because of her adultery but because of her subsequent conduct. Thus, the decision of Faulks J. in *Roper v Roper* was overruled and that of Lloyds-Jones J., affirmed. A few years later, a differently constituted Court of Appeal in the case of *Carr v Carr*³⁴ reluctantly followed the decision of that court in the case of *Cleary v Cleary*. The decision in *Cleary v Cleary* is difficult to reconcile with the provision in section 2(2) of the MCA 1973 under which if the parties continued to live with each other for a period of not more than six months after the discovery of the adultery, that cohabitation should be disregarded in determining whether the petitioner finds it intolerable to live with the respondent.³⁵ ‘Whether’ could also imply that it is the adultery which makes cohabitation intolerable.³⁶ Again if, as section 2(1) provides, the period or periods put together exceeded six months after the discovery of the adultery, then the party cannot rely on the said adultery. This may be taken to mean that it is the discovery of the adultery that makes cohabitation intolerable. Despite the above it has been suggested that the Court of Appeal were right in holding that the two clauses are not linked, because ‘on a literal interpretation they are not’ and also because ‘parliament did not intend there

³¹ (n28)

³² (1972)3 All E R.

³³ (1974)1 All E R 498.

³⁴ (1974)1 All E R 1193.

³⁵ M Freeman, *Understanding Family Law* (1st edn Sweet and Maxwell 2007) p93.

³⁶ *ibid*.

to be any linkage'.³⁷ In the debate in Parliament on the section, an attempt to link the two clauses with the addition of the words, 'by reason of which' was rejected.³⁸

In the above discussed Cameroonian case, the issue of intolerability could have been easily proven. The fact that the husband reacted violently when the wife came for reconciliation or the fact that he was living with a woman could have been invoked to solve the issue of intolerability. But the judge did not consider the intolerability as being separated from the adultery. This judge like many Cameroonian judges seem to prefer the view as laid down by Faulks J. in *Roper v Roper* that the intolerability should flow from the adultery.³⁹ In the case of *Ambi Chrysantus v Engwali Catherine Mbah*⁴⁰ Afong J. also took this view, justifying it by saying that *Cleary v Cleary* was highly criticised in the latter case of *Carr v Carr*. Without mentioning Faulks J. in *Roper v Roper* she holds the view that the intolerability should be 'as a result of the petitioner's adultery' a decision which is in line with that of Faulks J. in *Roper v Roper*.

The question is further complicated by the fact that some divorces are granted based on s1 (2) (a), without an examination of the intolerability issue at all. In *Mahop v Mahop*⁴¹ for example, the cross-petitioner's petition which was based on adultery alone was accepted notwithstanding the fact that the issue of intolerability was not raised. If raised it could have been easily proven because the petitioner had made several attempts to rape the cross-petitioner's sisters. Also in *Mbiaffie v Mbiaffie*⁴² the issue of intolerability could have been raised and easily proven because in addition to the adultery, the respondent was found in bed with his cousin. Nevertheless, there is a difference here between England and Anglophone Cameroon in the interpretation of s1 (2) (a) of the MCA 1973. One explanation for the difference could be that the Cameroonian judges hold the view that adultery

³⁷ M Hayes and C Williams, *Family Law Principles, Policy and Practice* (2nd edn Butterworths London 1999) p411-412.

³⁸ *ibid.*

³⁹ *Mahop v Mahop* (Suit N^o HCSW/21/MC/78) unreported; Afong J in *Niba George Armancho v Niba Ndango Ambei Gretchen* (Suit n^o HCB/33MC/00-01) unreported; *Ambi Chrysantus v Engwali Catherine Mbah* (Suit n^o HCB/15m/2001) unreported.

⁴⁰ *ibid.*

⁴¹ (Suit n^o HCSW/21/mc/78) unreported.

⁴² (Suit n^o HCSW/30/mc/85) unreported.

is sufficiently serious of itself and is deemed to render further cohabitation intolerable and that therefore the intolerability arises automatically from the adultery. If this view is correct then adultery is viewed in Anglophone Cameroon as a peremptory ground for divorce despite the wordings of s1 (2) (a).

The difference in the English and Cameroonian interpretation of the MCA 1973 raises the question of whether Anglophone judges in Cameroon are bound by English interpretation of statutes. Are judicial interpretations of statutes part of the received law? If they are, the above-mentioned decisions must be incorrectly decided. As mentioned in chapter one, English laws that are applicable in Anglophone Cameroon include the common law, the doctrines of equity, and the statutes of general application which were in force in England on or before 1st January 1900 and, in matters of divorce, the law for the time being in force in England. The law for the time being in force in England on this issue is the Matrimonial Causes Act 1973. One could take the position that although *Cleary v Cleary* is a court decision, it did not originate from the common law (unless one interprets any decision of a court or the doctrine of precedent as the 'common law' including those based on statutory enactments). On this view, while judges in Anglophone Cameroon would be bound by decisions coming from higher courts within Cameroon, they would not be bound by English decisions that emanate from English received laws. One could, however, take a softer view and say that just as English statutes are not enacted with Cameroon in mind, for Anglophone Cameroon to tie itself to all future laws of England in 'probate, divorce and matrimonial causes' that are enacted by Parliament in Westminster is problematic enough, and that to also tie itself to English courts' interpretations of those statutes goes too far. The English courts interpret legislations to take account of the concerns of the political, social and economic situations in England and Wales which are unlikely to suit the Cameroonian society. We could suggest that while Cameroonian courts (Anglophone Cameroon) should take into consideration judgments from English courts, they should not be bound by them. They rather have a constitutional obligation to consider the realities of Cameroon's own social and political conditions. This situation calls for a 'Cameroonised' law, a

unified law that will reflect the realities of Cameroon. Indeed, the beauty of the Common Law is that it is adaptable to social conditions. Cameroon should enjoy this beauty and adapt the Common Law to the Cameroonian reality. Accordingly, it is difficult to say that decisions from courts in Anglophone Cameroon that are not in line with the *Cleary* case are wrongly decided.⁴³ The question should be whether they rightly or fairly reflect the Cameroonian situation.

Conclusion

As seen above, the laws that govern adultery as a ground for divorce are different in Anglophone and Francophone Cameroon and under customary law. In Francophone Cameroon, it is easy to fulfil the requirement of adultery because adultery is a peremptory ground for divorce. Once proven, the judge must grant the divorce. In Anglophone Cameroon, since judges prefer to link the intolerability to the adultery, and because intolerability is subjective and assumed to follow the adultery, it is not difficult to satisfy this requirement either. The mere fact of basing the petition on adultery alone, could be construed as an indication that the adultery is intolerable. If it were tolerable, the petitioner would not have based his/her petition on that fact. In my view, this way of applying the law by judges in Anglophone Cameroon should be encouraged because it is a move towards convergence between the two parts of Cameroon.

Some Customary Courts have blended the modern law with traditional practices. This is especially so in the Francophone regions. These judges always compare the customary law situation with the position under the civil law before granting the divorce.⁴⁴ Thus, where a customary practice is contrary to the general principles of law, good morals or public policy, a customary judge in the Francophone section of the country will refuse to

⁴³ Simon Tabe, in *A Comparative Study of the Causes and Ramifications of Divorce under Statutory Law in Cameroon* (unpublished thesis, Yaoundé 1999) 87 is of the view that decisions of Anglophone judges that are not in line with the *Cleary* case are wrongly decided.

⁴⁴ *Madame Nguimtsop née Tiomo Alice v Nguimtsop Emile* (Jugement n°228/c du 29 Septembre 2011) unreported (Tribunal du Premier Degré de Dschang) ; *Kamte Boniface v Djouonzo Marie Bertha-Aimée* (Jugement n° 63/c du 21 Avril 2011) unreported (Tribunal du Premier Degré de Dschang) ; *Mme Tchougong née Kanmegnie Jeannette v Mr Tchougong Christophe* (Jugement n° 263/c du 13 Octobre 2011) unreported.

apply such custom. By contrast, judges in the Customary Courts of the two Anglophone regions (North-West and South-West regions) do not make such comparisons.⁴⁵ They do often apply customary rules that are discriminatory and repugnant to 'natural justice, equity and good conscience'.

This difference may lie to some extent in the differences between the test of 'public policy and of 'natural justice',⁴⁶ but it also reflects that there is greater consistency in the way the test is enforced by Francophone judges. Francophone Judges have granted divorces to wives based on adultery committed by their husbands contrary to traditional practices. This reasoning improves customary law rules and moves towards unifying the law. It should therefore be encouraged.

The judges in the Customary Courts in the Anglophone regions, being local persons, are more attached to tradition. They are therefore more prone to applying customary rules than their Francophone colleagues.⁴⁷ Discriminatory practices under customary law are thus, most noticeable in the Customary Courts in Anglophone Cameroon. Judges in these courts are not professional judges, unlike in the Customary Courts of Francophone Cameroon but lay persons from the locality who therefore may struggle more than professional judges with concepts such as natural justice, equity and good conscience. As these lay persons are immersed in their customs, they

⁴⁵ *Zifac Albert v Zifac Temesema Agatha* (Suit n° c/s 21/99-00 - Customary Court Limbe) unreported; *Ngale Moko Stephen v Susan Eposi* (Suit n° c/s 111/2005 - Customary Court Limbe) unreported; *Wabit Augustine Acha v Tifuh Caroline* (CRB 2/20/2012-Suit n° 210/2012 - Customary Court Mankon) unreported.

⁴⁶ Public policy is for the good of the public sphere. 'It has to do with those spheres which are so designated as "public", as opposed to a similar list we could make of expressions which involve the idea of private.' W Parsons, *Public Policy: An Introduction to the Theory and Practice of Policy Analysis* (Edward Elgar Publishing Ltd 2005) p3. Natural justice, on the other hand, is about the good for the individual or justice for him/her. It 'refers to the principles which must be followed in the application of rules, whatever their content to particular cases.' P Jackson, *Natural Justice* (Sweet and Maxwell 1979) p5. As A Fiorini wrote, 'The achievement of justice in a concrete case is the focus of common law systems while across the channel, it is essentially the application of the just rule that seems to count. A Fiorini, 'The Codification of Private International Law in Europe-Could the Community Learn from the experience of Mixed Jurisdiction?' *Tulane and European Civil Law Forum* (2008) p100.

⁴⁷ Judges in Customary Courts in Anglophone Cameroon have always been laymen since colonialism and were brought up to cherish their customs. This probably influences the rules applied by the Customary Courts in Anglophone Cameroon today. By contrast, judges in Francophone Cameroon since colonialism, have always been professional judges or civil servants (district officers) with some knowledge of the law. Besides, Francophone Cameroonians were brought up by their colonial master to reject their own culture in favour of French culture. This upbringing could influence their reasoning and thus a rejection of the customary law where it conflicts with the modern law.

do not see anything repugnant in these customs. Besides, some of them are ignorant of the enacted legislation and see their tasks as to apply customary rules. I would suggest that until the establishment of the unified court, as an interim measure, Customary Courts in Anglophone Cameroon should have professional judges. These professional judges would be able to determine when a customary rule conflicts with an enacted legislation. The present lay judges could serve as experts in customary law.

I have argued in favour of a unified system which would reconcile the different histories and traditions while eliminating discriminatory practices.

Adultery is not the only ground for divorce in Francophone Cameroon or under customary law and it is not the only evidence used to show that the marriage has broken down irretrievably in Anglophone Cameroon. These other grounds and proofs are the subject of the next chapter.

CHAPTER FOUR

THE COMPLEXITIES AND INEQUALITIES OF THE CURRENT LAW OF DIVORCE: OTHER GROUNDS FOR DIVORCE

INTRODUCTION

This chapter analyses the grounds for divorce in Anglophone/Francophone Cameroon and under customary law. It is difficult to identify a consistent approach to divorce law in Cameroon given the combination of extremely liberal grounds and restrictive grounds. The grounds for divorce under the received law in Francophone Cameroon are restrictive and are based on the French archaic law of 1884 which only relies on fault. Only the party who is not at fault can petition for divorce. Under the received law in Anglophone Cameroon, there is only one ground for divorce which is the 'irretrievable breakdown of marriage.' However, the irretrievable breakdown of marriage can only be proven by one or more of five facts, three of which are restrictive or fault-based.¹ As will be shown, some of the facts are confusing and ambiguous, leading to different interpretations and applications of the law. Under customary law, both restrictive and liberal rules feature, with some of the rules being discriminatory and making access to divorce more difficult for women. Some customary rules are so liberal that divorce can be granted even when the marriage has not broken down. However, under customary law, divorce is in practice hampered by the requirement that the marriage symbol should be refunded before divorce can be granted. The overall combination of the grounds for divorce in the different jurisdictions makes the law of divorce in Cameroon chaotic.

A gap between the black-letter law and the way it is enforced is also evident. Under the Civil Status Registration Ordinance (CSRO), the payment, non-payment or partial payment of the marriage symbol (bride price) is not to have any effect on the validity of any marriage celebrated in Cameroon.² Nonetheless, customary practices still make the payment of the marriage symbol a condition for the validity of any customary marriage and its refund a

¹ Matrimonial Causes Act 1973, section 1 (2) (a)-(c).

² S. 70.

condition for a valid divorce. This has far reaching consequences on the union itself and related issues such as paternity. Although section 72 of the CSRO stipulates that '*The total or partial settlement of a dowry shall under no circumstances give rise to natural paternity which can only result from the existence of blood relations between the child and his father,*' customary law still attaches paternity to the giver of the marriage symbol.

This messy state of the law of divorce in Cameroon calls for reform and this thesis proposes a unified system of courts and law as the best option. A unified court system will eliminate the problems of having multiple courts engaged in solving the same issue and a unified law could solve the problems of conflict of laws and the negative effect of the non-refund of the marriage symbol. The unified system will neither be the archaic French received law applicable in Francophone Cameroon because of its restrictive nature nor the English received law applicable in Anglophone Cameroon as that law is confusing and misleading. It will equally not be the current customary law because of its chaotic and discriminatory nature. The unified law I propose will be a mixed system which will consider the positive aspects of the divorce laws already applicable in Cameroon and the social realities of Cameroonians, regardless of moral or cultural affinity. The existing grounds for divorce will be examined in section A, while section B will analyse the current importance and effect of the marriage symbol on divorce.

A) EXISTING GROUNDS FOR DIVORCE

As discussed in the previous chapter, in Anglophone Cameroon, the rules governing divorce are essentially those that are applicable in England today³ and are found in the Matrimonial Causes Act 1973 while in Francophone Cameroon the grounds are derived from the French law of 1884 known as *lois Naquet*.

Under customary law there are no clear grounds for divorce. The grounds vary from custom to custom and range from fault-based to non-fault-based

³ This is by virtue of section 15 of the Southern Cameroons High Court Law 1955.

and the reasons include adultery,⁴ laziness, problems with in-laws, accusations of witchcraft, cruelty, separation, divorce by consent and infertility.⁵ While both men and women use the fault-based grounds, the non-fault-based grounds are used mostly by women. If a man is no longer interested in his wife and has no fault he can reproach her for, he can always, instead of divorcing her, marry another woman. But a wife who no longer wants to be married to a husband, who has committed no fault, must divorce the husband before she can get married to another man since polyandry is not practiced in Cameroon. Even within the same customary region, there are exceptions to given practices that lead to different or discriminatory applications of the custom. Some Customary Courts, especially in the North West region of the country, have granted divorce on grounds such as mere inconvenience (that is that 'the marriage has been inconveniencing the plaintiff') so long as one or both parties do not wish to live with each other again.⁶ The courts reasoned that 'marriage is love and when the love appetite fades, both parties could be aggressive to each other, whereby a man does away with the life of a woman and vice versa'.⁷ The inconvenience could be as a result of unreasonable behaviour, as in *Njofang Michael v Elizabeth Wanji*,⁸ long separation, as in *Tamfu Nfor Divine v Tansi Gwendoline Mbuli*⁹ or adultery, as in the case of *Kometa Michael Zozoh v Nchang Vera Muyo*.¹⁰ However, this ground is wide enough to include any reason, trivial or serious, to dissolve the marriage. So long as the woman is willing to refund the marriage symbol, the divorce will be granted. Other Customary Courts have refused to grant divorce to the petitioning wife just

⁴ This has been examined in Chapter Three p175 – 180.

⁵ These grounds will be explained in detail subsequently.

⁶ This phrase has been taken by some writers to mean 'irretrievable breakdown'. E Ngwafor, *Family Law in Anglophone Cameroon* (1stedn, University of Regina Press 1993) 115.

⁷ *Njofang Michael v Elizabeth Wanji* (Civil suit n° 6/2013-CRB 2/2012 Customary court Mankon) unreported; *Wabit Augustine Acha v Tifuh Caroline* (Civil suit n° 210/ 2012-CBR 2/20/2012) unreported, (Customary court Mankon); *Tamfu Nfor Divine v Tansi Gwendoline Mbuli* (Civil suit n° 105/2013-CRB 1/2013) unreported, (Customary court Mankon).

Note, however, that marriage, especially customary marriage is not necessarily based on love. People marry for various reasons such as family pressure and the financial status of the other party. See J Eekelaar, 'Why People Marry: The Many Faces of an Institution' (2007)41 *FLQ* pp418-422; J Eekelaar and M Maclean, 'Marriage and the Moral Bases of Personal Relationship' (2004)31 *Journal of Law and Society* pp518-523.

⁸ *ibid.*

⁹ (n7).

¹⁰ (Civil suit n° 41/2005-06 of 21st July 2006) unreported, (Customary court Bamunka).

because she had reverted from the use of her husband's name to her maiden name before filing for the divorce, even though there is no law in Cameroon that obliges a married woman to use the husband's name.¹¹ Overall, the laws of divorce in Cameroon offer a combination of liberal and restrictive grounds for divorce.

Even though the restrictive grounds for divorce in the Matrimonial Causes Act and the Civil Code are worded differently, they all deal with the behaviour of the respondent.¹² An analysis of the rules is necessary to formulate a uniform standard on the grounds for divorce in Cameroon.

1) Restrictive grounds for divorce.

Restrictive grounds for divorce exist in the different divorce laws in Cameroon. The restrictive grounds for divorce deal with the behaviour of one spouse. Sometimes the behaviour is directed towards the marriage itself as in desertion or where the respondent exercises violence on the petitioner. Sometimes it is behaviour outside the marriage such as imprisonment or unreasonable behaviour towards in-laws. Whatever the type of behaviour, it should be such that the petitioner cannot reasonably be expected to live with.

a) The received law in Anglophone Cameroon

The burden of proof of irretrievable breakdown of marriage under the Matrimonial Causes Act 1973 rests on the petitioner. The petitioner must show that the respondent has behaved in such a way that he/she cannot reasonably be expected to live with the respondent. Although it is specifically mentioned in section 1(2) (b) of the Matrimonial Causes Act, this fact could cover all the fault facts under the Act. If a respondent commits adultery or deserts the petitioner, it could be considered as behaviour such that the petitioner cannot reasonably be expected to live with. Adultery having been examined in the last chapter, this chapter will examine the behaviour of the respondent under sections 1 (2) (b) and (c) of the Act.

¹¹ *William Ngah of Babessi 1 v Ogen Takang of Kokobuma* (CRB 2/06-77 p151-156) unreported.

¹² The grounds for divorce under customary law are not written. Although they are not written, the restrictive grounds also deal with the behaviour of the respondent.

i) The behaviour of the respondent under section 1(2) (b)

Whether the petitioner can reasonably be expected to live with the respondent is a question that the court, rather than the petitioner, must answer before deciding whether or not to grant a decree of divorce under the MCA section 1(2) (b).¹³ The court must determine whether a reasonable person would think it reasonable for that particular petitioner to be able to live with that particular respondent.¹⁴ Seen in this light, the test is both objective and subjective in the sense that the question that must be answered is: 'can this petitioner reasonably be expected to live with this respondent?'¹⁵ As Bagnal J puts it in the English case of *Ash v Ash*¹⁶:

*Can this petitioner with his or her character and personality, with his or her fault and other attributes, good and bad, and having regard to his or her behaviour during the marriage reasonably be expected to live with the respondent?*¹⁷

Dunn J, in the English case of *Livingstone-Stallard v Livingstone-Stallard*¹⁸, put the question in another way when he said:

Would any right-thinking person come to the conclusion that this husband has behaved in such a way that this wife cannot reasonably be expected to live with him, taking into account the whole of the circumstances and the characters and personalities of the parties?

In the Cameroonian case of *Niba George Amancho v Niba Ndango Ambei Gretchen*,¹⁹ Afong J, in the High Court of Bamenda, examined the gravity and weight of the conduct complained of by both the petitioner and the cross-petitioner, and expounded on the ratio of Dunn J in *Livingstone-Stallard v Livingstone-Stallard*.²⁰ In granting a decree nisi of divorce to the petitioner, the court put the question whether 'this petitioner could reasonably be expected to live with this cross-petitioner who habitually physically attacked him to the extent of tearing his clothes, and who, as he genuinely believed,

¹³ N Lowe and G Douglas, *Bromley's Family Law* (11th edn Oxford University Press 2015) p268.

¹⁴ *Pheasant v Pheasant* (1972) Fam 202.

¹⁵ *Birch v Birch* (1992) FLR 564 CA.

¹⁶ (1972)1 All E R 582.

¹⁷ *ibid.*

¹⁸ (1974) 2 All E R 766 p771.

¹⁹ (Suit n^o HCB/33MC/00-01) unreported.

²⁰ (n18).

had tried to eliminate him by voodoo practices.’ The court took into account the personality of the petitioner particularly the nature of his job.²¹ Likewise, in granting a decree nisi of divorce to the cross-petitioner (wife), the court examined whether the wife could reasonably be expected to live with a husband who would not eat food prepared or served by her unless she tasted it first; a husband who accused her of trying to eliminate him; a husband who constantly accused her of sleeping with any man she talked to and who habitually brought home ‘witch doctors’ to perform strange rites causing strange odours to linger in their home. The reasoning of Afong J is thus in line with that of the English courts.

Section 1 (2) (b) is however confusing and has been interpreted differently by different judges in Anglophone Cameroon. While a few judges endeavour to refer to the terms expressed in the section,²² the majority prefer to use the old-fashioned (in the legal sense) word ‘cruelty’,²³ thus implying that the behaviour of the respondent must itself be unreasonable, and therefore that the respondent must be at fault. However, the section does not state that the behaviour of the respondent must be unreasonable but rather the behaviour must be such that the petitioner cannot reasonably be expected to put up with it. This is a ‘significantly different concept from unreasonable behaviour’.²⁴ Therefore, references to ‘unreasonable behaviour’ in s.1 (2) b are strictly not correct and have been described by Ormond LJ as ‘a linguistic trap’.²⁵ Unreasonable behaviour implies that the respondent should commit some fault before a decree of divorce can be granted to the petitioner. However, ‘behaviour such that the petitioner cannot reasonably be expected to live with’ need not necessarily be unreasonable. The English case of *Archard v Archard*²⁶ illustrates a situation in which the behaviour of the respondent could be considered reasonable and yet be such that the petitioner could not reasonably be expected to live with. In the above case,

²¹ The petitioner is a judge.

²² Inglis J. in *Mendi v Mendi* (Suit n° HCSW/80 mc/80) unreported; *Mbiaffie v Mbiaffie* (Suit n° HCSW/30 mc/85) unreported. See E Ngwafor (n6) p132-135.

²³ *Sandjo v Sandjo* (Suit n° HCSW/74 mc/80) unreported; *Shu v Shu* (Suit n° HCB/16/85) unreported; *Ndumu v Ndumu* (Suit n° HCSW/78 mc/83) unreported; *Tona v Tona* (Suit n° HCSW/102 mc/84) unreported. See E Ngwafor (n6).

²⁴ *Bannister v Bannister* (1980)1 Fam 240 CA.

²⁵ *ibid.*

²⁶ (1972) *The Times*, April 19th.

the parties were devout Roman Catholics at the time of their marriage. The wife later relented on her faith. When she was advised on medical grounds not to get pregnant for a period of two years, she insisted on the use of contraceptive. The husband (Respondent), still a fervent Roman Catholic, refused to have sexual intercourse with her with the use of contraceptives as the use of contraceptive was against his religion. Wrangham J held that in the circumstances there was a conflict between two reasonable behaviours and the Petitioner (wife) had therefore failed to establish behaviour on the part of the husband such that she could not reasonably be expected to live with. Having contracted the marriage on the understanding that they would not use artificial means of birth control because of their religious beliefs, the wife could not complain if the husband refused to change his view. It is clear from the facts of this case that the petitioner could not reasonably be expected to live with the respondent as husband and wife; yet the divorce was refused. This decision suggests that the behaviour of the respondent must be unreasonable. It is likely that the same conclusion would have been reached had the husband petitioned for divorce. In line with *Archard v Archard*, the husband would not have been able to complain if the wife had refused to have sexual intercourse with him without the use of contraceptive in view of her medical condition.²⁷ If the husband had petitioned for divorce, his petition would have equally failed. However, by virtue of the later Court of Appeal's decision in *Bannister v Bannister*,²⁸ divorce should be granted whether the behaviour is 'reasonable' or 'unreasonable', so long as it is such that the parties cannot reasonably be expected to live with each other as husband and wife. In this light, both Mr and Mrs Archard should succeed because their behaviour, though reasonable, is such that the other party cannot reasonably be expected to live with.

In my view, a distinction should be drawn between reasonable and unreasonable behaviour. First, the spouse who has behaved unreasonably should not be given the opportunity to divorce on the ground of the other's reasonable behaviour under the fault system. The unreasonable behaviour should therefore come from the respondent. Secondly, where both spouses

²⁷ P Bromley, *Bromley's Family Law* (6th edn, Butterworths 1981) p207.

²⁸ (n24) p240.

have behaved reasonably but their behaviour is nevertheless not one which their spouse can reasonably be expected to live with, either spouse should be able to bring an action for divorce. Where the behaviour of the respondent is reasonable, no fault has been committed by the respondent. To place section 1 (2) (b) entirely on fault, I suggest that, it should be required that, the behaviour of the respondent be unreasonable. Although such requirement does not feature in the section, it is in line with the application of the section by many of the judges in Anglophone Cameroon and mirrors the law as applied in Francophone Cameroon. In this light, therefore, the behaviour fact should be broken down into two; one fault-based and the other non-fault-based.

ii) The behaviour of the respondent under section 1 (2) (c)

Desertion can also be considered as a type of behaviour. The desertion fact under section 1 (2) (c) which deals with the desertion of the petitioner by the respondent 'for a continuous period of at least two years immediately preceding the presentation of the petition.' can be considered another restrictive or fault 'ground' for divorce because only the deserted spouse can petition for divorce. The deserter cannot bring an action based on his/her desertion. It [desertion] is 'the unjustifiable withdrawal from cohabitation without the consent of the other spouse and with the intention of remaining separated permanently.'²⁹ Four elements are therefore necessary to constitute desertion. These are: the fact of separation, the intention to desert, lack of consent from the other spouse and absence of a good cause. The courts will grant a decree of divorce when these elements are present. Thus, in *Ndifor Elizabeth Swiri v Anye Richard Fru*,³⁰ the respondent abandoned the petitioner and their child in Bamenda in 2002, at a time when the petitioner was ill. Until 2006 when the petitioner filed her petition for divorce, they had never resumed cohabitation. The court held that he was in physical desertion. Similarly, in *Nseke v Nseke*,³¹ the respondent went to Nigeria without informing the petitioner. From Nigeria, he wrote a letter to the

²⁹ Tabufor J. in *Ndifor Elizabeth Swiri v Anye Richard Fru* (Suit n° HCB/18MC/05-06) unreported; N Lowe and G Douglas (n13).

³⁰ *ibid.*

³¹ (Suit n° HCSW/108MC/84) unreported.

petitioner without mentioning his address, stating he hoped that God would help the petitioner. The court held that the respondent was in desertion.

If a spouse has a good cause for leaving the matrimonial home, that spouse will not be in desertion. Instead the spouse who is in the matrimonial home could be said to be in constructive desertion. In the case of *Kimberg nee Ruth Ambang Gyeh v Tendong Kimberg Maxim*,³² the petitioner testified that when she travelled to join her husband in Holland in 2004, she discovered that he was sharing the matrimonial bed with another woman and because she could not tolerate the situation, she immediately left the house and has since been living separately from the husband. The judge then asked: who is in desertion of the other? Is it the petitioner who physically checked out of the husband's residence or the respondent who was living with another woman?' Drawing from the English case of *Graves v Graves*,³³ he then went on to say that 'where a spouse behaves in such a way that the other is virtually compelled to leave, the former may in law be the deserter and is said to be in constructive desertion'. Thus, 'the respondent, by living permanently with another woman when he is lawfully married to the petitioner, is adjudged to be the deserter and not the petitioner who checked out of the home in consequence.'

Although it falls under section 1 (2) (c) of the Matrimonial Causes Act of 1973, desertion could be considered as behaviour which the petitioner cannot reasonably be expected to live with. If the respondent, without just cause, withdraws from cohabitation without the consent of the other spouse (petitioner) and with the intention of remaining separated permanently, this will constitute behaviour such that the petitioner cannot reasonably be expected to live with. Therefore, both section 1 (2) (b) and (c) deal with the behaviour of the respondent. However, while section 1(2) (b) deals with both unreasonable and reasonable behaviours irrespective of the duration of the particular conduct, section 1(2) (c) deals with unreasonable behaviour of the respondent which involves separation that must have lasted for at least two years 'immediately preceding the presentation of the petition.' It would be clearer if sections 1(2) (a-c) were merged into one ground for divorce as they

³² (Suit n^o HCB/2MC/05-06) unreported.

³³ (1864)3 SW & TR 350.

all deal with the behaviour of the respondent during the marriage. The specific requirement of two year-period of separation under section 1 (2) (c) should be ignored. It will be for the judge to decide whether the unreasonable behaviour of the respondent based on desertion is such that the petitioner cannot reasonably be expected to live with. This is a more flexible concept than one which will tie the petitioner to a period of at least two years.

b) The received law in Francophone Cameroon

All the grounds for divorce in Francophone Cameroon are restrictive or fault-based. They all deal with the respondent's unreasonable behaviour and relate to adultery, imprisonment or excessive or habitual violence by the respondent.

i) The behaviour of the respondent

All the grounds for divorce in Francophone Cameroon restrict the petition to the spouse who is not at fault. The behaviour of the respondent is not specifically mentioned in the civil code as a ground for divorce. Nonetheless, the grounds for divorce in the civil code will correspond to cases in which the respondent has behaved in such a way that his/her spouse cannot be reasonably expected to live with and thus can be considered as 'behaviour' grounds. If a respondent has, as required under the civil code, committed adultery,³⁴ been convicted and sentenced for a serious offence³⁵ or exercised excessive or repeated violence on or abused the petitioner in a way that constitutes serious violations of the duties and obligations of marriage that render marital life intolerable,³⁶ one may conclude that the respondent's behaviour is such that the petitioner cannot reasonably be expected to live with the respondent any longer. However, because divorce can be granted in Francophone Cameroon only when a fault has been committed by the respondent, it implies that the behaviour itself must be unreasonable. The articles refer to 'a conviction and sentence for a serious

³⁴ Articles 229 and 230 of the Civil code. Adultery has been examined in Chapter 3 180.

³⁵ Article 231 of the Civil code.

³⁶ Article 232 of the Civil code.

offence³⁷ or 'excessive or habitual violence or abuse'³⁸ by the respondent. Consequently, if the behaviour of the respondent is reasonable, the petitioner may not succeed even if the petitioner cannot reasonably be expected to live with the respondent. This position of the civil code is different from the position under the Matrimonial Causes Act where divorce could be granted even if the behaviour of the respondent is reasonable so long as it is such that the petitioner cannot reasonably be expected to live with. However, most judicial decisions based on section 1(2) (b) in Anglophone Cameroon ordinarily require that the behaviour should be unreasonable and therefore are in fact in line with the Civil Code. This makes the case for unification even stronger. But as we have seen, divorce under article 232 of the civil code applicable in Francophone Cameroon is not peremptory unlike adultery or conviction. Under article 232 the violence or abuse must be excessive or habitual. Divorce may not be granted if the violence or abuse is not excessive or habitual. Excessive or habitual violence or abuse is unreasonable and intolerable. Therefore, once it is proved divorce should be granted. Nevertheless, the article requires that the petitioner should also prove that the excessive or habitual violence or abuse is intolerable. The role of the judge here should have been to determine whether the violence is excessive or habitual and not whether it is intolerable. And if it is excessive or habitual divorce should be granted. If the petitioner could tolerate the behaviour he/she will not petition for divorce. As in Anglophone Cameroon, the article requires the judge to examine the effect of the respondent's behaviour on the petitioner to decide if it renders marital life intolerable. In *Fonzin v Dame Fonzin nee Nguetack Emilie Felicité*,³⁹ the petitioner's petition for divorce failed as the court did not consider the behaviour of the respondent (wife) weighty enough to allow the petitioner's action to succeed. In this case the petitioner (husband) brought an action for divorce in the High Court of Dschang (Francophone Cameroon) against the respondent (second wife) relying on article 232 of the civil code which is to the effect that, the judge can pronounce a divorce when there is excessive or habitual violence

³⁷ Article 231 of the Civil code.

³⁸ Article 232 of the Civil code.

³⁹ (Jugement n° 09/CIV/TGI du 12 Avril 2010) unreported.

or abuse by the respondent and these acts constitutes serious or repeated violations of the duties and obligations of marriage which renders marital life intolerable. The petitioner had an agreement with the respondent that she should live in Yaoundé while the first wife lived in Dschang. Eighteen months after the celebration of the marriage, the respondent came to Dschang and met the husband in his office. She decided, come what may, to spend the night with him at the home of the first wife. As this decision was likely to create conflict, the petitioner suggested that the respondent should stay the night in an inn. The respondent rejected the suggestion and blocked the doors of the petitioner's car. The petitioner was obliged to spend the night in his office while the respondent spent the night in the petitioner's car. In the morning, she followed him to the house where the first wife lived. The first wife and her children prevented her from entering the house. Being a military person, she intimidated, insulted and threatened them. The petitioner stated that his state of health (hypertensive) could not support such behaviour. Nevertheless, the court held that the fact that a spouse had violated the rules on the functioning of a polygamous home, and had ignored the prohibition of going to another wife's residence, was not enough to constitute violence as provided for in article 232. In other words, the judge was saying that the violence was neither excessive nor habitual. Violence in any decree should be accepted as a ground for divorce. The fact that one party petition for divorce based on violence is already an indication that the party cannot tolerate such violence.

ii) Desertion

Desertion is not expressly mentioned in the civil code as a ground for divorce. The violation of the duty or obligation of marriage referred to in article 232 is only where there is excessive or habitual violence or abuse. However, as desertion is a violation of the duty of the parties to cohabit, the courts in Francophone Cameroon have also granted divorce in cases in which the petitioners rely on desertion as a violation of the obligation of marriage. In the case of *Kom Medard v Dame Domkam Simone Beatrice*

*Epouse Kom*⁴⁰ for example, the cross petitioner alleged that the husband left the matrimonial home for a period of two years without her consent and was not in the matrimonial home at the time of the trial. In granting the decree of divorce, the court held that since the duty to cohabit is a fundamental obligation by the spouses, the violation of this obligation by one of them renders intolerable the maintenance of marital life. Desertion as a ground for divorce can easily be proven if the respondent has been convicted of the offence of desertion. When this happens, the petitioner could rely on article 231 of the civil code which permits divorce where the respondent has been convicted and sentenced for a serious offence.

The notion of constructive desertion is also recognised by the courts in Francophone Cameroon. In the case of *Guedje Jean v Dame Guedje née Akoumo Sabine*,⁴¹ the petitioner (husband) alleged that while he was in hospital for treatment the respondent (his wife who also cross-petitioned) left the matrimonial home and refused to return despite all his effort to reason with her. According to the petitioner, the wife's behaviour violated the duty of cohabitation which involves living together as husband and wife under the same roof, having sexual intercourse and helping and assisting each other. However, since it was the husband who sent her away because he had taken a second wife and had rejected all efforts made by the two families to reconcile his position, the court considered that he could not reproach the wife for not assuming her marital obligations. The court declared that by sending the wife away and refusing all attempts at reconciliation, the husband had violated the duty imposed on spouses to live together and this constituted a serious abuse which rendered intolerable the maintenance of marital life. Consequently, his petition failed, and the wife's cross-petition succeeded.

c) Under customary law

Fault, or unreasonable behaviour, is also relevant under customary law. But it is also open to interpretation. Under customary law, for example, some mild beating by the husband is generally allowed in situations where the wife

⁴⁰ (Jugement n° 10/CIV/TGI du 11 Juillet 2011) unreported.

⁴¹ (Jugement n° 21/CIV/TGI du 09 Mai 2005) unreported.

is considered stubborn by the husband as some form of correction. In my view, however, any act of violence, mild or serious, is unacceptable and should be prohibited and seen as unreasonable for the purposes of divorce. Inflicting violence on a wife as some form of correction by the husband lowers the status of the woman. Besides, the law is discriminatory as only the husband can inflict such punishment on the wife. Such tolerance of beating should be put to an end. As it stands, however, only where the beating becomes too frequent and causes serious injuries as in *Bwange v Bwange*,⁴² where the husband who had an uncontrollable temper frequently beat his wife and even burnt her clothes or, as in the case of *Monono v Monono*,⁴³ where the husband who usually went out would come back late and beat his wife even when she was pregnant, will the court notionally see the behaviour as unreasonable and grant the divorce. The court will also grant a divorce where, in addition to the physical violence, the husband restricts the wife's movements and visits from friends and family members.⁴⁴ Although it is mostly women who petition on this ground, a man could equally petition for divorce on the ground of the wife's cruelty. An example is the case of *Awah Patrick Chefor v Siri Awah Atanga Justine*⁴⁵ where the wife had been frequently violent to the husband and the last straw was when she held his testicles and squeezed and did not let it go despite his screaming. The divorce was granted.

Customary law considers the practice of witchcraft performed by the respondent on the petitioner or a close relation or friend of the petitioner to be a type of 'matrimonial fault' or 'unreasonable behaviour' sufficient to grant a divorce. Witchcraft is considered so serious that divorce will be granted on mere accusations of witchcraft. In the case of *Ndoseri Joana Ndifor v Forche Michael*,⁴⁶ the second wife accused the husband and the first wife of killing her son through witchcraft because the first wife did not have any male child.

⁴² (Civil Suit n° 68/86-87, CRB 3/86-87) unreported.

⁴³ (Civil suit n° 81/87-88 CRB8/87) unreported.

⁴⁴ *Miami Lydie v Nana Celestin* (CBK 01/2014-case n° 066/2014) unreported (Customary Court Buea).

⁴⁵ (Civil Suit n° 82/86-87, CRB 1/86-87) p70 unreported.

⁴⁶ (Civil suit n° 174/86-87, CRB 1/86-87) p281 unreported (Customary Court Mankon); *Ade Vincent v Ngwe Scholastica* (Civil suit n° 106/86-87, CRB 1/86-87) p177 unreported (Customary Court Mankon).

The Customary Court accepted the allegations without any proof and the divorce was granted. Accusations of witchcraft could heighten the tension or bitterness between a couple. As a result of witchcraft accusations, the marital atmosphere could become tense and will render living together as husband and wife intolerable. The divorce should therefore be granted on this basis and not based on witchcraft activities if it is not proven. Besides, trying to prove witchcraft increases the 'bitterness, distress and humiliation' which this thesis seeks to avoid.

Problems with in-laws could also lead to divorce under customary law. A customary marriage unites two families and not just two persons. It is therefore expected that the spouses, especially the wife who leaves her family to become part and parcel of her husband's family, should live in harmony with her in-laws. A husband could divorce his wife because of lack of respect for members of his family and himself and vice versa.

Another possible ground for divorce is laziness especially on the part of the husband who should provide financially for his family, but also on the part of the wife on whom more reliance is placed for the up-keep of the children. The divorce is likely to be granted where the laziness becomes so serious that the man cannot provide food or shelter for his family or the children become wayward. Other types of unreasonable behaviour that could lead to the granting of a divorce under customary law include: neglect,⁴⁷ threats, especially of murder and attempted murder,⁴⁸ dishonesty, theft, refusal by the husband to eat food prepared by the wife, refusal of sexual intercourse and accusations of witchcraft and abortion.⁴⁹ All the above-mentioned grounds under customary law could also be relevant under the received laws as forms of unreasonable behaviour

Restrictive rules on divorce exist under the received laws in both Anglophone and Francophone Cameroon and under customary law but they are found under different grounds. However, the various grounds always refer to one

⁴⁷ *Efectnji Mercy v Tomynjiwung* (Civil suit x10 17/2010 CR n°20629841 of 04/11/2010) unreported.

⁴⁸ *Wokama Nganje Edward v Diange Elizabeth Ngonde* (CBK 01/2014-case n° 057/2014) unreported (Customary Court Buea).

⁴⁹ *Alemnji Dorothy Atemfua v Alemnji Lawrence Asong* (Civil suit n° 27/09-CR n° 20629826 of 21/09/2009) unreported.

issue, which is the behaviour of the respondent. They can therefore be put under one umbrella: 'the unreasonable behaviour of the respondent.

There are other customary rules which are not based on fault but which restrict the granting of a divorce. For example, Muslims have rules that prohibit a man from divorcing his wife when the wife is pregnant because it is believed that the psychological problems related to divorce can affect the harmonious development of the unborn child.⁵⁰ A divorced woman under the Muslim tradition must wait for at least three months before she can remarry. This delay is to encourage reconciliation even after divorce.⁵¹ The Bakwerians also prohibit divorce when the woman is still breast feeding because it is believed that divorce could affect the stability and health of the child.⁵² These rules which are geared towards the wellbeing of the child could be considered as good rules and be preserved in a unified law.⁵³

The next subsection will analyse the liberal grounds for divorce in Cameroon.

2) Liberal grounds for divorce

This section examines situations in which the petition is not based on a fault by the respondent. The petition could be based on separation, with or without the consent of the respondent, the inability to have children, mental illness or simply on the fading away of the love between the parties. It could also be that the parties want to be together but do not want their present form of marriage anymore. As there is no legal provision in Cameroon which allows for the conversion of a marriage from monogamy to polygamy and vice versa, divorce is an option for parties who wish to change their form of marriage. This section therefore examines situations where one or both parties do not want to be together as well as situations where both parties want to be together but do not want their present form of marriage any longer.

⁵⁰ Muslim tradition which is based on the Koran; chapter 11 v 230.

⁵¹ Koran chapter 11 v 228. Another reason for the three-month waiting period is to clarify all doubts as to the father of a normal child born after a period of up to nine months after divorce.

⁵² *Samuel Lyonga Yukpe v Immaculate Ewanga Yefonge* (Civil Appeal n° CASWP/cc/45/81.

⁵³ However, the Muslims allow divorce as soon as the child is born as there are no longer any sentiments between the husband and wife.

a) Where one or both parties do not want to be together

On the one hand, the petitioner may want a divorce against the respondent's wishes in a situation in which the respondent has committed no fault. Under the MCA, the couple must live apart for a period of at least 5 years before the petitioner can bring an action. On the other hand, if neither party wants to go on living as husband and wife, the petitioner can be granted divorce based on the parties' joint consent to it. Neither type of divorce is allowed in Francophone Cameroon. In Francophone Cameroon, the respondent must commit a fault before the divorce can be granted.

i) Under the received law in Anglophone Cameroon

In order to prove that a marriage has broken down irretrievably under the Matrimonial Causes Act 1973, the petitioner could rely on the fact that they (petitioner and respondent) have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent consents to a decree being granted (section 1(2) (d)) or that they have lived apart for a continuous period of at least five years immediately preceding the presentation of the petition (section 1(2) (e)).

Section 1 (2) (d) requires the parties to have lived apart for a continuous period of at least two years. However, before a decree of divorce is granted under this section, the respondent must give his/her consent. Where both parties want a divorce, divorce will easily be granted. As with desertion, the parties must have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition. Unlike desertion, it is irrelevant that the 'living apart' is caused by the petitioner or the respondent. Therefore, even if the living apart is caused by the petitioner, he/she could still get a divorce under this section so long as the respondent gives his/her consent to the divorce. The consent must be freely given and the respondent can withdraw his/her consent at any time before a decree nisi is granted. After the decree nisi is granted, the respondent can apply to the court to have it rescinded on the ground that the petitioner misled him/her on any matter which he/she took into consideration before giving his/her consent.⁵⁴

⁵⁴ MCA 1973 section 10 (1).

Once the decree has been made absolute, the respondent can no longer withdraw his/her consent.

The notion of living apart is construed psychologically. The parties could be living apart even though they are living under the same roof, so long as they are not living in the same household⁵⁵ and consortium has come to an end.⁵⁶ But they will not be regarded as living apart if they share their meals and living accommodation, even though they no longer have sexual intercourse.⁵⁷ They will also be treated as living apart if the wife, having left her husband for another man, subsequently takes him in as a lodger because he is ill and has nowhere else to go.⁵⁸ If the court is satisfied that the parties have lived apart for a continuous period of at least two years and the respondent gives his/her consents, or that they have lived apart for a continuous period of at least five years, the decree of divorce will be granted. However, where a petitioner establishes irretrievable breakdown of marriage on the basis of five years separation, the court may refuse to grant the decree of divorce if the respondent satisfies the court that the dissolution of the marriage will result in grave financial and/or other hardships to him/her and that it would be wrong in the circumstances to dissolve the marriage.⁵⁹ The hardship should result from the dissolution of the marriage and not the breakdown⁶⁰ and it must be grave.⁶¹ It includes 'the loss of the chance of acquiring any benefit which the respondent might acquire if the marriage were not dissolved.'⁶²

In my view, divorce by consent should be encouraged as the individuals are likely to have more control over the divorce process, their financial and other ancillary matters. The bitterness, distress and humiliation which are often associated with fault divorce will be considerably reduced where the divorce is obtained with the consent of both parties as there will be no need for the couple to incriminate each other.

⁵⁵ MCA 1973 section 2 (6); *Mouncer v Mouncer* (1972) All E R 289.

⁵⁶ *Santos v Santos* (1972) Fam 247 CA.

⁵⁷ *Mouncer v Mouncer* (n55).

⁵⁸ *Fuller v Fuller* (1973) 2 All E R 650 CA.

⁵⁹ MCA 1973 section 5.

⁶⁰ *Talbot v Talbot* (1971) 115 Sol Jo 870.

⁶¹ *ibid*; See also *Mathias v Mathias* (1972) Fam 287.

⁶² MCA 1973 section 5 (3).

ii) Under the received law in Francophone Cameroon

As mentioned above, all the grounds for divorce in Francophone Cameroon are restrictive or fault-based. Liberal grounds for divorce are found in Anglophone Cameroon and under customary law only. There is no equivalent of sections 1(2) (d) and (e) of the Matrimonial Causes Act under the civil code. This would have been unthinkable in nineteenth century France. While there is no divorce based on the consent of the parties, any petition for divorce based on 'living apart' is subsumed under desertion if the other criteria for desertion are met.

iii) Under customary law

The notion of 'living apart' also exists under customary law. Separation is a ground for divorce under customary law. In the case of *Waffo née Mapah Diane v. Waffo Michel*,⁶³ it was stated by the court of first degree of Dschang (Customary Court) that a union between a man and a woman is considered as marriage only if they cohabit together. The absence of a sufficiently long cohabitation is thus a ground for divorce. The court did not explain what 'sufficiently long cohabitation' means. In the present case, the separation was four years. In the case of *Tamfu Nfor Divine v. Tansi Gwendoline Mbuli*,⁶⁴ the Mankon Customary Court also granted a decree of divorce in which the parties had been living apart for a period of eight years. Even if the divorce is objected to, for example on the grounds of religious beliefs, the court will still grant the divorce as in the case of *Njofang Michael v. Elizabeth Wanji*⁶⁵ in which the wife objected to the decree on religious grounds. The Mankon Customary Court held that since the parties had stayed apart for so long (9 years) "without each other rendering their marriage vows," the inference is that "they have long divorced their marriage pending legislation on it."

Inability to have children is a ground for divorce under customary law but it is not a ground for divorce under the received laws. Marriage in the African sense is for procreation. If children are not forthcoming and one or both

⁶³ (Jugement no 101/C du 19 Avril 2012) unreported.

⁶⁴ (Suit no 105/2013-CRB 1/2013) unreported.

⁶⁵ (Suit no 06/2013-CRB 2/2012) unreported.

parties want a divorce, the divorce will be granted. However, in most situations where the parties cannot have children or where the man is impotent, the wife is expected to make discrete arrangements to get pregnant. Although the husband might be aware that the wife has committed adultery, he will be happy to be a father and will not make any complaints against the wife. They could even both agree that the wife should have extra-marital sexual intercourse. If the sexual intercourse results in the birth of a child, the child will belong to the husband and not to the biological father. Generally, the biological father is kept in the dark as regards the pregnancy.⁶⁶

Another non-fault or liberal ground for divorce under customary law is the absence of love. Generally, a customary marriage is not based on love. Nevertheless, if there is no love between the parties and one or both want a divorce, it will be granted.⁶⁷ Amongst the Ngwo people from the North-West region, elopement (*amana*) was a common phenomenon. A married woman would run away with another man to be later married to him. In such instances, the new lover is obliged to refund the marriage symbol of the previous husband.

Mental illness is not seen as a ground for divorce but separation because of mental illness is accepted. It is expected that a spouse should stand by and support the other spouse who is ill. However, if the woman wishes to end the marriage because the husband is mentally ill, the marriage could be terminated on the refund of the marriage symbol. If it is the woman who is mentally ill, the husband need not terminate the marriage but he could marry another woman. If he does choose to end the marriage, the marriage symbol may not be refunded.⁶⁸ Nevertheless, some families will refund the marriage

⁶⁶ Artificial method of becoming pregnant such as artificial insemination is not known in the villages and beside it is too expensive.

⁶⁷ It should be noted that the absence of love is usually accompanied by some other considerations such as refusal to cook for the husband or to eat the wife's food or to have sexual intercourse.

⁶⁸ The practice whereby part of the marriage symbol is refunded if the wife is barren or ill is common with the Gusii people of Kenya. P Mayer, *Gusii Bride Wealth Law and Custom* (Oxford University Press 1950) p42-49.

In some tribes in Cameroon, if a husband sends away a barren woman, he loses his right to claim the marriage symbol. But if the barren woman goes on her own accord, the marriage symbol will be refunded. With the Bantus of South Africa, if a wife is childless or dies or deserts her husband before bearing children, then either the marriage symbol will be

symbol out of pride or anger at the son in law who has abandoned the sick wife. In some cases, the mental illness is accompanied by accusations of witchcraft which makes the case for divorce more acceptable.

b) Where both parties want to be together but do not want their present form of marriage

Parties to a potentially polygamous marriage who have become Christians, especially of the Roman Catholic faith, may want to convert their marriage into a monogamous marriage to live their full Christian lives. Also, parties to a monogamous marriage may want to convert their marriage into a polygamous marriage to fulfil some traditional requirements, for example when the husband is made a chief or paramount ruler of a kingdom and is expected to have several wives and lots of children or where the husband simply acquires a traditional title.

In Cameroon, there is no statute that allows for conversion of marriages from monogamy to polygamy and vice versa. One way of achieving this is to get a divorce and remarry, choosing the marriage option that will serve your purpose. However, getting a divorce where the marriage has not broken down is not envisaged under the received laws although it is accepted under customary law.

i) Under the received laws

Divorce will not be granted under the received law applicable in Anglophone Cameroon where both parties seek divorce to change their present form of marriage, because the only ground for divorce is the 'irretrievable breakdown of the marriage' and since the marriage has not broken down, the divorce will be refused. Similarly, in Francophone Cameroon, because divorce is based on fault grounds only, divorce will not be granted where no fault has been committed and both parties only want to divorce in order to change their present form of marriage. Couples whose marriages have not broken down but who need a divorce in order to change their present form of marriage

refunded or her family will have to replace her with another wife. A Kuper, *Wives for Cattle: Bride wealth and Marriage in Southern Africa* (Routledge and Kegan Paul Ltd 1982) p26.

may be tempted to fabricate lies to circumvent these rules and get a divorce. In my view, divorce by consent of the parties should be allowed in such a situation. An alternative and more satisfactory solution is for parliament to enact a law that will permit couples to convert their marriage from a monogamous marriage to a polygamous marriage and vice versa without going through divorce. Although no statute allows for such conversion, the High Court of Bamenda in *Babila Njingum John v Miriam Therese Dook*⁶⁹ granted the husband's request when he applied to that court to have his monogamous marriage converted into a polygamous marriage.⁷⁰

ii) Under customary law

Under customary law, it is possible to obtain divorce on the basis that both parties consent to divorcing even though the marriage has not irretrievably broken down or not broken down at all. In Cameroon where no written law allows for the conversion of a monogamous marriage into a polygamous marriage and vice versa, such a change of type of marriage has been possible through divorce under customary law.⁷¹ In *Nako Kofele Martin Alain v Ndive Epeti Likawo*,⁷² the husband was made the head of the family and both the husband and wife agreed to convert their monogamous union into a polygamous one. The divorce was granted. Such a situation is not envisaged under the received laws. This is an extreme liberal form of divorce which exists under customary law, as it permits happily wedded couples to get a divorce to come out of an unwanted form of union. As stated above, a preferable solution to the above problem would be for parliament to enact a law allowing for the conversion of marriages from monogamy to polygamy and vice versa. However, in the absence of the said law, this form of divorce should be accepted. The non-fault-based grounds for divorce could fall under two grounds; divorce by consent and where the marriage has broken down

⁶⁹ (Suit N°HCB/112m/89) unreported.

⁷⁰ See Chapter Five p255 - 258.

⁷¹ Although the High Court in the Babila Njingum case (n69) accepted the applicant's request to convert his monogamous marriage into a polygamous one, it is doubtful that such a decision would be maintained were the case to go on appeal. More of this is discussed in the next chapter p255 - 258.

⁷² (CRB n° 2, 2012-2013-Customary Court Tiko) p1 unreported. It is not very clear why this case had to be dissolved in a customary court since it was a monogamous marriage and all customary marriages are polygamous.

irretrievably as evidenced by a period of separation. The above study shows that the law of divorce in Cameroon is thorny, discriminatory, archaic, confusing and in need of reform. The next subsection examines the direction for reform.

2) Directions for reform.

Several trends emerge for a modernized and non-discriminatory law of divorce in Cameroon. In my view, the law should retain fault-based grounds for divorce. Fault is the primary ground for divorce in Cameroon both under the received law and customary law.⁷³ The existence of fault-based grounds for divorce signals that marriage carries important duties. Moreover, fault grounds could encourage spouses to make sacrifices that benefit their family, based on the expectation that the marriage is a long-term commitment.⁷⁴ However, procedural safeguards against 'bitterness, distress and humiliation' which fault divorce could provoke should be put in place.

Nonetheless, divorce should not be restricted to fault-based grounds. Where the marriage has become an empty shell, the law ought to release the parties even where no fault has been committed. Consent should therefore also constitute a ground for divorce. Divorce should be granted where the parties no longer wish to live together as husband and wife and both consent to the decree of divorce being granted. Consent divorce will also be useful to spouses who wish to divorce and then remarry under a different form of union. Divorce should also be granted where the parties have lived apart for a certain length of time. Living apart for a considerable length of time could signify that the marriage has irretrievably broken down.

a) Reform of the received law in Anglophone Cameroon

The divorce law, under the Matrimonial Causes Act, has been criticised especially by the Law Commission.⁷⁵ One of the criticisms levied by the Law Commission is that the law is confusing and misleading.⁷⁶ The only ground

⁷³ Also, the draft Family code has only fault grounds for divorce.

⁷⁴ A Parkman, 'Mutual Consent Divorce' in A Dnes & R Rowthorn, *The Law and Economics of Marriage & Divorce* (Cambridge University Press 2002) p61.

⁷⁵ The Law Commission (Law Com N° 192) *The Ground for Divorce*, Part 11.

⁷⁶ *ibid* (i) 2.8 p5.

for divorce under the Act is stated to be the 'irretrievable breakdown of marriage' which suggests that fault is not the basis for granting the divorce. Yet before a decree of divorce is granted, the petitioner must prove one or more of five facts, three of which do involve fault.⁷⁷ This confusion could be eliminated by removing 'irretrievable breakdown' as the only ground for divorce and replacing it with multiple grounds. The facts found in the Matrimonial Causes Act, section 1(2) (a-e) could be independent grounds for divorce and not proof of irretrievable breakdown of the marriage. These five facts could be split into three grounds for divorce. As sections 1 (2) (a)-(c) deal with the behaviour of the respondent, they could be subsumed under one ground, namely that the respondent has behaved unreasonably. This new ground would cover current instances of fault grounds under section 1(2) (a)-(c). Reasonable behaviour such that the petitioner cannot reasonably be expected to live with will fall under a different ground since it does not deal with fault. It should be noted that some marriages do not break down because of any of those five indicators of breakdown. These indicators are generally the consequences rather than the causes of breakdown.⁷⁸ Some marriages break down because the reasons for contracting these marriages no longer exist. Some people get married because of the financial status of the other party and others because of love. Where a marriage is based on love, it will break down if the love fades away. This fact is found in divorce suits in Cameroon as well as in England,⁷⁹ but because faded love is not a fact that is needed to establish irretrievable breakdown under the Act, attention is never focused on it.⁸⁰

More generally it seems illogical for an English court (or a court in Anglophone Cameroon) to observe that a marriage has broken down irretrievably but yet be unable to grant a decree of divorce because one or more of the five facts under section 1(2) (a-e) have not been proven.⁸¹ Strictly speaking, the court should not come to the conclusion that the marriage has broken down irretrievably unless one or more of the five facts

⁷⁷ *ibid.*

⁷⁸ AN Lowe and G Douglas (n13) p213.

⁷⁹ *Stringfellow v Stringfellow* (1976)2 ALL E R p539; *Buffery v Buffery* (1988)2 FLR p365

⁸⁰ A Diduck, *Law's Family-Law in Context* (Lexis Nexis Butterworths 2003) p45. It could also be because it is very subjective and thus difficult to prove.

⁸¹ Matrimonial Causes Act 1973 section 1 (2).

have been proven, even if it is convinced that the marriage has come to an end.⁸² Conversely the Act provides that, if any of the five facts is proved, the court should grant a decree of divorce 'unless it is satisfied on all the evidence that the marriage has not broken down irretrievably.'⁸³ This provision is also confusing as it suggests that there need not necessarily be a link between the 'irretrievable breakdown' and the fact(s) established.⁸⁴

Section 1(2) (b) of the Act is also confusing. It states that divorce will be granted where 'the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent.' This provision is frequently referred to as 'unreasonable behaviour' which insinuates 'blameworthiness or outright cruelty on the part of the respondent.' However, the fault connotations have been described as 'a linguistic trap' since the behaviour itself need not necessarily be unreasonable or cruel. Focus must be on its effect as the behaviour must be such that the petitioner cannot reasonably be expected to live with the respondent. Section 1(2) (b) thus contains 'a significantly different and more flexible concept which is obviously capable of varying from case to case and court to court'⁸⁵ This could include both fault and non-fault 'grounds.' This ambiguity has led to conflicting interpretations and applications of section 1(2) (b) in Cameroon. To eliminate this confusion, I would recommend that section 1(2) (b) should be based exclusively on fault grounds and require 'unreasonable behaviour' on the part of the respondent. As well as removing any linguistic ambiguities, this modification of section 1 (2) (b) would be in line with the importance of fault in divorce Cameroonian laws. However, because my proposals include both fault and non-fault grounds divorce should also be granted where the behaviour of the respondent is not unreasonable but is such that the petitioner cannot reasonably be expected to live with. This will however, fall under a different ground.

Another criticism levied against the Matrimonial Causes Act is that it distorts parties' bargaining positions. Negotiations about the future care of children and distribution of family assets may be distorted by whichever of the party is

⁸² MCA 1973 section 1 (2).

⁸³ MCA section 1 (4).

⁸⁴ Law Commission (Law Com N^o 192), *The Ground for Divorce* (n75) p5-2.9.

⁸⁵ *ibid* p5-2.10.

in a stronger position in relation to the divorce itself.⁸⁶ In almost all legal actions, parties are hardly in the same bargaining position. Nevertheless, to help the parties reach an agreement, conciliation should be encouraged. This could be done by the parties' legal representatives. The judge could also have a meeting with the parties individually and with the two of them together with the aim of making sure that the parties have arrived at an agreement that is just and free of coercion.

Furthermore, the Act has been criticised for being discriminatory and unjust. The fault-based fact was considered 'intrinsically unjust'.⁸⁷ 'Justice in this context means...the accurate allocation of blameworthiness for the breakdown of the marriage.' Both parties could have contributed to the breakdown of the marriage. The petitioner could even have contributed more. However, the respondent could then cross-petition for divorce. It has been said that 'restricting divorce to matrimonial fault is illogical' because 'where both parties are equally guilty, it denies them both divorce.'⁸⁸ This conclusion however should not be the only interpretation in situations where both parties have contributed to the breakdown. In my view, where both parties are guilty, instead of refusing them both the divorce, the divorce should be granted to both. In such a situation, the respondent could cross petition based on the fault of the petitioner and, the divorce will be granted to both. This is the position adopted by the courts in Francophone Cameroon where divorce is granted only on fault grounds.⁸⁹

In addition, the Act has been criticised for doing 'nothing to save the marriage.'⁹⁰ The liberal position adopted by the Act favours divorce over the stability of marriage. Despite this stance, reconciliation should always be encouraged. Through reconciliation, efforts to save the marriage will be made and the overall pro-divorce stance toned down.

⁸⁶ *ibid* p7-8 (iii) and (vi).

⁸⁷ *ibid* p6.

⁸⁸ *ibid* p15.

⁸⁹ *Dame Tsafack Victoire épouse Assadio v Assadio Pierre* (Jugement n°21/CIV /TGI du 09 Novembre 2009-Dschang) unreported.

⁹⁰ Law Commission (Law Com N° 192), *The Ground for Divorce* (n75) p7-8.

b) Reform of the received law in Francophone Cameroon

All the grounds for divorce in Francophone Cameroon are fault-based. The respondent must have committed a fault before an action for divorce can be brought against him/her. This thesis advocates for the maintenance of fault as a ground for divorce because fault demonstrates the seriousness of the promise made on marriage. A fault-based divorce could preserve marriage as it could discourage petitioning for divorce based on an ephemeral dissatisfaction.⁹¹ It has been argued that fault-based-grounds are 'archaic and pathogenic',⁹² and are susceptible to provoke hostility and bitterness between the parties as they 'encourage one to make allegations against the other'.⁹³ This negative effect of the fault-based ground could be minimised if procedural safeguards are put in place. For example, the parties could be encouraged to settle ancillary matters before the divorce petition. Where a settlement is reached, the fault-based divorce could be transformed into divorce by consent. This could moderate the bitterness'⁹⁴ caused by the fault system. Moreover, non-fault-based grounds should be available as well.⁹⁵ If divorce is too restrictive, parties will go to extremes to circumvent the law. They might fabricate testimonies to establish fault grounds.⁹⁶ These unsatisfactory tactics, will be avoided however if divorce is also allowed on non-fault grounds.

c) Reform of customary law

Customary law is the signet of the people. Any reform process that touches on the personal law of the people must therefore take customary law into account. The customary law rules will therefore be the starting point of my proposed unified law. While some of the customary rules on divorce are discriminatory, others are worth preserving. Overall customary law on divorce is very diverse. Some of the rules are restrictive, while others are

⁹¹ E Scot, 'Marital Commitment and the Legal Regulations of Divorce' in A Dnes & R Rowthorn (n74) p35.

⁹² H Fuchiron, 'The New French Divorce Law' (2005) *ISFL* p242.

⁹³ Law Commission (Law Com N° 192), *The Ground for Divorce* (n75), p7 (iv).

⁹⁴ This solution has been adopted by the new French Divorce law.

⁹⁵ These other non-fault grounds have been discussed in the last section.

⁹⁶ L Stone, *Road to Divorce: A History of the Making and Breaking of Marriage in England 1530-1987* (Oxford University Press 1997) p17; A Parkman, 'Mutual Consent Divorce' in A Dnes & R Rowthorn (n74) p61.

liberal. The customary practices show that divorce is generally accepted, although it is usually disapproved of. Some customary courts have refused to grant divorce to the petitioners even when it seems that their marriages had broken down irretrievably.⁹⁷ In one case the divorce petition was dismissed because of the needs of the extended family. Following the respondent's father's testimony that he and his wife were not only old but blind and therefore needed the assistance and maintenance from the respondent and plaintiff, the court, 'moved with pity,' ordered that 'the marriage shall not be dissolved.'⁹⁸ Divorce has also been refused under customary law to a petitioning wife on the ground that she had reverted from using her husband's name to using her own maiden name before petitioning for the divorce.⁹⁹ It should be noted that no law in Cameroon obliges a married woman to use her husband's name, yet the use of her maiden name before the divorce was held against her. This is an example of withholding of divorce to punish the woman. Besides, the rule is discriminatory because a man could use his name before, during and after marriage and no one will question him. Such a discriminatory rule is neither meant to protect the institution of marriage, nor serve anybody's interest. It should therefore be abolished. A marriage that has broken down irretrievably should be capable of being dissolved especially in situations where maintaining the marriage does not serve anybody's interest. Yet other Customary Courts have granted divorce on the mere ground that the marriage was inconveniencing the plaintiff.

In all customs reconciliation is encouraged. However, where reconciliation fails, the divorce will be accepted. Parties will however only be divorced when the marriage symbol has been refunded. The marriage symbol plays an important role in customary marriages and divorces. Some of the discriminatory rules on customary divorces are centred on the marriage

⁹⁷ *Paul Anya v Helen Bih Anya* (Civil book 8/86-87 p23, Customary Court Limbe).

⁹⁸ *ibid.* However, on appeal by the husband, the Court of Appeal annulled the decision. The Court of Appeal quoted section 5(1) of the Judicial Organisation Ordinance which states that 'all judgments must set out the reasons upon which they are based in fact and in law' and since pity is not one of the reasons contemplated by the section, the judgment was annulled because it was 'not a case of wrong reasoning but one of no reason being given at all.' (CASWP/cc/9/88) unreported.

⁹⁹ *William Ngah of Babessi 1 v Ogen Takang of Kokobuma* (CRB 2/06-77 p151-156) unreported.

symbol. The next section will thus examine the effect of the marriage symbol on divorce.

B) THE MARRIAGE SYMBOL: SHOULD IT BE EXCLUDED OR INCLUDED AS A CONDITION FOR DIVORCE?

Reform of the law of divorce in Cameroon would not be complete without an analysis of the importance and effect of the marriage symbol on divorce. The non-refund of the marriage symbol has far-reaching consequences on 'divorce'. The section seeks to give an answer to the issue as to whether the requirement that a marriage symbol be paid upon marriage and refunded upon divorce be abolished. I will argue that while abolition of this requirement should for the time being be ignored, the requirement should have no effect on the validity of the divorce. The courts, particularly the Customary Courts in Anglophone Cameroon, should ignore the practice and not base the validity of a marriage or divorce on the payment or non-refund of the marriage symbol. The law obliges married persons to register their marriage and such registration should serve as proof of marriage and not whether marriage symbol was given or not. Before I examine the consequences of the non-refund of the marriage symbol, I will first consider the importance currently conferred on the marriage symbol.

1) The importance of the marriage symbol

a) Marriage symbol: a covenant and security which creates a bond between two families.

The institution of the marriage symbol is seen as 'the most concrete symbol of marriage covenant and security'¹⁰⁰ under customary law. As a Christian says to his bride 'with this ring I thee wed', an African will say to his bride 'with this symbol I thee wed.' The ring and the symbol are symbolic but they

¹⁰⁰ J Osom, *Moral Implication of High Bride-Price in Nigeria: "Annang Case Survey"* (Doctoral Dissertation in Moral Theology Rome 1989) p38.

play a vital role in these cultures.¹⁰¹ If a Christian is not wedded in church, he/she may feel something is lacking in the marriage, which is God's blessings. Thus, if the marriage fails, the failure may be attributed to the fact that the marriage had not been blessed by God and therefore was doomed to fail. Similarly, in a customary marriage, if the marriage symbol is not given by the boy's family or the girl's family refuses to take the marriage symbol, the couple will feel that there is something lacking in their marriage to make it stable namely, the marriage symbol, which symbolises the consent and blessings from one or both parents.¹⁰² This reasoning has been extended to marriages celebrated by a Civil Status Registrar even where the consent of the bride and bridegroom's parents is not necessary because the parties are adults.¹⁰³ For example, in the case of *Njotsa v Njotsa*,¹⁰⁴ the judge noted that:

The failure of this marriage has been sealed by the fact that it did not when it was being solemnised, and does not even now, enjoy the blessings of the couple's respective parents. In these circumstances, it will not be in the interest of the parties to keep it on.

When the marriage symbol is given, the parties receive the consent and blessings from their parents and the couple feel committed to one another.¹⁰⁵ Where the marriage symbol is not given, the woman may feel that she is being used by a man who might eventually abandon her. The union could be likened to a partnership in which any of the parties can quit at any moment. The non-payment of the marriage symbol is therefore a potential cause for the instability of the marriage. The marriage symbol serves as a 'stabilising factor' in the marriage and a bond which unites the two families.¹⁰⁶ It has equally been said that by providing the marriage symbol, the husband values

¹⁰¹ D Nsereko, 'The Nature and Function of Marriage Gifts in Customary African Marriages' (1972) 23 *AJCL* 691 at p696. However, the ring and the symbol do not play the same role. In a Christian marriage, the husband pronounces those words to the wife and puts a ring on her finger and the wife does the same. With the marriage symbol the husband gives the symbol and the wife's family gives the bride in return. The ring is the symbol of the spouse's commitment to one another. The marriage symbol is more akin to a transaction.

¹⁰² If the girl's parents object to the marriage, they will refuse the marriage symbol.

¹⁰³ 21 years of age.

¹⁰⁴ (1971-73) UYLR p5

¹⁰⁵ It is not uncommon for the husband, in the heat of a quarrel with the wife, to pronounce words like 'you [referring to the wife] can go, after all who paid your bride price?'

¹⁰⁶ J Osom (n100) p37.

the wife more because 'one really values what he suffers for'.¹⁰⁷ The marriage symbol may be a token amount which could be as little as £12.¹⁰⁸ Therefore while the husband may value 'what he suffers for', the value is not measured in terms of money but in the whole process of getting the two families to give their consent, which is exemplified by the payment and acceptance of the marriage symbol. However, because of its important role in protecting the institution of marriage, the practice of the marriage symbol could be maintained but failure to pay it should not render the marriage void. The marriage symbol could be treated like the wedding ring. While the wedding ring is very important to Christians it has no legal effect on the marriage or divorce. Although the wedding ring has now become a symbol of commitment, originally it was the husband who placed the ring on the wife's finger as a symbol of a valuable gift from him to the wife and also to symbolise the contract between the two families and ownership of the bride by the husband. It is only in the mid-20th century that rings began to be exchanged between both husband and wife to symbolise commitment to each other. As tradition or culture evolves this shift with the wedding ring could eventually happen with the marriage symbol. This is more so as customary law (and my proposed unified law) will not be enforcing the payment or refund of the marriage symbol. The symbolic and cultural importance of an act should not necessarily be transferred to its legal importance.

b) Marriage symbol versus the written law

The payment of the marriage symbol is an important factor in the celebration of a customary marriage especially in Anglophone Cameroon and its non-payment renders *the* marriage void. In *Peter Lisanji v Nalova Namme*,¹⁰⁹ it was stated by the Court of Appeal of the South West Province (now South West Region-Anglophone Cameroon) that;

Under Bakweri laws and customs, there was no marriage between the Appellant and the Respondent's daughter, since there was no traditional assessment of the bride price.... That particular custom is

¹⁰⁷ *ibid.*

¹⁰⁸ The marriage symbol could also be as high as £2500.

¹⁰⁹ (1980) CASWP/cc/44/80, unreported.

itself so notorious that it is one which the court can properly take judicial notice.

In a later case before the same court, Ngwanmesia J, in *Thomas Ngwa v Sylvester Ngangfor* stated that, 'in the traditional customary law marriage, the lack of dowry nullifies the marriage. It is unlike the Europeanised type of marriage where want of dowry does not in any way vitiate the marriage'.¹¹⁰

These cases contradict the provisions of section 70(1) of the CSRO which states that: 'The total or partial payment or non-payment of dowry, the total or partial execution or non-execution of any marriage agreement shall have no effect on the validity of the marriage'.¹¹¹ Although the above cases were decided before the coming into force of the CSRO,¹¹² cases decided after the coming into force of the ordinance have maintained the same position. For example, in *Hadrine Emilia Ngomba v Robert Ndivé Ngomba*,¹¹³ where the parties had been 'married' for 25 years but the wife's father had refused to take the marriage symbol, the Customary Court declared the parties unmarried and thus 'living together as lovers or concubines'. Surprisingly, such decisions taken by the Customary Courts after the enactment of the CSRO have been affirmed by the Court of Appeal in Anglophone Cameroon. In *Joseph Achu v Lucas Afa*, the Court of Appeal of the South West Province (now South West Region-Anglophone Cameroon) pointed out that '*the important essentials of a valid marriage under native law and customs are... the giving and acceptance of the dowry*'.¹¹⁴ Similarly in *Ndi v Ndi*, that same Court of Appeal declared a marriage to be void because no marriage symbol was given. The court declared that 'bride price not having been paid, the plaintiff/appellant cannot assert that he has contracted a valid customary marriage'.¹¹⁵

Unlike in Anglophone Cameroon, the courts in Francophone Cameroon have respected the rules stipulated in the CSRO. Even before the coming into force of the CSRO, the Supreme Court had decided in a case emanating from Francophone Cameroon that the validity of a marriage does not depend

¹¹⁰ (1981) CASWP/cc/350/80, unreported.

¹¹¹ S.70 (1).

¹¹² 29th June 1981.

¹¹³ (Civil suit n° 174/86-87 CRB3/86-87 Customary Court Buea) unreported p133.

¹¹⁴ (1983) CASWP/cc/52/83 unreported.

¹¹⁵ (1984) CASWP/cc/61-2/84, unreported.

on the payment of the marriage symbol.¹¹⁶ The CSRO is meant to have uniform application in the entire nation, but this goal has not been achieved. The main hindrance to the application of uniform laws in Cameroon is due to the multiplicity of laws governing the same issue. An enacted legislation supersedes customary law, therefore where a customary rule is contrary to an enacted legislation, that customary rule ought not to apply. Nevertheless, the courts have continued to apply the repealed customary rule. Though this practice is much more common with the courts in Anglophone Cameroon, courts in Francophone Cameroon have also shown such tendency. For example, in *Affaire Mbeuchem c/ Joseph Yetchi Jean et Sanjo Julienne*,¹¹⁷ Sanjo Julienne had obtained a divorce judgement by default against her husband, Mbeuchem in France, but had failed to notify him. She later got married to Yetchi Joseph with whom she had eight children. Mbeuchem Jean petitioned the High court of Douala (Francophone Cameroon) to nullify the marriage between Sanjo Julienne and Joseph Yetchi. The court declared the marriage bigamous and recognised Mbeuchem as the father of the eight children.

Would a proposed legislative reformed unified law on divorce not run the risk of being similarly ignored? It is submitted that non-enforcement of the CSRO nowadays is largely due to the multiplicity of normative layers. When a case falls under customary law, many judges turn exclusively to customary rules and fail to apply the superseding legislative rules. Under my new proposed system however, the legislative provision will be the only law applicable. Any doubt as to its application will therefore be avoided.

To have an optimum application of the unified laws, it is also important that the court system should be unified. A single court with original jurisdiction on divorce matters which would have only a single law to apply should therefore be put in place. Such unified law would thus ensure that non-payment of the marriage symbol no longer affect the validity of the marriage. Shouldn't the new proposed law more radically seek to eradicate the practice? Arguably the practice of paying a marriage symbol is demeaning for women.

¹¹⁶ *M Fabien c M Marie Louise* (1974) 6 Rev. Cam. Dr. p175.

¹¹⁷ (Jugement Civil du 16TGI Avril 1990 Douala) unreported.

c) Marriage symbol: a reflection of ownership of the husband over the wife

When the marriage symbol is given, the husband may feel that the woman is his property and expects too much from her in terms of performing household chores and even working for him in his business without being paid. An illustration may be found in *Canicia Njanchang v Mbakop Paul*.¹¹⁸ In this case, the plaintiff (Canicia) and the defendant (Paul) got married and a meagre amount of ten thousand francs (less than £15) was given as marriage symbol by the husband to the plaintiff's family. Both the plaintiff and the defendant lived in Kumba. The defendant was a farmer and the plaintiff helped him with his farming. When she fell ill, instead of taking care of her, the defendant beat her and compelled her to go with him to the farm. When the illness became severe, she reported the matter to the gendarmes who advised them to live in peace, but the defendant did not change his 'cruel attitude' towards her. She then travelled to Bamenda. The defendant followed her to Bamenda. He was advised to take her to her father's house in Kumba for the matter to be resolved. When they got to Kumba, the defendant threatened the father to refund the marriage symbol. Eventually the marriage symbol was refunded and a divorce agreement was signed by the respondent, the plaintiff's father and a witness. Thereafter the plaintiff travelled again to Bamenda for treatment. The defendant made a complaint to the 'gendarmerie of Bare' that his wife had absconded. The plaintiff was arrested in Bamenda and taken to Kumba and from Kumba to Barre. The charge against her was that she had escaped from her husband. When she showed the signed 'divorce' document, the gendarmes were satisfied. The defendant however pleaded that she should return to him. The gendarmes accepted the defendant's plea on condition that he returned the refunded marriage symbol to the plaintiff's father within a week. The plaintiff went back to the defendant hoping that the defendant would pay the money back. Instead the defendant held her in the farm, and tried to persuade her that the money should not be repaid to her father. When she disagreed, he beat her. To justify his action the husband complained that because of the wife's illness and subsequent absence, his crops had been spoilt. Marriage to him

¹¹⁸ (CRB. 1/79-80) unreported p89-113.

was a means to 'buy' an assistant for farm duties. When the wife did not meet up to his expectation, the husband felt he had wasted the money paid as marriage symbol.

Similarly, in *Achu v Achu*¹¹⁹ Inglis J (in the Court of Appeal South West Region) held that:

Customary law does not countenance the sharing of property, especially landed property, between husband and wife on divorce. The wife is still regarded as part of the husband's property. That conception is underscored by the payment of dowry on marriage and on the refund of same on divorce.

Arguably the practice of paying a marriage symbol reduces women to property. If the concept that a human being (the wife) can be the property of another (the husband) is accepted, then the notion of divorce will become unnecessary. The husband would not need to petition for divorce to do away with his property and property (the wife) could not petition for divorce. Such a standpoint is unacceptable. It violates human dignity, a value which goes to the very essence of human existence. It is also contrary to the Constitution¹²⁰ and the international treaties which Cameroon has duly ratified such as the Convention on the Elimination of all Forms of Discrimination against Women.¹²¹ The objectification of women should be eradicated. One method of eradicating this objectification of women is that the giving of the marriage symbol should be done both ways just as the wedding ring. The financial value of the marriage symbols need not be equal. It is sufficient that it is accepted by both families. In this way, the wife will no longer be regarded as the husband's property because she (or her family) has also given marriage symbol to the husband (or his family). However, this solution may, for the time being, not be accepted by the people, but it is hoped that with the negative effect of the marriage symbol and the evolution of culture such an approach will eventually see the light of day just as the wedding ring.

A second solution is to prohibit any payment of the marriage symbol. However, considering the importance of the marriage symbol in customary

¹¹⁹ (1988) BCA/62/86 unreported.

¹²⁰ Preamble to the Constitution.

¹²¹ Ratified on 23rd August 1994.

practices, such an approach is not adopted in this thesis. Another solution would be to keep the payment of a marriage symbol as an optional practice and to neutralise the obnoxious effects of the marriage symbol. As the modern courts are already moving in this direction,¹²² it is likely that this change would be enforced and respected in a unified system of courts and law.

Is the other usual meaning of the marriage symbol – as compensation to the wife’s family – more respectful of women?

d) Marriage symbol as compensation to the wife’s family

The marriage symbol currently serves as compensation to the wife’s family for the loss of her services. When a woman gets married, she leaves her family and becomes a member of her husband’s family. All the work and household chores she used to perform in her family are then transferred to her husband’s family. In that sense marriage of a female could be considered a loss to her family and a gain to the husband’s family. Thus, the symbol serves as consideration for the services transferred from the wife’s family to the husband’s family. The bride’s family is parting with someone they value (their daughter) and therefore receives some compensation (the marriage symbol). Consequently, if the wife eventually returns to her family after divorce, her family should return to the husband’s family what they had received as compensation (the marriage symbol). This conclusion will have force in cases where the divorce is based on a fault committed by the wife. In such a situation, the woman becomes a commodity. The woman at fault may be compared to a flawed purchased product. If a man buys a defective product (wife), he should have the right to return the product (divorce) and collect his money (marriage symbol). Under that model the refund of the marriage symbol is a logical conclusion for a valid divorce. However, marriage should be regarded as a two-way event where both parties (husband and wife), and not just the wife, leave their respective parents and unite to form their own home. In this situation if the wife’s family is losing her services, the husband’s family is also losing his services and should also be

¹²² *Fomara Regina Akwa v Fomara Henry Che* (2002) CCLR p33-39.

compensated by the wife's family. In this light, the marriage symbol should be paid by both families; the wife's family to the husband's family and the husband's family to the wife's family. This will create equality of treatment and the wife will not be regarded as a commodity.

There are however exceptions in customary law to the requirement of refund of the marriage symbol upon divorce.

e) Exceptions to the rule on the refund of marriage symbol

There are no uniform rules as to whether the marriage symbol should or should not be refunded. In some villages, the refund will depend on the duration of the marriage and whether there are children or no children in the marriage. Where there are no children, a full refund of the marriage symbol might be expected. But where there are children and the marriage has lasted for a long period, some customs might consider that there should be only a partial or no refund in recognition to the children born out of the marriage and the services rendered while the couple were married.¹²³ However, if the wife seeks divorce in a situation where the husband has committed no fault, the marriage symbol will need to be refunded.¹²⁴ If her petition is based on a serious fault¹²⁵ (such as continuous battery) by the husband, she may be exempted from the requirement of the refund. In such a case, the refund of the marriage symbol would be optional.¹²⁶ Thus fault is relevant in determining whether the marriage symbol should be refunded, and if it should be refunded, in what proportion. However, there are variations across villages. In some villages, the marriage symbol must be refunded irrespective of the gravity of the fault of the husband. Thus, in the case of *Miamo Lydie v Nana Celestin*,¹²⁷ the plaintiff and the defendant got married in 2004 and had 4 children by the time of the trial, in 2014. The defendant (husband) was a violent man who insulted and beat the plaintiff even when she was pregnant, and prevented her from associating with her friends and

¹²³ J Mbaku, Culture and Customs of Cameroon (Greenwood press Connecticut 2005) p147.

¹²⁴ For example, if the wife divorces the husband because he is mentally ill or because she finds someone she loves more than the husband.

¹²⁵ Adultery by the man is not considered as a serious fault.

¹²⁶ The parents of the wife might want to return the marriage symbol if they consider it is the right thing to do.

¹²⁷ (n44).

family members. He had even returned gifts that the wife's father had sent to their children. Yet the Buea Customary Court asked the wife to refund the marriage symbol when she petitioned for divorce. This decision goes against the Court of Appeal's ruling (still within the same region) in the case of *Paul Anya v Helen Bih Anya*¹²⁸ in which the court held that

Where a marriage has yielded offspring, whether such offspring are dead or living, it is against public policy, "that is natural justice, equity and good conscience" as spelt out in the Southern Cameroons High Court Law 1955, to demand a refund of bride price or to receive it.

This decision could lead to the conclusion that the Customary Courts in Anglophone Cameroon seem to operate outside the hierarchy of courts in Cameroon. In Anglophone Cameroon where the doctrine of binding precedent is applicable, the Buea Customary Court ought to have applied the rule as laid down by the Court of Appeal, especially as it is the Court of Appeal of the same region. This decision by the Customary Court, coupled with the non-application of enacted legislation by that court, is problematic. This problem could be solved by creating a unified system of court and law whereby a single court would have original jurisdiction in divorce matters and would have to apply only the unified law.

The requirement to refund the marriage symbol may thus vary according to customs and the consequences that are attached to the failure to refund the marriage symbol are also subject to variations.

2) Consequences of the non-refund of the marriage symbol

The refund of the marriage symbol is sometimes an important factor in the termination of a customary marriage. There are no uniform rules as to when a customary marriage may come to an end. However, in most cases, a customary marriage will come to an end when the marriage symbol has been refunded¹²⁹ or waived by the husband. In the case of *Jinglele Ekeme David v*

¹²⁸ CASWP/cc/9/88.

¹²⁹ The refund of the marriage symbol on divorce is a rule that cuts across most traditions in Africa. See the following: A Armstrong, 'Away from the Customary Law' (1988-89) 27 *JFL* p348; D Nsereko, 'The Nature and Function of Marriage Gifts in Customary African Marriages' (n101) p691; R O Ekundare, *Marriage and Divorce under Yoruba Customary Law* (University of Ife Press 1969) p40.

Grace Ime Jingele,¹³⁰ the court granted divorce to the husband 'on refund of no dowry' although dowry (marriage symbol) was paid, because in his request for divorce, the husband stated that 'dowry' should not be refunded. In some tribes, such as the Bayangs of the South West region, the marriage symbol is refunded only when the woman remarries.¹³¹

The non-refund of the marriage symbol has far-reaching consequences in customary law and affects issues such as unilateral divorce, paternity, death, curses and burial prerogatives.

a) Non-refund of marriage symbol precludes unilateral divorce

The basis of marriage and divorce under customary law is centred on the marriage symbol. In most cases, if the marriage symbol is not refunded, the marriage remains valid.¹³² With the Bakweris of the South West Region, the husband cannot refuse to take back the marriage symbol. If he refuses, another member of the family may receive it in his place. Amongst the Okus in the North-West Region, if reconciliation fails, the traditional council (*kwifon*) will ask the couple to go home, close their doors and settle the matter in their bedroom.¹³³ The *kwifon* does not pronounce a divorce. If the parties do not wish to live together as husband and wife, they can separate but divorce is difficult to obtain. However, if the wife is willing to refund the marriage symbol and the husband is willing to accept it, then divorce can take place. In some cases, however, the wife may not be willing to refund the marriage symbol and even where she is willing to refund it, the husband may not be willing to accept it.¹³⁴ This precludes unilateral divorce. This works injustice for the woman who remains tied to the bonds of a marriage that has

¹³⁰ Civil suit 14/2003-2004.

¹³¹ *Ayuk Etang Elias Bechem v Manyi Agbor Serah and Agbor Simon* (Civil suit n° 44/85-86 Customary Court Kumba) unreported p37.

¹³² This is a condition that runs through most of the customs where marriage symbol is paid to the girl's family by the husband as a condition for the validity of the marriage. Even though the Civil Status Registration Ordinance clearly stipulates in section 70(1) that the payment or non-payment of the marriage symbol does not affect the validity of any marriage, no customary marriage is conducted without the payment of the marriage symbol and most customary marriages are considered terminated only when the marriage symbol have been refunded.

¹³³ Information received during my interview in March 2015.

¹³⁴ Unlike in Bakweri land where a member of the husband's family could accept the refund of the marriage symbol, in Okuland only the husband can accept the refund of the marriage symbol.

factually fallen apart and because the marriage is polygamous the husband could marry another woman without divorcing her.

Besides, as the marriage has not been dissolved because of the non-refund of the marriage symbol, the husband continues to be the father of subsequent children born of the woman.

b) Non-refund of marriage symbol and paternity

If the marriage symbol is not refunded and has not been waived by the husband, the marriage remains valid. Consequently, all the children born of the woman belong to the husband. The presumption that children born to a married woman belong to the husband also exists under French and English laws. However, while the presumption under French and English laws is rebuttable, the presumption under customary law is irrebuttable. The marriage symbol under customary law transfers the reproductive power of the woman from her family to that of the husband. The African conception of legitimacy is thus built on the marriage symbol. A man, although he can be the biological father of a child, cannot claim to be the legitimate father of that child (under customary law) unless a marriage symbol has been given. In a nutshell, the marriage symbol makes men fathers.¹³⁵ An example is the case of *Ngeh v Ngome*.¹³⁶ In the above case, Paulina Mekang left her husband Ngome and went on to live with another man, Paul Ngeh. She gave birth to twins, many years after she had left her husband. As the marriage symbol had not been refunded, Ngome sought to claim the twins as his and the court granted his request. However, on appeal, Gordon C.J refused to uphold such a custom and criticised the judge for allowing 'rules and regulations of native law and custom to have enslaved him as to have caused him to close his eyes to biological and other realities'.

In *William Abang v Beatrice Enda*,¹³⁷ the appellant claimed paternity of two children he had with the respondent. The Customary Court dismissed the claim because no marriage symbol was given and therefore there was no marriage between the mother and the appellant. The decision was upheld by

¹³⁵ P Mayer (n68) p57.

¹³⁶ (1963) *WCLR* p32-33.

¹³⁷ (1987) *BCA* unreported.

the Court of Appeal. By the custom of the Menka people the child belongs to the man who gave the marriage symbol. And where no one gave the marriage symbol the child belongs to the girl's parents. The practice is contrary to section 72 of the CSRO which states that

*The total or partial settlement of a dowry shall under no circumstances give rise to natural paternity which can only result from the existence of blood relations between the child and his father.*¹³⁸

Enlightened and rich people will not usually claim paternity of unrelated children as they will not want to place more burdens on themselves and reduce the inheritance of their biological children. However, villagers might welcome the extra hands that these children would bring, even though they don't have the ability to provide for their up-keep. The boys will become farmhands¹³⁹ and the girls a source of revenue through future marriages. Thus, in this traditional set up, it is the children who suffer the most. The child/children might have to live with a stranger, possibly in a strange village. A man might also want the child/children not only as farmhands and as a source of revenue but also out of vengeance for his wife's 'divorce'. The children are most likely to be subjected to difficult living conditions and their mother will endure the anguish of her former husband claiming her children. This connection between the marriage symbol and paternity deprives the biological father of his rights over his child/children and exposes the children to harm. The custom has already been banned by the CSRO. The present problem lies in the lack of respect and enforcement of the written law. The CSRO is a national legislation which supersedes all customary law and ought to apply throughout the entire nation. However, because of the pluralism of courts and laws in Cameroon, the law is not currently being respected. Too often the law is set aside where a customary marriage is involved. For the laws to be effective, a unified system of court and law should be put in place. This will ensure that only a single court is available to administer the only law. This current negative effect of the marriage symbol on women at times continues even after the death of the husband.

¹³⁸ Art 72.

¹³⁹ The main occupation of the villagers is agriculture.

c) Marriage symbol: a symbol beyond death

Divorce is particularly difficult to obtain with the Bassas of the littoral region. In Bassa land, marriage concerns the individuals as well as their two families but it also concerns the dead (ancestors) and the living. During the marriage ceremony, the words spoken by the officiating elder are taken very seriously either to bless (if you keep your promises) or to curse (if you do not keep your promises). During the ceremony, the spirits of the dead ancestors of the couple are invoked. The couples then take their engagements between the living and the dead. When the living and the dead meet, it solidifies the marriage. It is easy to break up a commitment taken with the living but to break up a commitment with the dead is very difficult. That is why it is difficult to dissolve a marriage in Bassa land. The reason for this is to stabilise the marriage because marriage is seen as a very important institution which should not be dissolved at the mere will of the parties. Generally, what is common is separation and not divorce. However, this does not mean that divorce does not exist in Bassa land. Like in most of the other ethnic groups, if it is the woman who is opting for the divorce, she must refund the marriage symbol and all other expenditure that the man has incurred on her and her family. If the husband sends the wife away, he must explain the reason behind his action to the two families. He can only do so if the wife has committed a serious offence like murder or attempted murder. Even adultery by the wife is not a ground for divorce in Bassa land, although the woman can be disciplined. When the woman leaves the matrimonial home on her own accord, it is expected that the husband should go after her, because a woman is like family property that you cannot abandon. In any case if she leaves the matrimonial home on her own accord, it does not constitute divorce unless the marriage symbol is refunded.¹⁴⁰

A customary marriage unites two families and not just two persons. It is a relationship between the individuals concerned and their families. Even death does not put an end to a customary marriage.¹⁴¹ Upon the death of a woman's husband, the husband's brother or uncle or any other male relative

¹⁴⁰ The above information was obtained during my interviews in March 2015.

¹⁴¹ M Doumbé-Mouloungou, *Les Coutumes et le Droit au Cameroun* (Edition Clé Yaoundé-1972) p41.

of the deceased husband, except her son, is expected to take over her as a husband. If she does not accept any of the deceased husband's relative any child begotten by her still belongs to the late husband or his family. As a condition for the termination of the marriage either by death or by divorce, the woman must refund the marriage symbol.

Unlike the customs of the Bakweri people where a member of the family can accept the refund of the marriage symbol in place of the husband, even where the husband has refused to take it, in Oku land only the husband can accept the refund of the marriage symbol. However, in Oku land it is difficult for a man to accept the refunded marriage symbol because if he does, he loses his children to the wife's family. The children will no longer be considered his. Consequently, he will no longer have any control over them. On the part of the woman, she may not want to refund the marriage symbol because if she does, the children will no longer belong to the former husband and she may not be able to take care of the children alone. Therefore, even if the wife runs to her father's compound and the husband wants to take back the marriage symbol, the wife or her father might refuse to refund it. Thus, if the husband should die without accepting the refund of the marriage symbol, the woman will never be able to remarry because she did not get a divorce. She cannot even get married outside Okuland, because her parents cannot receive a second marriage symbol for the same daughter and a customary marriage is valid only when the marriage symbol has been given.¹⁴² She is considered as the 'property' of the husband. She can 'neither inherit nor administer the property of her deceased husband because she is part of the chattels of her deceased husband to be inherited or administered.'¹⁴³ Until the marriage symbol is refunded, the father cannot collect the 'property' (daughter) to give to another man. Even though the justification for these customs is to preserve the marriage, the effect might be that the couples would be living in bondage. They might want to be free, to remarry, to start their lives over again, but they cannot because of the dreadful consequences of the non-refund of the marriage symbol which extends even beyond death.

¹⁴² The above information was obtained during my interviews in March 2015.

¹⁴³ *Sikibo Derago v Ngaminyem Etim* (1982) BCA/36/81 unreported.

This custom is contrary to the written law which says that, '*In the event of death of one of the spouses or of legally pronounced divorce, the marriage shall be dissolved.*'¹⁴⁴ The law also provides that

*In the event of death of the husband, his heirs shall have no right over the widow, or over her freedom or the share of property belonging to her. She may, provided that she observes the period of widowhood of 180 days from the date of the death of her husband, freely remarry without anyone laying claim whatsoever to any compensation or material benefit for dowry or otherwise, received either at the time of engagement, during marriage or after marriage.*¹⁴⁵

This law is important as it exonerates the woman from refunding the marriage symbol, protects her property, liberates her from levirate marriage and gives her freedom to remarry whosoever she chooses to marry provided that 'she observes the period of widowhood of 180 days from the date of the death of her husband.' However, the law is ignored in many customary communities. Respect for customary laws is also tied to belief in witchcraft.

d) Non-refund of marriage symbol: curses and witchcraft

The fear of witchcraft is one of the reasons why some of the villagers adhere to customary traditions. It is believed in Cameroon and the African society generally that witches and wizards exist with supernatural powers capable of carrying out mystical activities.¹⁴⁶ It is often believed that failure to refund the marriage symbol might trigger curses and witchcraft. Traditional beliefs thus support the requirement of refunding the marriage symbol. In Dschang, in the West Region for example, the illness of a man was thought to flow from his mother's failure to refund the marriage symbol upon divorce. It was discovered that the mother of the sick man had 'divorced' her husband but the marriage symbol had never been refunded. She had then moved to Bansa, got married to a second husband and had given birth to the sick man. When he became sick at the age of about 65 years, it was believed that

¹⁴⁴ CSRO s77(1).

¹⁴⁵ CSRO section 77 (2).

¹⁴⁶ T Mbuy, *Understanding Witchcraft Problems in the Life of an African-Case studies from Cameroon* (High speed printers, Owerri Imo State Nigeria 1992) p3; K Bongmba, *African Witchcraft and Otherness-A Philosophical and Theological Critique of Intersubjective Relations* (State University of New York Press 2001)

the cause of his sickness was the non-refund of the marriage symbol. His children then decided to refund the marriage symbol and went as far as selling the piece of land they owned to do so. The marriage symbol was thus refunded. Unfortunately, the man still died. However, his children believed that the curse had been broken and that thanks to the refund of the marriage symbol, they would themselves be spared from further calamities.¹⁴⁷

e) Non-refund of marriage symbol and burial prerogatives

Another effect of the non-refund of the marriage symbol relates to burial rights. If the wife dies before the marriage symbol has been refunded, the husband will be entitled to her corpse. If the husband rejects the corpse, as some men have done, his parents or a member of his family or a grown-up child from his family could take the corpse for burial. It is not uncommon to find the current husband and the former husband quarrelling over the wife's corpse, just because the marriage symbol of the former husband was not refunded. The father of the deceased woman may also be quarrelling with the 'husband' of the deceased in cases where the marriage symbol was never paid. Where the marriage symbol was never given, the 'husband' traditionally will not be regarded as truly married to the deceased and his entitlement to bury his de facto 'wife' might therefore be challenged. Despite legislative provisions passed to deny such consequences, the non-refund of the marriage symbol continues to have a major impact. Solutions will therefore be sought that take into account the important cultural significance of the marriage symbol, but which acknowledge Cameroon's constitutional obligations.

3) The necessity for excluding the rules on the non-refund of the marriage symbol

The crucial importance of the marriage symbol for the validity of a marriage and divorce and the consequences it carries such as the impossibility for the wife to escape the marriage, refusing to terminate the marriage even after the death of the husband, the conception it conveys of married women as

¹⁴⁷ This was narrated to me by the buyer of the land.

property of their husband and the effect it has on paternity irrespective of biological links should be addressed. These customs may be important in their communities but the question remains as to whether they should be addressed by law, in particular, in the context of the proposed unified divorce law which this thesis advocates.

When customary practices go against the constitutional prohibition of discrimination on the grounds of sex they should be discouraged. Such practices could also be set aside by virtue of Law n° 79/04 of 29th June 1979 which states that 'the Customary and Alkali Courts shall apply the customs of the parties provided that they are not contrary to the law and to public policy.' Yet these customs are being enforced on a regular basis by the Traditional Council, Customary Courts, and even the modern courts (the High Court and the Court of Appeal).

Furthermore, the inconsistency in the application of the customary rules creates ambiguities as to the condition surrounding the validity of divorce. While it is apparent that for a marriage to be terminated, the marriage symbol should be refunded, it is not always clear what constitutes 'refund' of the marriage symbol. In some areas, it must be given to the husband, in other areas it could be given to another member of the family where the husband is not willing to accept it. Beyond the uncertainties concerning the receiver, there is also uncertainty concerning what should be refunded. In some areas, it is the original marriage symbol. In others, it is the original marriage symbol and gifts made to the wife's family during the duration of the marriage; yet, in others, the marriage symbol is depreciated, considering the number of children born out of the marriage and the length of the marriage. Moreover, the man can waive the refund of the marriage symbol. The refund of the marriage symbol may not therefore be the fundamental right it is made out to be. If it were, the husband would never be able to waive it, because you cannot waive a fundamental right. The CSRO already states that

In the event of dissolution of a marriage, as a result of divorce, the person who received the dowry may be asked to pay back all or part

*of the dowry if the court feels that such a person is totally or partially responsible for the divorce.*¹⁴⁸

The article clearly says, 'may be asked' and not 'must be asked'. Therefore, the refund of the marriage symbol is not obligatory except the court authorises it. However, the current law does not say what should happen if the receiver is asked to refund the marriage symbol but fails to do so. Will the current effects of the non-refund of the marriage symbol continue? The law must be clear and unambiguous.

Although Customary Courts in Anglophone Cameroon have been particularly renowned for perpetuating customary rules that are contrary to the written law, there are instances where even the High Courts have applied customary rules that are repugnant to natural justice, equity and good conscience, sometimes in situations where Customary Courts had refused to apply the said rules. For example, in *Manga Ikome v Manga Ekemason*¹⁴⁹ the husband and wife had been married for thirty years when the wife died. On her death, the husband applied to administer her property. The deceased family opposed his claim saying that they did not know him to be married to the deceased because the marriage symbol had not been given. The Customary Court dismissed their claim since there was evidence of a marriage certificate. On appeal, the judgement was set aside. The Court of Appeal held that a marriage certificate is only prima facie evidence of marriage and because the marriage symbol had not been given, the registration of the marriage as evidenced by the marriage certificate and the act of living together as husband and wife for thirty years 'did not perfect what was already an imperfect union'. Consequently, the Court of Appeal disinherited the widower and gave the deceased's property to her family. This has added to the confused state of the application of the law and shows the necessity of unifying both the courts and the law. In this way, the unique court will have only the unique law to apply. This will solve the problems of jurisdiction and choice of law issues within Cameroon.

Cameroon is not the only African country where there are harmful consequences of the marriage symbol. In Uganda, for example, where

¹⁴⁸ Article 73.

¹⁴⁹ (1985) CASWP/cc176/85 unreported.

similar effects of the non-refund of the marriage symbol exist, the Supreme Court has declared the refund of the marriage symbol to be 'unconstitutional and dehumanising.'¹⁵⁰ In 2007 in Uganda, a local NGO, Mifumi, petitioned the Constitutional Court of Uganda to declare the payment of the marriage symbol unconstitutional, but the court ruled against Mifumi. Mifumi then filed an appeal to the Supreme Court.¹⁵¹ The Supreme Court did not pronounce the practice of giving marriage symbol unconstitutional but ruled in a majority judgement of 6:1 that the traditional custom and practice of demanding a refund of the marriage symbol if a marriage breaks down is unconstitutional and 'dehumanising to women.'

*The return of the bride price connotes that the woman in marriage was some sort of loan. But even in sale, the cliché is that goods once sold cannot be returned or goods once used cannot be refunded. If that cannot be done in respect to common goods like cows, why should it be applied to a woman in marriage?*¹⁵²

Women are regarded as commodities that can be sold. They stay in abusive marriages to protect their father who are unable to refund the marriage symbol. This ruling by the Supreme Court of Uganda has 'broken the chain that trapped women in relationships they want to leave, empowering them to walk away if a marriage fails.'¹⁵³ One of the consequences of the ruling is that the non-refund of the marriage symbol has no effect on the effectiveness of the divorce.

The Constitution of Uganda, like that of Cameroon prohibits discrimination based on sex.¹⁵⁴

In Uganda, any person who alleges that:

an act of parliament or any other law or anything in or done under the authority of any law...is inconsistent with or in contravention of a

¹⁵⁰ A Mwesigwa, Uganda court rules against refund of 'bride price' after divorce (2015) the Guardian, August 17th. [theguardian.com/global-development/2015/aug/17/uganda-court-rules-against-refund-bride-price-divorce].

¹⁵¹ *ibid.*

¹⁵² Per Justice Bart Katureebe, one of the six judges who consented to the ruling in the above case.

¹⁵³ A Mwesigwa (n150).

¹⁵⁴ Sections 8 (1) and 20 (1).

*provision of this Constitution, may petition the Constitutional Court for a declaration to that effect, and for redress where appropriate.*¹⁵⁵

If the Court considers that the situation should be redressed in addition to the declaration sought, the court may (a) grant an order for redress or (b) refer the matter to the High Court to investigate and determine the appropriate redress.¹⁵⁶ Having been unsuccessful in the Constitutional Court, Mifumi appealed to the Supreme Court. The Supreme Court of Uganda is the final court of appeal in Uganda¹⁵⁷ and is empowered to hear appeals from decisions of the Court of Appeal sitting as a Constitutional Court.¹⁵⁸ Besides, *'any party aggrieved by a decision of the Court of Appeal sitting as a Constitutional Court is entitled to appeal to the Supreme Court against the decision...'*¹⁵⁹

While this decision is welcomed, there are specific obstacles to a similar ruling of unconstitutionality in Cameroon. While the refund of the marriage symbol is permitted under the CSRO,¹⁶⁰ a ruling of unconstitutionality will seem to be *ultra vires*. The Supreme Court of Cameroon does not have the power to declare enacted legislations unconstitutional. Furthermore, constitutional review by the Constitutional Council is only preventive. It must be done before the law is enacted.¹⁶¹ Once the law has been enacted, the Constitutional Council can no longer declare it unconstitutional nor can ordinary courts. Thus, while the Supreme Court of Uganda can rule on the constitutionality of laws, the courts in Cameroon cannot. Nevertheless, the government of Cameroon is bound by its constitutional and treaty obligations to eliminate the harmful consequences surrounding the marriage symbol.

To sum up, I do not advocate the prohibition of the payment and refund of the marriage symbol. As the most crucial symbol of marriage in customary practices, it should not be abolished in one strike. The practice of giving marriage symbol is embedded in the culture of the people, eliminating it completely might cause the people to revolt or ignore the law. I therefore

¹⁵⁵ Art. 137 (3) (a) and (b).

¹⁵⁶ Art. 137(4) (a) and (b).

¹⁵⁷ Art. 132(1).

¹⁵⁸ Art. 131 (2).

¹⁵⁹ Art. 132 (3).

¹⁶⁰ Section 72.

¹⁶¹ Article 47 (3).

suggest that the law as it is under the CSRO concerning the giving of the marriage symbol be maintained under the unified law. While not prohibiting the giving of the marriage symbol, the CSRO does not tie the validity of a customary marriage to the giving of the said marriage symbol. Secondly marriage symbol could also be paid by the wife's family and not just the husband's family. This will eliminate the discrimination that exists in the practice of the marriage symbol. Thirdly, to remove all ambiguities in the law, and considering the harmful consequences of the failure to refund the marriage symbol, I suggest an addition to the law which will make it clear that the refund of the marriage symbol is not obligatory. Its refund shall depend on the free will of the person refunding it. Furthermore, its non-refund shall have no effect on the validity of the marriage and divorce. This gives leeway for parents who want to refund the marriage symbol to go ahead and refund it. But this should not be obligatory.

Section 232 of the draft Family Code stipulates that: 'where bride price and gift are required by customs, they shall have no legal effect on a marriage.' A fortiori, its non-refund should have no legal effect on the divorce. This is supported by section 233 which states that 'bride price and gifts received by any person in consideration of marriage, shall not be refunded under any circumstances.' If it should not be refunded, it should not have any effect on the divorce. This provision in the draft code is slightly different from my viewpoint as it bars parents who would like to refund the marriage symbol from doing so. The phrase 'under any circumstances' would imply that parents or receivers of the marriage symbol cannot refund it even if it is their wish to refund it. In my view, the law should not ban persons from refunding the marriage symbol if they desire to do so. As the optional compliance is from the receiver of the marriage symbol, the giver of the marriage symbol cannot ask for, let alone insist on its refund. Hence, allowing such optional compliance will not be lived in practice as a duty to comply.

Non-respect of the law is sometimes due to ignorance of the existence of the law. In order to raise more awareness on the importance of human rights and gender equality, the judge should explain the consequences or effects of the divorce upon the parties once divorce has been granted.

Conclusion

The customary rules in Cameroon are undergoing tremendous change. It is difficult to grasp the exact state of contemporary customary rules on divorce. Customary Courts sometimes apply rules that are different from customary practices. Some customary rules on divorce are so flexible that the Customary Court will grant divorce based on mere inconvenience to the petitioner, while others will refuse to grant divorce even in cases where the marriage seems to have broken down irretrievably. Even within a given area, it is difficult to identify what practice is applicable. This uncertainty is exacerbated by the continued unwritten state and the different ways and pace at which traditional authorities are changing the customary law to respond to social change. This uncertainty in the rules and the multiplicity of customary laws call for reform of the law.

The next chapter will examine the rules that should feature in the new proposed law of divorce.

CHAPTER FIVE

THE DESIGN RULES

INTRODUCTION

There is a major tension between restrictive grounds for divorce which are based on a matrimonial fault committed by the defendant and liberal grounds which allow divorce in the absence of any fault by the parties. Which of these rules (restrictive or liberal) should form the basis of divorce reform in Cameroon? I argue in this chapter that for constitutional and social reasons, these conflicting rules are both important and effect should be given to both. As we have seen in chapter four, the grounds for divorce in Francophone Cameroon are based only on the fault system. I argue, however, that restricting divorce to fault-based grounds only is archaic and does not reflect Cameroon's historical and cultural specificities. We also saw in chapter four that a mixed fault and non-fault divorce system exists in Anglophone Cameroon but that there are difficulties with that system, as identified by the Law Commission of England and Wales in 1992 and because the ways in which it has been interpreted in England are not always appropriate for or transferable to Cameroon. A mixed system which considers Cameroon's received laws, customary laws and constitutional obligations and therefore reflects and respects Cameroon's sovereignty, history, cultural specificity and international obligations is proposed in this thesis. The mixed system advocated in this thesis will balance all these various competing and complementary interests. Three fundamental underlying objectives will run through the proposed system: to support the institution of marriage up to the point that it has irretrievably broken down, to minimise the distress and bitterness in divorce and to eliminate discriminatory practices. As concerns the jurisdiction of the court, my proposal consists of the creation of a single court with exclusive jurisdiction over divorce matters.¹ I have proposed a unified system of court and law because a unified system will make the law less complex, more predictable, easier to apply and will eliminate the problems inherent in the conflict of laws.

¹ As per the draft family code in section 59.

In the first part of this chapter, I will consider whether divorce should be based on fault or non-fault grounds and then state the chosen rules for the new unified law. Inspiration for the chosen rules will be drawn from the common threads and specific threads that exist in the different laws of divorce in Cameroon. However, those threads that are found to be discriminatory will be eliminated or modified. I will further justify the selection of my chosen rules based on my underlying objectives and by reference to the principles of discrimination, reconciliation and constitutional obligations.

A) RESTRICTIVE VERSUS LIBERAL GROUNDS FOR DIVORCE

In this section I will analyse the problematics of choosing between restrictive and liberal divorce and will explain why in the context of Cameroon both rules should be maintained. I will bring out the common threads and specific threads that are found in divorce laws in Cameroon and state the chosen rules.

1) The dilemma

Should divorce be based exclusively on fault grounds or, should it be based only non-fault grounds? On the one hand, it has been argued that divorce and family instability is a source of societal decline and therefore the family can only be saved if the government restricts divorce by putting in place fault grounds and discouraging unhappy spouses from selfishly defecting from their responsibility.² Ruth Deech holds the view that with non-fault divorce, 'marriage is a short term option with no specific obligations and no impediments to the freedom of the individual within the family.'³ On the other hand, those who oppose all restrictions on divorce argue that 'the damage the fault rules would cause would far outweigh any benefits.'⁴ They also consider such restriction as oppressive constraints on individual freedom.⁵

² E Scott, 'Marital Commitment and The Legal Regulation of Divorce' in A Dnes & R Rowthorn, *The Law and Economics of Marriage & Divorce* (Cambridge University Press 2002) p35.

³ R Deech, 'Divorce Law and Empirical Studies' (1990) *LQR* p243.

⁴ I Ellman, 'The Misguided Movement to Revive Fault Divorce and Why Reformers Should Look Instead to the American Law Institute', (1997) *IJLFP* p221.

⁵ E Scott in A Dnes & R Rowthorn (n2) p35.

Restrictions will not therefore be effective in promoting family stability or enhancing the welfare of children. While the two groups have a similar goal (the protection of the family), the reasons they put forward are conflicting. Scott believes that both sides are in error about the law's appropriate role in regulating marriage and restricting divorce. While accepting that the State can play a role in promoting marital stability, she opines that the role of the State should be to assist couples to achieve their goal of a lasting relationship, not to impose the values and preferences of one group in society on the rest, as conservative advocates suggest.⁶ She equally holds the view that legal enforcements of marital commitments are compatible with liberal principles and (paradoxically) easy termination policies, which are associated with liberal ideologies, can also undermine the freedom of individuals to pursue their life goals.⁷

Both restrictive and liberal divorce grounds have their advantages and disadvantages.⁸ Liberal divorce grounds are usually said to release unhappy spouses from marriages that cannot be saved, especially where no fault has been committed by the respondent. However, most marriages go through difficult times and a judge may easily run to the conclusion that the marriage cannot be saved. If legal enforcement of the commitments taken on marriage were the norm, some of these marriages would survive the hard times. Restrictive divorce grounds could therefore discourage divorce based on an ephemeral dissatisfaction and thus preserve the institution of marriage.⁹ Although acrimonious divorce litigation which is associated to the fault grounds 'undermines the parties' future relationship, a worrisome cost if the marriage involves children whose welfare is linked to their parents' future ability to cooperate,¹⁰ such acrimony could be mitigated by encouraging conciliation. Liberal divorce grounds undermine the very essence of marriage. Some people choose marriage over informal union partly because the marriage gives them more confidence in the partner's commitment. However, with liberal divorce grounds, the obligation and commitment of

⁶ *ibid.*

⁷ *ibid* p35 - 36.

⁸ S Bridge, 'Marriage and Divorce: The Regulation of Intimacy' in J Herring, *Family law: Issues, Debates, Policy* (William Publishers 2001) p8-44.

⁹ E Scot in A Dnes & R Rowthorn (n2) p36.

¹⁰ *ibid* p51.

marriage can no longer be clearly distinguished from those of cohabitation mainly because unhappy spouses can quit the marriage as easily as cohabitants can quit their union.¹¹ On the other hand, while reminding spouses of their commitments, a restrictive (fault ground) divorce also encourages spouses to make up fake accusations against one another, practices that undermine the integrity of the judicial process.¹² However, as long as the law allows divorce on non-fault grounds, such risks of fake evidence and perjury could be avoided. Moreover, retaining fault grounds in addition to non-fault grounds will remind the spouses of the expected behaviour in marriage.¹³ As the conservative Baroness Young puts it,

*The message of no fault is clear. It is that breaking marriage vows, breaking a civil contract, do not matter. It undermines individual responsibility. It is an attack upon decent behaviour and fidelity. It violates common sense and creates injustice for anyone who believes in guilt and innocence.*¹⁴

Labour Lord Stallard aptly summarises it in this way, 'no fault' means 'no responsibility, no commitment and no security'.¹⁵ Hence to put away the whole concept of the fault ground is to redefine the institution of marriage. The fault ground will also be relevant where consent has not been given by the respondent and where the period of separation has not been attained. Thus, if a husband who exercises violence on his wife refuses to consent to a divorce by her, and the required period of separation has not been attained, she could petition on the grounds of cruelty or unreasonable behaviour.

In this thesis, I have argued that fault and non-fault divorce should both feature in the new divorce law. Mixed grounds (that is both fault and non-fault grounds) exist under customary law and the received law applicable in Anglophone Cameroon. If divorce were restricted only to fault-based

¹¹ *ibid* p45.

¹² A Parkman, 'Mutual Consent Divorce' in A Dnes & R Rowthorn (n2) p61.

¹³ *ibid* p51.

¹⁴ Hansard (HL), vol 569, col 1638, Quoted by The Right Honourable Lady Justice Hale DBE, 'The Family Law Act-Dead Duck or Golden Goose' in S Cretney (ed) *Essays for the New Millennium* (published by Family Law 2008) p27.

¹⁵ *ibid*.

grounds, it would reflect only the law in Francophone Cameroon and antagonize Anglophone Cameroonians. It could also be said that mixed grounds could antagonize Francophones. It should be noted however that Cameroonians, whether Anglophones or Francophones, always fall back on customs in matters affecting personal law. That is why even those who opt for modern marriages perform customary rites before celebrating a civil marriage. Cameroonians see themselves first as Cameroonians and should strive to promote positive cultural values. Where these values lack, they should fall on foreign values to supplement them. Thus, expanding the grounds for divorce to include positive customary values (which coincide with grounds available under the received laws in Anglophone Cameroon) should be acceptable by all. Imperialist and archaic grounds would therefore give way to Cameroon's positive cultural values and be in line with modernity. Moreover, having only fault grounds for divorce would bar instances where divorce is justified, either because the marriage has become an empty shell or because spouses wish to divorce to remarry under a different form of marriage. A mixed system of both fault and non-fault grounds is therefore preferable. It will embrace Cameroon's historical and cultural specificities. While the fault grounds will be available to those whose religious or moral values prohibit divorce except on the commission of a matrimonial offence, the non-fault grounds will be available to others. In this way, the new unified law will reflect the positive aspect of the Cameroonian culture which could also help to foster national unity. The positive common and specific threads will be the bases of my proposed law, while discriminatory rules will be eliminated or modified.

2) Common threads and specific threads

Current rules on divorce in Cameroon are extremely diverse. However, some common threads are found in all the law districts while some threads are more specific.

a) Common threads

The common threads under the received laws and customary laws are the emphasis on reconciliation and fault. On the one hand, my proposed new law

will underline the importance of reconciliation and thus seek to support the institution of marriage. On the other hand, where reconciliation is impossible and one spouse is clearly at fault, fault-based grounds for divorce will be available to acknowledge both the harm caused to the spouse and the importance of marriage.

b) Specific threads

While there are common threads that are found in all the divorce laws in Cameroon, some threads exist in specific systems only. The new proposed law of divorce will not only reflect the most common existing trends of divorce law. It will also include trends which albeit more specific, would foster the overall goal of a more equal, less acrimonious divorce law. These acceptable specific threads are consent, separation and specific bars to divorce. Specific threads which are discriminatory will either not be retained in my new law or be modified. These unacceptable specific threads which deal with fault grounds are the discriminatory nature of adultery, mild violence and the negative effect of the marriage symbol. In the next sub-section, I will state the chosen rules.

3) The chosen rules for the new law

A unique jurisdiction to entertain divorce matters has been suggested. Three grounds for divorce are proposed in this thesis: where the respondent's behaviour is unreasonable (that is, where a fault has been committed), where the parties consent and where the marriage has broken down irretrievably as evidenced by a period of separation. In addition, other rules which could serve as a bar to divorce or which aim at protecting the institution of marriage have been suggested.

Rule (a) The jurisdiction of the court

i) The High Court shall be the unique court with original jurisdiction in all matters relating to the status of persons and divorce.

ii) No divorce shall be valid except that granted by the High Court.

Rule (b) The grounds for divorce

Divorce shall be granted where:

- i) The respondent has behaved unreasonably.*
- ii) Both parties consent to the decree of divorce being granted.*

Where a petition for divorce is based on consent, and the respondent cannot give a valid consent, the intention of the petitioner will be relevant in deciding whether to grant the divorce. In granting the divorce the interest of the respondent will be of paramount consideration.

- iii) The marriage has broken down irretrievably as evidenced by a continuous period of at least two years of living apart calculated from the date the petition for divorce was lodged.*

Rule (c) Other rules

- i) Divorce shall not be granted unless reconciliatory attempts have been made. However, reconciliation will not be obligatory were the divorce is based on a fault ground. Reconciliatory attempts by family members and Traditional Councils should be encouraged.*

It is prohibited for parties to use against any spouse what was said or done during the reconciliation in any subsequent action.

- ii) Divorce based on separation shall not be instituted against a woman where there is a child or children of the marriage who is/are less than three years old unless adequate provisions have been made for their maintenance.*

- iii) The non-refund of the marriage symbol shall under no circumstances affect the validity of any divorce pronounced by a court with competent jurisdiction.*

- iv) Divorce shall be made in two stages: A degree nisi which will be converted to a decree absolute within a maximum period of six months.*

- v) There shall be no discrimination in the application of the above rules.*

The justification for the chosen rules will now be explained in detail.

B) JUSTIFICATION FOR THE CHOSEN RULES

The above rules are selected based on the current divorce laws in Cameroon. While the draft code attempted unification, my proposals go beyond that draft by taking into account the principles of non-discrimination, reconciliation and constitutional obligations.

1) Rule (a) The jurisdiction of the court.

Rule (a) (i) The High Court shall be the unique court with original jurisdiction in all matters relating to the status of persons and divorce.

This implies that the Customary Court will cease to have jurisdiction over matrimonial issues including divorce. The High Courts in both Anglophone and Francophone Cameroon have similar jurisdiction in divorce matters. Both have jurisdiction over customary and civil marriages and in both courts, jurisdiction is based on residence. Both courts are staffed and should continue to be staffed with professional judges, trained at ENAM. These judges are therefore well versed in the received laws applicable in their respective jurisdictions. The difference in the High Courts in the two law districts relates to the applicable law.¹⁶ If the laws are unified, both courts would apply the same substantive law.

The issue of jurisdiction between Customary Courts and High Courts especially in Anglophone Cameroon remains pertinent. The problem is more serious because of lack of a common criterion for distinguishing a statutory marriage from a customary marriage. This will be explained in light of the case of *Manyi Motanga v Ngomba Motanga*¹⁷ where the parties had celebrated their marriage at the Civil Status Registry but did not mention whether it was polygamous or monogamous. The High Court construed the marriage as polygamous and therefore customary and thus declined jurisdiction. To my mind, as the marriage was celebrated by a Civil Status Registrar, the judge ought to have classified it as statutory and therefore should not have declined jurisdiction. Declining jurisdiction meant that the petitioning wife had to take the matter to the Customary Court where discriminatory rules awaited her. Although today the High Court would not decline jurisdiction because it has jurisdiction over both customary and statutory marriages,¹⁸ it would nevertheless apply customary law if the marriage is characterised as customary. Besides, customary Courts still have jurisdiction over customary marriages and apply customary law. The risk of

¹⁶ Rules on civil procedure in Anglophone Cameroon and Francophone Cameroon differ. However, this thesis does not deal with procedural rules. It is hoped that the rules on Civil procedure will eventually be unified as differences in procedural rules may have an impact on the application of substantive rules.

¹⁷ (Suit No. HCB/2/76) unreported.

¹⁸ By virtue of the 2006 law.

being subjected to discriminatory customary rules remains high and the confusion over the characterisation of a marriage as 'monogamous' or 'polygamous' heightens the risk. Proposals can be made for better criteria for distinguishing between statutory marriage and customary marriage. However, a simple and more satisfactory solution would be to establish a single court system with original jurisdiction in divorce matters in the entire nation. Jurisdictional problems would then be avoided altogether and the predictability of legal solutions greatly improved.

The Customary Courts in Anglophone Cameroon are staffed with local people versed with local custom. Once it is admitted that the marriage symbol was given these courts assume jurisdiction irrespective of whether the marriage is statutory or customary. To simplify the issue of jurisdiction a single court system with original jurisdiction in divorce matters is proposed. This unique court should be the High Court. This happens to coincide with the proposals made by the state in the draft family code.¹⁹

Rule (a) (ii) No divorce shall be valid except that granted by the High Court.

There are different methods for negotiating disputes in family matters and these include mediation,²⁰ arbitration and adjudication. Arbitration and adjudication involve an appeal to a third party to impose a decision on the parties because the parties themselves cannot agree.²¹ However, while in arbitration 'the parties agree in advance to accept the decision of the arbitrator' even though it is not legally binding,²² in adjudication, 'the judge imposes his decision not by invitation of the parties but by virtue of the office from which he derives his authority'.²³ Adjudication has more 'formal rules and procedure and the parties are represented by professional advocates. It involves 'an authoritative and binding decision given to the parties by a third party'.²⁴ On the other hand arbitration has less formal rules and even though

¹⁹ S. 59.

²⁰ This is examined below at p260 - 262.

²¹ M Roberts, *Mediation in Family Disputes: Principles of Practice* (3rdedn, Ashgate publishers 2008) p13.

²² *ibid.*

²³ *ibid.*

²⁴ B Rwezaura, 'Some Aspects of Mediation and Conciliation in the Settlement of Matrimonial Disputes in Tanzania' in J Eekelaar and S Katz, *The Resolution of Family Conflict: Comparative Perspective* (Butterworths Toronto 1982) p53.

the parties may agree to be bound by the decision of the arbitrator, strictly speaking, the decision of an arbitrator is not legally binding. The parties may choose the arbitrators. Thus, parties may sometimes prefer their matter to be settled by arbitration instead of a court of law.

There have been recent tendencies for English courts to accept arbitration decisions by religious courts in family matters.²⁵ In *AI v MT*²⁶ for example, a Jewish husband and wife requested that their dispute should be settled by the New York Beth Din. After being informed that the interest of the child is the paramount consideration in resolving such disputes, the judge, Baker J, accepted their request and referred their dispute to arbitration before the New York Beth Din on the basis that although the outcome of the case would be likely to carry considerable weight with the court, the decision would not be binding and would not preclude either party from pursuing applications to the High Court in England in respect of any of the matters in issue.²⁷ As a result, the High Court ratified the decision of the New York Beth Din on the grounds that 'it was consistent with the best interest of the child and was satisfactory from a financial point of view'.²⁸

While such proceedings relating to ancillary financial matters and issues over children may arguably be encouraged in England,²⁹ such delegation would not be appropriate in Cameroon where regional and ethnic conflict has crept into the church, particularly Christian churches in Cameroon.³⁰ It is therefore possible that a religious arbitrator could be influenced by the ethnicity of one or both parties rather than religious doctrine. Also, such a delegation of power would be inappropriate in Cameroon particularly in Anglophone Cameroon, where not only Customary Court judges but also judges in the High Courts and even the Courts of Appeal have applied repugnant customary rules. If parties were given the option to request the High Courts

²⁵ *AI v MT* (2003) EWHC 100 (FAM).

²⁶ *ibid*.

²⁷ *ibid* p15.

²⁸ *ibid* p37.

²⁹ *AI v MT* (n25); M Malik, 'Minorities and Law: Past and Present' (2014) *Current Legal Problems* pp1-32; Ronan McCrea, 'Why the Role of Religious Tribunals in the Legal System Should Not be Expanded' (2016) 2 *Public Law*. p214-222.

³⁰ C Fombad, 'State, Religion and Law in Cameroon: Regulatory Control, Tension and Accommodation' (2013)57 *Journal of Church and State* pp18-43 <http://jcs.oxfordjournals.org/> at University College London 12, 2015.

for arbitration by Customary groups,³¹ it is likely that such Customary groups would carry on applying discriminatory customary practices and probably their rulings would then be endorsed by the High Courts and even the Courts of Appeal (especially those from Anglophone Cameroon), despite the discrimination.³² For the time being, it is therefore ill advised to give such powers to the local communities in the unified system. If a religious divorce is a requirement for the parties to remarry or to continue with their other religious obligations, a religious divorce could be obtained after the legal divorce. A religious divorce obtained without a legal divorce would have no legal effect because in the eyes of the law the parties are still married.

My proposed divorce grounds will be very flexible, including fault-based and non-fault-based grounds. This means that the parties could easily get a divorce from the state courts. There will be no objection to a customary or religious divorce obtained after a divorce from the State court if such divorce is obtained for the personal satisfaction of the parties so long as such practices are not discriminatory and are not in conflict with the laws of the State.³³

As we saw in chapters three and four, the present grounds for divorce in Cameroon are very complex. In Francophone Cameroon, only fault-based grounds for divorce exist, while in Anglophone Cameroon the sole ground for divorce can be established by proving both fault and non-fault facts. Under customary law, while both fault and non-fault grounds for divorce exist, some of the grounds are discriminatory. I will now justify the selection of the proposed grounds for divorce.

2) Rule (b) The grounds for divorce

Divorce shall be granted where:

Rule (b) (i) The respondent has behaved unreasonably.

³¹ It will not be to Customary Courts because the courts would have been unified. Hence Customary Courts will no longer be in existence.

³² Discriminatory practices also exist under customary law as regards ancillary, monetary and child matters.

³³ Such practices will not be legally binding.

Fault grounds for divorce exist in both the received laws and customary law. This new behaviour ground will cover these fault grounds. Although the western world is moving away from fault as a ground for divorce,³⁴ and fault grounds have been considered 'archaic and pathogenic,'³⁵ fault should nevertheless remain a ground for divorce in Cameroon. Marriage is still considered as an important institution in Cameroon and is the only legal form of union which is recognised.³⁶ Retaining fault as a ground for divorce would underline the importance of marriage and the duties that are associated with marriage.

Under the draft family code all the four grounds for divorce are based on fault. My new broad behaviour ground would cover all the four grounds for divorce in the draft family code. The fault grounds for divorce in the draft family code could raise problems of construction. For example, the problems posed by section 1 (2) (a) of the MCA 1973 applicable in Anglophone Cameroon have not yet been resolved by the courts in Anglophone Cameroon.³⁷ Maintaining similar provision in section 264 (1) of the draft code will only increase the problems as the law would be applied not only by the courts in Anglophone Cameroon but also by the courts in Francophone Cameroon where adultery so far is a peremptory ground for divorce. I have therefore not maintained section 264 (1) of the draft family code. The wordings of section 264 (2) of the draft family code could also create confusion and makes sections 264 (1) and (3) redundant.³⁸ My proposed fault ground would cover all unreasonable behaviour by the respondent. Although what is sometimes consider as unreasonable behaviour from a woman is not seen as unreasonable behaviour if done by a man, I have

³⁴ M Roth, 'Future Divorce Law-Two Types of Divorce' in K Boele-Woelki (ed), *Common Core and Better Law in European Family Law* (Published by the Organising Committee of the Commission on European Family Law 2005) vol 10 at p41-57; A Agell, 'The Underlying Principles of Consensual Divorce' in K Boele-Woelki (ed), *Common Core and Better Law in European Family Law* ibid p59-69.

³⁵ H Fulchiron, 'The New French Divorce Law' (2005) *ISFL* p242.

³⁶ Civil Partnership is not legally recognised in Cameroon unlike in England where it is recognised by the Civil Partnership Act (CPA) 2004 for same-sex couples (section 1(1) and in France by the Pacte Civil de Solidarité (PACS) where it is recognised for same-sex and opposite sex couples who do not want to get married (article 515-1 of the Civil Code). The parties under a PACS get some legal protection but not to the same extent as married couples.

³⁷ For a discussion of the problems see Chapter Three p183 – 186.

³⁸ For a discussion of this see p92 - 93.

added rule C (v)³⁹ which eliminates discrimination in the application of the rules.

Rule (b) (ii) Both parties consent to the decree of divorce being granted.

Where a petition for divorce is based on consent, and the respondent cannot give a valid consent, the intention of the petitioner will be relevant in deciding whether to grant the divorce. In granting the divorce the interest of the respondent will be of paramount consideration.

Divorce by consent does not exist under the received law in Francophone Cameroon. It also does not exist under the draft family code. However, divorce by consent would feature in the new divorce law. Consent is a 'ground' for divorce under customary law⁴⁰ and is one of the facts in Anglophone Cameroon that establishes irretrievable breakdown of the marriage where the parties have lived apart for a period of two years.⁴¹ Under the received law in Anglophone Cameroon divorce could be granted where the respondent gives his/her consent on two conditions. The first is that the marriage must have broken down irretrievably. Where the marriage has not broken down irretrievably, the divorce will not be granted even though the respondent has given consent. This is tied to the fact that 'irretrievable breakdown of the marriage' is the only ground for divorce under the received law in Anglophone Cameroon. Consequently, even where the parties consent to the divorce, the court must still make sure that the marriage has broken down irretrievably. Further investigation into the marriage will then ensue which could lead to distress. Thus, this supposedly liberal 'ground' has its limitations. The second condition is that the parties must have lived apart for a continuous period of at least two years. Thus, even if the marriage has broken down irretrievably and the respondent consents to the decree being granted, the decree will nevertheless not be

³⁹ See p266 - 267.

⁴⁰ *Nako Kofele Martin Alain v Ndivi Epeti Likawo* (CRB n° 2, 2013 Customary Court Tiko) p1 unreported.

⁴¹ Under the Matrimonial Causes Act 1973 section 1(2) (d), a petition for divorce may be presented to the court by the petitioner on the sole ground that the marriage has broken down irretrievably by showing that the spouses have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent consents to the decree being granted.

granted unless the parties have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition. Under my proposed reform these two conditions will not be necessary where the parties consent to the divorce. As we saw in Chapter Four⁴² divorce could be obtained under customary law where the marriage has not broken down so long as both parties consent to the divorce. Where the parties consent to the divorce, the divorce should be granted without the judge making enquiries as to the reasons for the divorce or whether the marriage has broken down irretrievably or not. This will make consent divorce more appealing than the other grounds for divorce. As consent divorce reflects the wish of both parties, it should be encouraged. Divorce by consent will cover instances where the marriage has broken down or the parties are no longer interested in the marriage. Divorce by consent will also cover cases where spouses are happily married but wish to convert their potentially polygamous marriage to a monogamous marriage for example to abide by Christian precepts fully or when they wish to convert their monogamous marriage into a polygamous marriage, to fulfil some traditional requirements. There is no conversion procedure in Cameroon which allows parties to a marriage to change their marriage from one form to the other. Divorce by consent for conversion purposes should therefore be allowed.⁴³ If divorce were refused, the marriage might eventually breakdown because of the difficulties the parties will encounter due to their present type of marriage. As one of the objectives of divorce law is to protect the institution of marriage, such divorce should therefore be encouraged. Although divorce granted under such a situation would not be protecting the same marriage, it will be protecting marriage between the same persons.

⁴² See p211.

⁴³ The type of polygamy practiced in Cameroon is polygyny (the practice of having several wives at the same time). Polyandry (the practice of having more than one husband at the same time) is not accepted in Cameroon. I am aware that polygamy (and the marriage symbol) is the bedrock of the discriminatory rules on divorce in Cameroon. Reforming customary law of divorce without reforming customary marriages will therefore not be adequate. I therefore propose that the law on customary marriages should be reformed. The presumption of a polygamous marriage under customary law should be eliminated. Even though polygamous marriages are discriminatory against women, some women prefer polygamous marriages to monogamous marriages and some polygamous marriages remain potentially polygamous forever. Polygamy should therefore be made an option under customary law as it is with statutory law.

The case of *Babila Njingum John v Miriam Therese Dook*⁴⁴ illustrates this point. The case deals with the conversion of a monogamous marriage to a polygamous marriage.

In Cameroon, there is no enacted legislation that allows for the conversion of a marriage from monogamy to polygamy or vice versa. Such conversion procedure does not exist in England and France from where the received laws in Cameroon originated. Although polygamous marriages cannot be celebrated in England⁴⁵ or France,⁴⁶ polygamous marriages celebrated abroad will be recognized in England⁴⁷ and France⁴⁸ if such marriages comply with the personal law of both parties which is the law of domicile under English law⁴⁹ and of nationality under French law.⁵⁰ Nevertheless in *Babila Njingum John v Miriam Therese Dook*, the High Court of Bamenda (Anglophone Cameroon) accepted an application by the husband to convert his monogamous marriage into a polygamous marriage, without the consent of the wife who had suffered mental illness sometime after their marriage.

⁴⁴ Suit N° HCB/112M/89 NWP (Unreported).

⁴⁵ By virtue of section 11 (b) of the Matrimonial Causes Act 1973, 'a marriage celebrated after 31st July 1971 shall be void' if 'at the time of the marriage either party was lawfully married.'

As far back as 1866 in the case of *Hyde v Hyde and Woodmansee* (1866) L Rev I P & D p130 Lord Penzance held that, 'marriage is the voluntary union for life of one man and one woman to the exclusion of all others.' (p133).

⁴⁶ Article 147 of the French Civil Code states that a second marriage cannot be contracted before the dissolution of the first. ('On ne peut contracter un second mariage avant la dissolution du premier.')

⁴⁷ Section 47(1) of the Matrimonial Causes Act 1973 (MCA), as amended by the Private International Law (Miscellaneous Provisions) Act 1995 (PILA) provides that:

A court in England and Wales shall not be precluded from granting matrimonial relief or making a declaration concerning the validity of a marriage by reason only that either party to the marriage is, or has during the subsistence of the marriage been, married to more than one person.

⁴⁸ Although marriage is a strictly monogamous institution in France, polygamous marriages celebrated in other countries under religious and cultural regime are recognised in France. P Malaurie, L Aynés and H Fulchiron, *La famille* (2nd ed Défrenois publishers 2006) p122.

⁴⁹ By virtue of section 11 (d) of the Matrimonial Causes Act (MCA) 1973, a marriage celebrated after 31st July 1971 shall be void 'in the cases of a polygamous marriage entered into outside England and Wales, that either party was at the time of the marriage domiciled in England and Wales.' By virtue of Part 11 of the Private International Law Act (PILA) 1995 'a marriage is not polygamous if at its inception neither party has any spouse additional to the other.'

The following cases also illustrate that the domicile of both parties governs capacity to marry: *Padolecchia v Padolecchia* (1967)3 All E R p863, *Re Paine* (1940) Ch p16, *Sottomayor v Sottomayor* (1877) 47 LJP p23 and *Brook v Brook* (1816) 9HLC 193 p207.

⁵⁰ The third sentence of article 3 which is expressed in general terms is to the effect that French law governs status and capacity of French citizens even those residing in a foreign country. Nationality is the connecting factor in matters of personal law under French law. D Holleaux, J Foyer and G Pradelle, *Droit International Privé* (Masson Paris 1987) p196-208.

The judge pointed to a lacuna in the law and likened marriage to a contract which can be modified by the parties. He thus ruled that the marriage certificate, as a civil status document, could be rectified. Atangcho Akonumbo believes the judge in this case acted within the law.⁵¹

It should be noted first that the law rectifying civil status certificates provides that such certificates 'may be rectified after signature only under conditions laid down by the law'⁵² and the law provides that such certificates 'shall be rectifiable if they contain erroneous information that could not be corrected at the time the said certificates were drawn up.'⁵³ In the above case, the parties had freely chosen a statutory marriage with monogamy as option. There was therefore no error which required that the marriage certificate be rectified. Secondly, the judge also likened marriage to a contract. Even if marriage can be likened to a contract, both parties should give their consent to the conversion. The wife was incapable of giving a valid consent because of her mental illness. Was it therefore right for the husband to unilaterally change the nature of the marriage? When husband and wife both selected monogamy as an option at the time of celebration it is only equitable that both should also consent to the change.⁵⁴ Yet the judge based his ruling on equitable principles. If there is a lacuna in the law which must be filled, the judge applying equitable principles should be able to fill the gap equitably. If it were the wife who had a mentally ill husband, would the wife have been able to rectify the marriage certificate to enable her to live a married life? Certainly not, as the nature of the polygamous marriage prohibits it.

Another reason that motivated the judge's decision was that the ill spouse 'cannot be thrown in the streets helpless'. Section 5 (1) of the Judicial Organisation Ordinance states that 'all judgements shall set out the reasons upon which they are based in fact and in law.' Is the decision of the judge in the above case based on justice or pity? If the judge's decision is based on justice, it should be clearly substantiated. If it is based on pity then it should

⁵¹ A Akonumbo, 'The Rationale in *Babila Njingum v Njingum Mariam*' (2001)46 *Jurisdis Périodique-Revue de Droit et de Science Politique* p46.

⁵² 1981 Civil Status Registration Ordinance section 1 (2).

⁵³ *ibid* s22 (3).

⁵⁴ I Asanga, 'The Choice of Type of Marriage and Matrimonial Property System in Cameroon: A comparative study' (2004) 8 *Annales de la Faculté des Sciences Juridiques et Politiques*, Université de Dschang p145.

be noted that 'pity is not one of the reasons contemplated by section 5 (1) above'.⁵⁵ There were other options available to a husband who wished to provide for his ill wife. If the husband wanted to live a married life, while still providing for the first wife, he could have divorced his first wife and take her in as a lodger and care for her and marry another woman or divorced her and remarry her under customary law where consent by the parents of the woman have been generally accepted under customary practices.⁵⁶ The second customary marriage being polygamous, the husband could then have married another woman. These other options are within the ambit of the law. Parliament could enact a law allowing for such conversions. However, the conversion should not unilaterally be decided by one of the parties, as in the present case. Both parties should give their consent.

A solution to the above problem is that divorce should be granted even in cases where the marriage has not broken down, but where the parties want the divorce to remarry under another regime. This option is available under customary law. Both options could be kept. However, divorce should also be granted where the marriage has not broken down, even though one of the parties is incapable of giving a valid consent, to enable spouses to choose a different marriage option. This should be possible even though one party will be unable to consent to the second marriage. In Cameroon a marriage could be celebrated 'between two persons of whom one, in apparent danger of death, can no longer personally give his consent or appear before the registrar'⁵⁷ or between two persons 'one of whom is deceased'.⁵⁸ In such situations the consent could be given 'by his father, mother, brother, sister, legal guardian or customary head' of the family.⁵⁹ If a marriage can be celebrated with someone who is in apparent danger of death and cannot give a valid consent or worse still with someone who is dead *a fortiori*, marriage should be allowed to be celebrated or terminated with someone who is mentally ill. Divorce should therefore be granted under this ground

⁵⁵ *Paul Anya v Helen Bih Anya* (CASWP/cc/9/88) unreported.

⁵⁶ A second statutory marriage, whether polygamous or monogamous, would have been difficult as consent of the parties is a requirement for the validity of such a statutory marriage.

⁵⁷ Civil Status Registration Ordinance (CSRO) 1981 section 66(1).

⁵⁸ *ibid* section 67 (1).

⁵⁹ *ibid* section 66 (2).

even where the respondent cannot give a valid consent. However, for the petition to succeed, the intention of the petitioner must be made known. The petitioner will have to show that the interest of the respondent is the paramount reason for choosing this ground. If there is no legislation which allows parties to convert their marriage and divorce by consent where the marriage has not broken down is refused, the parties may agree to fabricate lies to get a divorce.

The parties may, on the one hand, consent to the divorce only without any agreement as to financial and other ancillary matters. In this type of situation, a degree nisi should first be granted. The judge should then settle financial and other ancillary matters before the decree is made absolute. On the other hand, they could consent to the divorce, financial and other ancillary matters. Where the parties have settled their financial and other ancillary matters, the judge should dialogue with them, individually and jointly, to ensure that the agreement was arrived at in good faith and without any undue influence.⁶⁰ Even where the parties consent to the divorce to remarry into a different type of marriage, they will still have to settle financial and other ancillary matters as the different type of marriage might affect financial and other ancillary matters. If the judge is convinced that the agreement was reached fairly, the divorce should be granted without any unnecessary prolongation if consent was freely given. Divorce by consent should not necessarily involve a period of separation. Since incrimination is not necessary in consent divorce, this could reduce the bitterness and humiliation that is often associated with fault ground divorce. Divorce by consent should therefore be encouraged and the parties should have more control over the divorce process. When divorce is obtained by the consent of the parties, the bitterness and humiliation that is common with fault-based divorce is reduced.

Another rule which should be taken into consideration is where the parties have lived apart for a certain length of time.

⁶⁰ Good procedural rules should be put in place to make sure that the consent was freely given. Without good procedural rules, the purpose of the substantive rules could be defeated. The judge could have a meeting with the parties individually before or at any time during the trial and if he or she feels that the consent was obtained by coercion or some undue influence the divorce could be refused or the financial and other arrangements agreed to by the parties could be adjusted.

Rule (b) (iii) The marriage has broken down irretrievably as evidenced by a continuous period of at least two years of living apart immediately preceding the presentation of the petition.

Separation would feature in the new law. Separation or living apart can lead to divorce under customary law⁶¹ and it is also evidence that the marriage has broken down irretrievably under the received law in Anglophone Cameroon.⁶² Separation is not a ground for divorce in Francophone Cameroon. It is also not a ground for divorce in the Draft family code. Separation would serve as proof that the marriage has broken down irretrievably. Besides, during the period of separation, the parties would experience life as it would be if the divorce is granted. This will enable them to finally make their choice on whether to divorce or maintain the marriage. Separation should therefore be included as a ground for divorce.

Under customary law, there is no fixed duration for the separation prior to granting divorce. Under the received law applicable in Anglophone Cameroon, the separation must be for two years where the respondent agrees to divorce or five years where he/she does not. However, as proposed above, there should be no separation period if the divorce is by consent. In my proposed reform, the period of separation should be used as conclusive evidence that the marriage has broken down irretrievably. Therefore, once the required period of separation is attained, the divorce should be granted whether or not the judge is convinced that the marriage has actually broken down irretrievably.

The behaviour of the respondent which is not unreasonable but which is such that the petitioner cannot reasonably be expected to live with could fall under this section. This forms a separate ground from unreasonable behaviour because it does not deal with fault. It is meant to cover situations such as that in *Archard v Archard* discussed above.⁶³ It is expected that the

⁶¹ *Tamfu Nfor Divine v Tansi Gwendoline Mbuli* (Civil suit n°105/2013-CRB 1/2013 Customary Court Mankon) unreported.

⁶² Under the Matrimonial Causes Act 1973 S 1 (2) (d) and (e) a petitioner could petition for divorce based on the fact that they have lived apart for a continuous period of two years immediately preceding the presentation of the petition and the respondent consents to the decree being granted or that they have lived apart for a continuous period of at least five years immediately preceding the presentation of the petition where consent is not required.

⁶³ Chapter Four, p195.

petitioner should be able to endure the respondent's behaviour which is not unreasonable for some time than enduring an unreasonable behaviour of the respondent.

The period of separation should not be too long so that the parties may continue with their individual lives if divorce is the ultimate solution. Nevertheless, the period should not be too short either because the parties could miss the opportunity of reconciliation. A minimum period of two years of living apart is therefore proposed in this thesis. Thus, where the parties have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition, the divorce should be granted. Two years is long enough to indicate that a marriage has broken down irretrievably. The court need not inquire into the cause(s) of the breakdown. Finding the real cause of the breakdown of the marriage would be both difficult and intrusive. Unlike the current received laws in Anglophone Cameroon, divorce should not be refused on the grounds of financial or other hardship. The financial hardship could be settled during the divorce process.

3) Rule (c) Other rules

Rule (c) (i) Divorce shall not be granted unless reconciliatory attempts have been made. Reconciliation will not be obligatory where the divorce is based on a fault ground. Reconciliatory attempts by family members and Traditional Councils should be encouraged.

It is prohibited for parties to use against any spouse what was said or done during the reconciliation in any subsequent action.

Reconciliatory attempts in divorce matters are usually carried out in Anglophone Cameroon, Francophone Cameroon as well as under the different customs. Reconciliation can help promote the stability of marriage. Reconciliation should not be made mandatory where the divorce is based on a fault ground.

While both mediation and arbitration could be used in settling different kinds of family disputes, mediation is used in reconciliation. 'Mediation is a form of intervention in which a third party, the mediator assists the parties in disputes

to negotiate over the issues that divide them.⁶⁴ Unlike in arbitration where the arbitrator imposes a decision on the parties in mediation, 'the mediator has no power to impose a settlement on the parties, who retain authority for making their own decision'.⁶⁵ However Balthazar Rwezaura takes the view that there could be an 'imposition of a settlement' in mediation 'through the invocation of political, moral or religious authority'.⁶⁶ If the mediation aims at reconciliation, imposing a settlement on the parties does not seem appropriate. As the objective of the mediation in my proposal is not to reach an agreement about matters ancillary to the divorce, but to reconcile the parties, to bring peace between them and thus to save the marriage, imposing a settlement on them may aggravate the problem. The role of the mediator in reconciliation should therefore be to facilitate the negotiation process and to maintain a calm and peaceful atmosphere and let the ultimate decision come from the parties. Moral pressure should therefore not be put on the parties to settle their problems in a particular way. This does not however, prohibit the mediator from advising the parties. In some Traditional Council, if the reconciliation fails, the parties are advised to go home and work it out and the council accepts their decision.⁶⁷ In negotiation by mediation, the parties are always present and thus have an opportunity to communicate with each other.⁶⁸ 'The parties conduct the negotiations themselves and reach their own agreement with the help of the mediator.'⁶⁹ Such agreements taken by the parties themselves could be more enduring. Mediation could be carried out by Traditional Councils, family members, friends, religious authorities, and state institutions such as the social welfare service. Mediation by Traditional Councils, family members and friends, or, where the parties belong to a religious group, the head of the religious group within that area or his/her representative, should be encouraged. Divorce is a

⁶⁴ M Roberts, *Mediation in Family Disputes: Principles of Practice* (n21) p7; B Rwezaura, 'Some Aspects of Mediation and Conciliation in the Settlement of Matrimonial Disputes in Tanzania' in J Eekelaar and S Katz (n24) p52.

⁶⁵ M Roberts (n21) p7; A Griffiths, 'Mediation, Conflict and Social Inequality: Family Dispute Processing among the Bakwena' in R Dingwall and J Eekelaar, *Divorce Mediation and the Legal Process* (Clarendon Press Oxford 1988) p129.

⁶⁶ B Rwezaura in J Eekelaar and S Katz (n24) p53.

⁶⁷ This has been discussed in Chapter Three, p176.

⁶⁸ M Roberts (n21) p35.

⁶⁹ *ibid* p7.

matter that touches on the personal law and affects the status of the person. Generally, when it comes to personal issues, people are more willing to have open and clear discussions with family members, friends and religious representative whom they know well than with outsiders (like government officials). Besides, when further problems arise, it is easier to go back to or contact a family member, friend or religious person than a government official. Family members also have a special way of carrying out reconciliation which is less formal⁷⁰ and more relaxed. In Cameroon, the procedure usually begins with a meal prepared by the wife while the husband buys drinks and the actual reconciliation process comes after they have eaten. Although the problem at hand might be serious, a lot of humorous words are said while eating to make everyone relax. Provocative words are also said as part of the humour. Sometimes, the parties even reconcile before the end of the meal. Reconciliation is more successful if it is done before the matter gets to court, hence reconciliation should be encouraged at the earliest opportunity.

While some people may not want to expose their marital secrets to outsiders, others might prefer to go to a third party in order to avoid embarrassment or family pressure to agree to something they do not like. Government officials (social welfare service) will then be used. In any case the parties will have to make the decision on which body to choose from. Mediation by state officials should be encouraged where mediation by family members, friends and religious persons has failed. State institutions such as welfare and social services have persons specially trained to carry out mediation. For the reconciliation to be genuine it should be made clear before the beginning of the reconciliation that what will be said or done during the reconciliation should not be brought up or used against any spouse in any subsequent action.⁷¹

If the second attempt at reconciliation fails, and divorce seems the obvious outcome, conciliation should be encouraged before the divorce is granted. The purpose of conciliation at this stage is no longer to persuade the parties

⁷⁰ Mediation is less formal compared to court proceedings.

⁷¹ See also article 252-3 of the French civil code which states that 'What was said or written on the occasion of an attempt at reconciliation, under whatever forms it took place, may not be invoked for or against a spouse or a third party subsequent to the procedure.'

to give up the idea of divorce but rather to encourage them to reach an agreement on divorce, financial and other ancillary matters and have the consequences of divorce explained to them. This should be done before the divorce decree is granted as the parties might consider the effect of divorce more devastating than living together as husband and wife and might change their mind and refuse to continue with the divorce process. However, mediation alone would not be a better option in such settlements because of the unequal bargaining strength of the parties.⁷² Generally, the woman is in the weaker position.⁷³ Thus, although mediation could still be used in such settlements, the judge should examine the agreement reached by the parties to make sure that it was not obtained by coercion before accepting it.

Rule (c)(ii) Divorce based on separation shall not be instituted against a woman where there is a child or children of the marriage who is/are less than three years old unless adequate provisions have been made for their maintenance.

One of the criticisms levied against the Matrimonial Causes Act 1973 is that it can make things worse for the children.⁷⁴ The welfare of the child is considered in some Cameroonian customs. A few customs forbid divorce proceedings against a woman when the woman is pregnant⁷⁵ or breast feeding to ensure the stability and proper development of the child.⁷⁶ No age limit to breast-feeding is set. Some mothers breast feed for a few weeks, some a few months and others a few years. Some do not breast feed at all. Such bar to divorce could simply be taken to imply that divorce proceedings should not be instituted against a woman when the child is of tender age but a pregnant or nursing mother could initiate divorce proceedings.⁷⁷ This age

⁷² Griffiths in R Dingwall and J Eekelaar (n65) p129-143; B Rwezaura in J Eekelaar and S Katz (n24) p65.

⁷³ A Griffiths (ibid); M Roberts (n21) p216-219.

⁷⁴ Law Commission (Law Com N° 192) The Ground for Divorce 2.19 p8

⁷⁵ Muslim Tradition, Koran chapter 11 v 230.

⁷⁶ *Samuel Lyonga Yukpe v Immaculate Ewanga Yefonge* (Civil Appeal n° CASWP/cc/45/81).

⁷⁷ Under customary practices, when divorce is obtained, the woman goes back to her parents (or her family). She depends on her family for financial and material assistance. A breast-feeding mother will go with the child and her family will have to support both. The husband is under no obligation to assist her financially or otherwise. If the woman petitions for divorce, she knows that the husband is under no obligation to assist her financially or otherwise.

could be fixed at 3 years which coincides with the nursery school age in Cameroon. However, this should not apply where the divorce is based on a fault ground. Indeed, the petitioner can be expected to be more patient where the respondent has committed no fault than where the respondent has committed a fault. The provision that divorce should not be instituted against a pregnant or breast-feeding mother could be waived if adequate safeguards are made for the welfare of the child.

By contrast, other specific rules and practices relating to divorce should not feature in the proposed new divorce law. Unacceptable specific threads relating to fault ground are the current discriminatory rules and practices relating to the marriage symbol and the ground of adultery

Rule (c) iii) The non-refund of the marriage symbol shall under no circumstances affect the validity of any divorce pronounced by a court with competent jurisdiction.

One of the vices of present customary practices is that divorce is tied to the refund of the marriage symbol. The negative consequences of its non-refund are numerous: the woman whose family has not refunded the marriage symbol will not be able to remarry, any children she may then have with another man will still belong to her 'former' husband and her body after her death will belong to her first husband (or his family if the first husband happens to die before her). These rules are discriminatory and demeaning for women. They go against the Constitution which guarantees 'equal rights' to all persons and seeks to 'protect women, the young, the elderly and the disabled'⁷⁸ and should be prohibited. A married woman would refrain from petitioning for divorce if she cannot refund the marriage symbol because of the harsh consequences flowing from the non-refund of the marriage symbol. One way out of this situation is to prohibit the payment of the marriage symbol. However, because the marriage symbol is seen as an important covenant and security which creates a strong bond between the two families, outright prohibition may not be respected. The practice of giving the marriage symbol has been in existence from time immemorial. It will therefore be ill-

⁷⁸ Second section of the preamble.

advised to drastically change the rules under customary law. Consequently, I do not advocate prohibiting the payment of the marriage symbol right away but making it optional. Another solution could be for both parties to give marriage symbol to each other. The amount may not necessarily be the same but the amount would have to be accepted by the parties and in case of divorce there will be no refund by either party. While this solution seems just it may be socially unacceptable because the marriage symbol is seen as some compensation to the wife's family for the loss of her services which has been transferred to the husband's family. Besides, I do not want the validity of a marriage to be tied to the payment of the marriage symbol. I will therefore not adopt this position. Under my proposed new law, the non-refund of the marriage symbol should under no circumstances affect the validity of any divorce pronounced by a competent court. The draft code does not expressly mention whether the marriage symbol should or should not be refunded on divorce. However, in section 233 it states that, 'bride price and gifts received by any person in consideration of marriage, shall not be refunded under any circumstances.' The phrase, 'under any circumstances' should include divorce. As I examined in chapter four,⁷⁹ legislations have been put in place to curb the ill-effects of the marriage symbol but these laws are not being respected by the courts or the people. Under the present law, the person who receives the marriage symbol (and not the wife) 'may be asked' to refund all or part of it, 'if the court feels that such a person is totally or partially responsible for the divorce'⁸⁰ but this provision is not being respected by some Customary Courts, Traditional councils and even by the modern courts where the wife is nevertheless asked to refund the marriage symbol.⁸¹ The challenge therefore is not only to devise new legislation in that respect but to ensure that the courts and the people respect the existing law. Unification of the law will help ensure that the law is enforced. The current multitude of laws, governing divorce and overlapping jurisdiction, increase the risks that customary rules relating to the

⁷⁹ See p220 - 222.

⁸⁰ Article 73 of the 1981 CSRO.

⁸¹ In *Mary Ayaba Azwe v John AyabaTebid* (1997) CASWP/32/1996 (unreported), the Court of Appeal ordered the appellant to pay back the marriage symbol before she could collect her belongings from the matrimonial home.

marriage symbol endure. Confronted with such diversity, the judge will be tempted to revert to customs he is familiar with. In my proposed system, only a single court will be granted original jurisdiction to examine all issues on divorce and only one law will be applicable. This single court will ensure better application of the law in general including its provisions on the marriage symbol. The risk of discriminatory customs slipping through will therefore be averted. Moreover, civic education and information campaigns should be put in place to make people aware of the new law.

Rule (c) (iv) The divorce will be made in two stages: A conditional decree which will be converted to a final decree within a maximum period of six months.

The Muslim tradition maintains a three-month period after divorce before the woman can remarry to give room for reconciliation as well as to clarify any doubts relating to the paternity of a child born after a period of up to nine months after divorce. This provision is like the granting of a degree nisi which is later converted to a decree absolute under the received law. However, this method of clarifying doubts as to the paternity of the child now seems outmoded because there are now scientific ways of removing any uncertainty.⁸² Nevertheless, the provision could be kept allowing parties a last chance of getting back together. The three-month period could also be used by the parties to settle financial and other ancillary matters (if this has not been agreed by them prior to the divorce process) before the divorce is made final. A further three-month period could be added if financial and other ancillary matters could not be settled by the parties. Within this second three-month period, the judge should be able to settle the parties' financial and other ancillary matters.

Rule (c) (v) There shall be no discrimination in the application of the above rules.

The aim of this rule is to avoid any discrimination which could arise in the application of the above rules particularly Rule (b) (i) which deals with the

⁸² Blood test could be carried out to establish the paternity of a child.

respondent's unreasonable behaviour as a ground for divorce. It would ensure that the current difficulties with adultery and violence which are considered as fault-based grounds are treated equally whether committed by the husband or the wife. Here is where human rights, the fourth source of law, become part of my unified law.

Discriminatory nature of adultery as a ground for divorce

Under both the received laws and customary law, divorce will be granted to a husband on the ground of adultery committed by the wife. However, when the adultery is committed by the husband, under most customs, the wife will be expected to prove other unreasonable behaviour by her husband before the divorce can be granted. If she fails to prove such unreasonable behaviour by the husband and she insists on the divorce, she will have to refund the marriage symbol before the divorce can be valid. This is discrimination on the grounds of sex which goes contrary to the Constitution and International treaties duly ratified by Cameroon.⁸³ It should therefore be prohibited.⁸⁴

Mild violence

The exercise of mild violence is still attached to the concept of the payment of the marriage symbol. Once the marriage symbol is given, the woman is regarded as the property of the husband and therefore she is under the authority and control of the husband. The husband can exercise his control by inflicting mild violence as a form of correction. Under customary law, a woman is a perpetual minor. If unmarried, she is under the control and authority of the father. If married, she is under the control and authority of the husband and such control can take the form of mild violence as a form of correction just as a parent could inflict mild violence on his/her children.⁸⁵

⁸³ An example is the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), ratified on 23rd August 1994.

⁸⁴ In Anglophone Cameroon, in addition to the adultery, the petitioner must prove that he/she finds it intolerable to live with the respondent. However, the requirement applies to the petitioner (whether male or female) and therefore is not discriminatory.

⁸⁵ In Cameroon parents exercise mild physical violence on their children as part of parental authority.

Mild violence is also seen in some tribes as a sign of love.⁸⁶ Violence in any form should not be accepted whether mild or severe. This is also discriminatory because it is the husband that can exercise such violence on the wife.

While the above specific rules are unacceptable, some specific rules are acceptable. The acceptable specific rules relate to consent, separation and specific bars to divorce

CONCLUSION

The rules I have put in place take account of my underlying objectives of supporting the institution of marriage up to the point that it has irretrievably broken down, minimising the distress and bitterness in divorce and eliminating discriminatory practices. The grounds for divorce are a mixture of both fault and non-fault grounds. The rules take account of the divorce laws applicable in Francophone Cameroon, Anglophone Cameroon and under customary law. All the fault grounds that exist in Francophone Cameroon law have been subsumed under one ground, which is the unreasonable behaviour of the respondent. The ground for divorce in Anglophone Cameroon (the irretrievable breakdown of the marriage) has also been maintained but the different facts necessary to prove the irretrievable breakdown of the marriage in Anglophone Cameroon have been converted into distinct grounds for divorce with some changes. While all the fault facts have been placed under one ground, the non-fault facts (consent and separation) are found in two separate grounds. Divorce by consent which exists under customary law where divorce can be obtained by happily married couples to enable them to fulfil their religious, customary or other obligations has been entrenched.

Reconciliation has been considered important in supporting the institution of marriage. I have therefore encouraged reconciliation before divorce is granted. I have also condemned discriminatory practices that exist under customary law with respect to mild violence and adultery. The negative effect of the marriage symbol has also been thinned out.

⁸⁶ Amongst the Ewondos of the Centre Region, a woman on whom mild violence has not been inflicted by the husband feels she is not loved by the husband.

As concerns the jurisdiction of the court in divorce matters, the High Court shall be the sole court with original jurisdiction to entertain divorce.

OVERALL CONCLUSION

Lord Denning in 1957 described African law in general as 'a jumble of pieces much like a jigsaw or a mosaic'.¹ This situation aptly describes the current law of divorce in Cameroon. More than half a century after independence, the current law of divorce in Cameroon is 'a jumble of pieces, much like a jigsaw or a mosaic'. While today we would call the jumble of customs and different colonial influences all brought together since independence an example of deep legal pluralism, the effects are problematic.

The problems with the present law

The law of divorce in Francophone Cameroon has been the same since independence. In Anglophone Cameroon, the law has changed as the laws of divorce in England have changed while customary rules in Cameroon have also undergone tremendous change. It is not easy to grasp the exact state of contemporary customary rules on divorce. Customary Courts sometimes apply rules that are different from customary practices. For example, some Customary Courts will grant divorce to a petitioning wife based on adultery by the husband while others will not. Some customary rules on divorce are so flexible that the Customary Court will grant divorce based on mere inconvenience to the petitioner, while others will refuse to grant divorce even in cases where the marriage seems to have broken down irretrievably. Even within a given village it is difficult to identify what practice is applicable. This uncertainty is made more acute by the unwritten state of customary law and by the different ways and the rate at which customary authorities are changing customary rules to respond to social change. This vagueness in the rules, and the multiplicity of customary laws, calls for reform of the law.

Pluralism of laws in Cameroon has given rise to problems relating to conflict of laws and has affected the rights of individuals, particularly those subjected to customary jurisdiction where some of the rules are discriminatory. The complexity has been made worse because of the difficulties in differentiating monogamous marriages from polygamous ones. It is acknowledged in

¹ Foreword to the *African Journal of African Law*, 1957 Vol. 1, N° 1 p1.

Anglophone Cameroon that Customary Courts have jurisdiction over customary marriages and only the High Courts have jurisdiction over statutory marriages but the uncertainties in determining whether a marriage is statutory or customary has made it difficult for justice to be achieved. While some judges have interpreted all marriages celebrated under the 1981 CSRO as statutory, whether polygamous or monogamous, others have interpreted the phrase 'statutory marriage' as covering monogamous marriages only. This latter interpretation renders all polygamous marriages customary and subjects them to Customary Courts and customary law. The difficulties encountered in differentiating monogamy from polygamy, and the complex nature of the jurisdiction of the court to grant divorce, have generated complexity and unpredictability.

Some laws have been enacted to solve the problems of jurisdiction of the courts² and of discrimination under customary law, but these laws have not been respected by the courts. For example, even though the law provides that 'in the event of death of one of the spouses the marriage shall be dissolved,³ the Court of Appeal stated in the case of *Sikibo Derago v Ngaminyem Etim*⁴ that the wife 'is part of the chattels of her deceased husband to be inherited'. Hence the problem of jurisdiction of the court and the application of the right law particularly by the courts in Anglophone Cameroon still exists. In general, the study shows that the law of divorce in Cameroon is thorny, discriminatory, archaic and confusing.

Possible solutions

The confused and messy state of the law of divorce in Cameroon calls for reform and I have examined various solutions in this thesis such as unification, constitutional overrides, harmonisation and integration. Harmonisation or integration could solve the problems of conflict of laws but

² Law n° 2006/015 of 29th December 2006 gave the High Court jurisdiction over customary marriages. Prior to the enactment of this law the High Court had jurisdiction only over statutory marriages while Customary Courts had jurisdiction over all customary marriages. The new law did not however deprive Customary Courts of their jurisdiction over customary marriages hence, today, both the High Courts and the Customary Courts have jurisdiction over customary marriages.

³ CSRO s77 (1).

⁴ (1992) BCA/36/81 unreported.

these remedies will not eliminate discriminatory rules. The constitutional review mechanism in place is inadequate as post-constitutional review is not guaranteed in the Constitution. Even if some form of judicial review of the Constitution were to be enacted, judges in Cameroon, especially in Anglophone Cameroon could not be relied upon to adequately protect the rights of individuals over group cultural rights. Unification is therefore the only viable solution. Unification will create a new law which supplant the current laws. Unification will solve the problems of discrimination and of conflict of laws. It is therefore preferable to legal pluralism and the other above-mentioned alternatives. I have thus proposed a unified system of courts and law as the best option. I have argued that the problem of application of the right law could be solved by instituting a unified court and legal system. Where the courts are unified, there will be only one court with original jurisdiction to handle issues on divorce. Laws must also be unified. Were the laws not be unified, there would be no assurance that the courts (even a unified court) would apply the right law.

A unified law would solve the problems of conflict of laws and eliminate discriminatory practices. The new law will thus deny any legal effect to the customary requirement of refunding the marriage symbol. It will abolish the dire consequences flowing from the non-refund of the marriage symbol such as the impossibility for the wife to escape the marriage even after the death of the husband⁵ or the attribution of paternity irrespective of biological links.⁶ By undermining the requirement of the marriage symbol, the new law will thus challenge the concept that the requirement currently conveys of married women as property of their husbands.

The Cameroonian Constitution protects traditional values alongside equality. I have argued in favour of a unified system which would reconcile tradition and equality by selecting and retaining traditional values which are not discriminatory. To some extent the law is already moving towards greater harmony but a unified law will be the final step.

⁵ Chapter Four, p231 - 233.

⁶ Chapter Four p229 - 230.

Characteristics of the unified law

The unified law I have proposed is a mixed system which takes account of the positive aspects of the divorce laws already applicable in Cameroon. The proposed rules take account of the divorce laws applicable in Francophone Cameroon, Anglophone Cameroon and under customary law. All the fault grounds that exist in the divorce law in Francophone Cameroon will merge into one ground, which is the unreasonable behaviour of the respondent. The ground for divorce in Anglophone Cameroon (the irretrievable breakdown of the marriage) will be maintained. However, the different facts necessary to prove irretrievable breakdown of the marriage in Anglophone Cameroon have been converted into distinct grounds for divorce with some modifications. While the entire fault facts have been subsumed under one ground, the non-fault facts (a two-year and a five-year separation) are found under two separate grounds. Under the reform there will no longer be any need for any period of separation if the divorce is by consent. Irretrievable breakdown of the marriage will be evidenced by a period of two years of separation instead of five as is under the current received laws in Anglophone Cameroon. However, where there are minor children, divorce will not be granted on the ground of a two-year separation unless adequate provision has been made for the welfare of the child. Divorce by consent which exists under customary law will feature in the new law. The proposed reform eliminates the discriminatory practices that exist under customary law in respect of the grounds of adultery and mild violence. To promote the stability of the marriage reconciliation is considered important. I have therefore encouraged reconciliatory endeavours before divorce can be granted. Finally, the refund of the marriage symbol will no longer be obligatory and its non-refund will have no effect on the validity of the divorce. As concerns jurisdiction, the High Court will henceforth be the unique court with original jurisdiction in all matters pertaining to divorce.

Unification by codification/unification through judges

Having accepted the view that unification is the ultimate solution, it is also necessary to choose the type of unification. The two main methods of unification of law are through codification or judge-made laws. A unification

process through judges will be too slow and cumbersome in a country like Cameroon with two distinct legal systems in addition to customary laws. Unification through codification is a more appropriate option. This choice moreover coincides with the goal of the Cameroonian legislator. The Cameroonian legislator aims at unifying all the laws in Cameroon eventually. The objective therefore is to have a code on family law that will be applicable in the entire nation. It is hoped that the complex, discriminatory and obscure divorce rules which have been restructured in this thesis will form part of the family code. In this way, the law will become systematic, comprehensive, certain, non-discriminatory, simple and easy to apply. Although it may be difficult to alter a code, this thesis has been carefully carried out and the rules judiciously selected to mitigate the negative effect of discriminatory practices and to respond to social realities of the people. Nevertheless, it is advisable that the proposed rules should first be enacted as individual legislations and be tested for wide approval before being put into the form of a code.

Creating awareness of the new law

Non-respect of the law is sometimes due to ignorance of the existence of the law. For the above proposed new rules to be respected the people will need to be aware of its existence. Hence, the law will need to be published in the official gazette in the two official languages (French and English). As copies of the official gazette are not easily accessible the law will also be published in newspapers, television and other social media. Sensitisation campaign will also be necessary to raise awareness of the new law. Both formal and informal legal education should be carried out. Before a decree of divorce is pronounced, the judge should explain the consequences and effects of divorce to the parties. Through these various means, knowledge of the new law would become part of Cameroonian culture and of the people's lives.

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