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Constitutional identity, bijuralism and the establishment of the common law division in the Supreme Court of Cameroon

Laura-Stella Enonchong

SOAS, University of London, London, UK

ABSTRACT

This article discusses the establishment of the Common Law Division (CLD) of the Supreme Court in the context of the Anglophone Crisis in Cameroon. It argues that the problem of the common law's unequal status in Cameroon's bijural legal system is compounded by the feeble constitutional affirmation of bijuralism as a constitutional identity. That has a concomitant effect on the way that the common law is represented within the Supreme Court and the CLD in particular. To explore that argument, the article offers an original analysis of bijuralism as a constitutional identity constructed from the legal, political and historical evolution of bijuralism in Cameroon. It is further contended that the establishment of the CLD was a missed opportunity to address the parity of the two legal traditions. Ultimately, the article suggests that the door to further reforms is not closed. In particular, the introduction of constitutional amendments to unequivocally affirm bijuralism as a constitutional identity and to reassert the parity of the two legal traditions.

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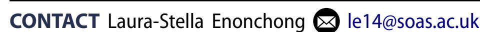
Introduction

Post-colonial societies grapple with diverse challenges in accommodating differences across a wide range of issues. This is the situation in Cameroon where the complexity of multiple ethnicities is compounded by language and legal traditions. Following article 1(3) of the Constitution, English and French are the two official languages in Cameroon. This is complemented by a legal system that is composed of the inherited civil law and common law legal traditions. Language and legal tradition in particular have been at the heart of deep divisions in society and have often led to political tensions (Fombad 1997; Konings and Nyamnjoh 1997; Mbaku 2019). More recently, these divisions precipitated an armed separatist conflict in the North-West and South-West Regions, the two English speaking (Anglophone) regions



CONTACT Laura-Stella Enonchong le14@soas.ac.uk
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of Cameroon (Mabku 2019; Beseng, Crawford, and Annan 2023). The origins of the conflict are attributed to historical perceptions of marginalisation of the minority Anglophone regions in Cameroon. A significant area where marginalisation has been prominent is in the recognition of the inherited English common law practiced by the minority Anglophone regions in Cameroon's bijural legal system (Fombad 1997; Konings and Nyamnjoh 1997; Mbaku 2019; Beseng, Crawford, and Annan 2023). One initiative that the government embarked on as a measure to address the grievances against perceived marginalisation of the common law particularly in the Supreme Court, was to establish a Common Law Division (CLD) through an amendment of Law No. 2006/016 of 29 December 2006, to lay down the Organisation and Functioning of the Supreme Court (Supreme Court Law). It should be noted that the Supreme Court has a civil law orientation, a framework which has historically obviated the equal representation of common law litigants in that Court. The establishment of the CLD was in part to mitigate that exclusion and thus far, some progress has been made in that direction.

However, there are residual challenges which prevent the common law from fully developing its distinct identity. This is because the legislative instrument establishing the CLD does not address the core of the problem which lies in the unequal status of the common law vis-à-vis the civil law, arguably, a constitutional matter. This article makes two fundamental arguments. First, it argues that the problem of the common law's unequal status is compounded by the feeble constitutional affirmation of bijuralism as a constitutional identity. That has a concomitant effect on the way that the common law is represented within the Supreme Court and the CLD in particular. To explore that argument, the article offers an original analysis of bijuralism as a constitutional identity constructed from the legal, political and historical evolution of bijuralism in Cameroon. Second, it is contended that the establishment of the CLD was a missed opportunity to address the parity of the two legal traditions. Ultimately, the article suggests that the door to further reforms is not closed. In particular, the introduction of constitutional amendments to unequivocally affirm bijuralism as a constitutional identity and to reassert the parity of the two legal traditions. It is an important step towards stemming the tide of dissatisfaction that triggered the ongoing violent conflict in the Anglophone regions and more generally to support the peaceful co-existence of the two distinctive entities that make up Cameroon.

Research on the Anglophone conflict has made scant reference to the idea of constitutional identity as a conceptual tool to explore the complexities of the conflict. This is unsurprising given the nascent state of scholarship on constitutional identities in African constitutional systems (Erk 2023). In constructing bijuralism as a constitutional identity in Cameroon, this article offers an alternative perspective from which to appreciate the Anglophone conflict and to assess existing attempts to address its fundamental bases. The broader implications are relevant to our understanding of the development of constitutional identities in divided societies where distinctive legal traditions complicate the matrix of diversity in society. In addition, it underscores the instrumentalism of law in the construction of constitutional identities and its limitations in their preservation.

This article applies the doctrinal method and a comparative analysis, using secondary materials and primary sources (legislation and case law). The doctrinal

method is used to analyse the normative foundations of Cameroon's bijural constitutional identity and the legal, social and political implications. The comparative approach adopted here provides a useful perspective from which to understand the distinct historical and political evolution of bijuralism as a constitutional identity in Cameroon and its trajectory. Cross-jurisdictional references to a bijural jurisdiction such as Canada highlight some of the shortcomings with the constitutional position of bijuralism in Cameroon and help to support an introspective and contextual approach to constructing a stronger constitutional affirmation of Cameroon's bijural constitutional identity.

The rest of the article proceeds as follows. The next section provides a contextual background to the problems which necessitated the establishment of the CLD. That is followed by a discussion of the Supreme Court and the reforms introducing the CLD. The concept of constitutional identity is discussed with a framing of bijuralism as a constitutional identity in Cameroon. The article then proceeds to advance arguments in support of constitutional reforms aimed at addressing the unequal recognition of the common law.

Background

Cameroon has a complex history which has been documented extensively (LeVine 1964; Johnson 1970; Chiabi 1997; Ngoh 2001). For present purposes, it is relevant to note that Cameroon was a German protectorate from 1884 until 1916 following Germany's defeat in World War I (LeVine 1964; Johnson 1970; Chiabi 1997; Ngoh 2001). Cameroon was subsequently partitioned between Britain and France, a partition which was later recognised under a League of Nations mandate in 1919 and from 1946, under a United Nations trusteeship. Britain obtained two unconnected sections which formed one-fifth of the territory (British Northern and Southern Cameroons) while France obtained four-fifths (French Cameroon) and each colonial power administered their portions of the territory separately introducing *inter alia*, their respective language and legal tradition. French Cameroon was the first to gain independence in 1960, (LeVine 1964; Johnson 1970; Chiabi 1997; Ngoh 2001). In 1961 British Northern Cameroons voted in a United Nations organised plebiscite to gain independence by joining the Federal Republic of Nigeria. Whereas, the British Southern Cameroons joined the Republic of Cameroon (the former French Cameroon) to form the Federal Republic of Cameroon, composed of two federated states representing the two distinct entities (LeVine 1964; Johnson 1970; Chiabi 1997; Ngoh 2001). Article 46 of the Federal Constitution preserved the dual legal traditions in the two federated states. This explains why Cameroon has a bijural legal system composed of the inherited French civil law and the inherited English common law. In 1972, the federation was dissolved to form a unitary political system under a Unitary Constitution, article 38 of which continued to recognise the two legal traditions.

Present day Cameroon is made of ten administrative regions as provided for in article 61(1) of its current 1996 Constitution. Two of these regions (20%), the former British territory, are English speaking (Anglophone) and apply the common law. The other eight regions (80%), the former French territory, are French speaking

(Francophone) and apply the civil law. Historically, the Anglophone minority have been subjected to forms of marginalisation in areas such as representation in government, the education system, and the use and application of English language and the common law legal tradition (Fombad 1997; Konings and Nyamnjoh 1997; Mbaku 2019; Beseng, Crawford, and Annan 2023). With regard to the common law, Anglophone lawyers had persistently expressed dissatisfaction with the increasing deployment of Francophone civil law trained judges to courts and judicial services in the Anglophone regions (Mekong 2017; International Crisis Group 2017; Simo 2017; Fako Lawyers Association – FAKLA 2021; Enonchong and Eware 2022; Beseng, Crawford, and Annan 2023). Some of the major objections related to the fact that the civil law trained judges did not have competency in English language or a mastery of the common law. This led to an undesirable situation where the channels of communication were broken between litigants and the courts, resulting in the denial of justice to the former (Simo 2017; FAKLA 2021; Enonchong and Eware 2022). The problems were also manifested in the Supreme Court which is essentially (but not exclusively) civil law oriented with a majority of francophone judges, a framework which has historically hindered the equal representation of common law litigants in that Court (Mekong 2017; FAKLA 2021; Enonchong and Eware 2022). In a qualitative empirical study of the CLD carried out by Enonchong and Eware, the researchers found that appeals to the Supreme Court from the Anglophone regions remained undetermined for excessively prolonged periods – 34 years in some cases (2022, 5–6). For instance *Paul N. Ndille v Helen Nneh* (2019) which remained pending for 34 years and *Kembiwe Joseph v The People of Cameroon* (2019) which remained pending for 33 years until their determination by the CLD in 2019 (Enonchong and Eware 2022; 5–6). According to Enonchong and Eware, some participants in the study (judges) attributed such excessive delays to the inability of francophone civil law trained judges to understand the common law or English language (2022, 5–6). In the circumstances, appeals from the common law regions which were written in English and applying common law principles were unlikely to be determined in a timely manner or at all by francophone civil law judges. In effect, the Supreme Court was inaccessible to common law litigants in practice, thereby undermining their access to justice at the level of that Court. The issue of the potentials for undermining justice through the application of common law principles by civil law trained judges who did not have the relevant competency has been an ongoing concern in Cameroon (Ngwafor 1995).

A broader issue that the situation highlights is the lack of equality of both legal traditions, despite the bijural nature of the country. Although no law, whether the Constitution or subordinate legislation expressly provide that the common law is subordinate to the civil law, practice and perception suggest otherwise. For instance, the system of training of judges which, before 2017, adopted a typically civilian approach as seen in the fact that judges are trained in the National School of Administration and Magistracy (ENAM). Whilst that arrangement still applies, in 2017, in response to the Anglophone conflict, a common law section was included in ENAM to take account of the common law in the training of judges and other judicial personnel (Simo 2017; Nsom 2017). Nevertheless, the established system of judicial training was transplanted from France into the former French administered

part of Cameroon (Monie 1970; Anyangwe 1989). In the post-colonial context of reunification, further developments in the system caused the demise of the common law approach which is characterised by the appointment of judges from the bar (Monie 1970, 318). This situation arises from the fact that in 1972, the judicial system was unified by virtue of Ordinance No.72/4 of 26 August 1972 on the Organisation of the Judiciary. That law dispensed with the distinct systems that existed in the common law and civil law jurisdictions as obtained at the end of colonial rule and during the Federation. The unified court system mirrored closely the system in the civil law jurisdiction, hence the civil law orientation of the Supreme Court and the approach to the training of judges. The inaccessibility of the Supreme Court to common law lawyers and litigants as described earlier, was a glaring manifestation of the unequal place of the common law in that Court.

Other practices which had developed to accord an unequal place to the common law include the language in which laws were adopted and promulgated. The language of expression and communication of both legal traditions is English and French, respectively. Laws have been promulgated predominantly in French and often, without an official English translation (Enonchong 2007; Ashukem 2022) or a rather inaccurate version (Fombad 1997; Neba and Amos 2019; Simo 2017). This is irrespective of article 31(3) of the Constitution which mandates the publication of laws in the Official Gazette in English and French. Through that provision, the Constitution infers not only the importance of the two languages, but implicitly, the importance of the two legal traditions, necessitating laws to be published in both languages. Nevertheless the Constitution does not go far enough to state that the laws should be adopted and promulgated in both languages. This can be contrasted with the position in Canada which like Cameroon, has English and French as its official languages, and a bijural legal system composed of the civil law (minority) and the common law (majority) legal traditions. In Canada, the official language policy as prescribed by the Official Language Act 1985,[1] mandates that acts of parliament are enacted simultaneously in English and in French. The drafting process is equally undertaken simultaneously in English and in French (L'Heureux-Dubé 2002; Shoemaker 2012). These practices are in recognition of the equality of both languages normatively and in practice and it additionally addresses the issue of inaccurate or ambiguous translations *(Canadian Pacific Railway Company v. Robinson* 1891).[2] The importance of the Canadian language policy is further enhanced by the fact that it has been accorded quasi-constitutional status by the courts (*La Vigne v. Canada* 2002).[3]

In Cameroon, as with domestic law, the application of international law has revealed the predominant place of the civil law. For instance, Cameroon ratified the Treaty on the Harmonisation of Business Law in Africa, known by its French acronym, OHADA, in 1996 at a time when the Treaty's official language of application was French (Decree No. 96/177 1996)[4]. Cameroon operates a monist system which implies, as per article 45 of the Constitution, the OHADA Treaty became applicable domestically upon ratification and took precedence over national laws. This raised at least two fundamental issues; first, the concern that OHADA is based substantially on civil law principles; second, the working language of the Treaty being French. These two issues indicated that with regard to the common

law and English language, the political powers paid insufficient attention to the potential unconstitutionality of the OHADA Treaty arising in particular from the apparent inconsistency with the language prescription in the Constitution. This explains the objection of common law practitioners to its application in the Anglophone regions and indeed the reluctance of some judges to apply it. In *Akiangan Fombin Sebastian v Foto Joseph & Others* (2000)[5], a High Court judge in the Anglophone region declined to apply the OHADA Treaty on the basis that it suffered from self-exclusion from the Anglophone regions due to its French language prescription. A similar approach was adopted in *Limbe Urban Council v Isidore Bongham*[6] where the court held that OHADA infringed on the human rights of Anglophone Cameroonians. Although Cameroon subsequently ratified the amended OHADA Treaty (Decree No. 2012/344 2012)[7] which now includes English as one of its working languages, it did not completely dispel the misgivings of the common law practitioners.

It was the cumulative effect of the discriminatory practices described earlier that reinforced the perception within the common law practitioner community and litigants that the common law was undermined and indeed, was progressively and systematically being eroded. Some decades earlier, Charles Fombad accurately predicted the potential ills of failing to ensure meaningful legal pluralism in Cameroon, particularly with respect to the equal status of the common law. He stated thus:

> In Cameroon, nothing could be more harmful to national unity and integration than laws which are perceived by one segment of the community as imposed. This may fuel the ugly flames of secession by extremists who feel that it is only in a separate state that they can ensure for themselves and their offspring, the way of life and system of justice which they cherish. (Fombad 1997, 231)

In October 2016, common law practitioners launched a peaceful protest in an attempt to further draw the attention of the government to their burning concerns (International Crisis Group 2017; Mbaku 2019; Beseng, Crawford, and Annan 2023). Previously, the government and in particular, the Ministry of Justice had remained silent to petitions made to it by common law practitioners through the appropriate channels (Mbaku 2019; Beseng, Crawford, and Annan 2023). The Minister of Justice, Laurent Esso stated that some initiatives were considered in 2015 to respond to the lawyers grievances, including preparation for the organisation of a judicial forum at the request of the President of the Republic on 09 July 2015 (Esso 2017; Simo 2017; Balama 2017). However, it was clear by October 2016 that no concrete actions were being taken, prompting the lawyers to protest peacefully. Regrettably, the government responded to the protest with disproportionate force, plunging the country into what has now become an interminable armed conflict (International Crisis Group 2017; Mbaku 2019; Beseng, Crawford, and Annan 2023). In a bid to mitigate the very volatile situation, some measures were taken by the government in 2017 to address specific concerns raised by the lawyers. These included the establishment of the Common Law Division (CLD) of the Supreme Court in 2017. It was a positive move to indicate that the government was not completely indifferent to the concerns of the common law practitioners. The CLD went fully functional in 2018. So, six years on, to what extent is it addressing the fundamental issues resulting in

the difficulties encountered by the common law advocates and indeed, the issue of the common law's unequal status in the Supreme Court?

The Supreme Court and the Common Law Division

To appreciate better the nature of the reforms and their practical implications, it would be necessary to first understand the structure of the Supreme Court. Thus, this section will provide a brief overview of the relevant structure of the Supreme Court and the reforms introducing the CLD. It will then analyse their practical implications to evaluate the extent to which they address the concerns of the common law advocates relating to equal access and representation of the common law. For the latter purpose, the article makes reference to a study conducted by Enonchong and Eware (2022, 2024), which to date, to the best of the author's knowledge, represents the only comprehensive study of the CLD.

Structure of the Supreme Court and the reforms

Article 38(2) of the Constitution of Cameroon provides that the Supreme Court shall be composed of three Benches. These are, the Administrative Bench – with competence in administrative litigation; the Audit Bench – with competence in the auditing of public accounts and the Judicial Bench – with competence in civil, criminal, commercial, social matters and matters relating to customary law.

In addition to the above, section 41(1) and section 20 of the 2006 Supreme Court Law respectively, make provision for two further benches; the Panel of Joint Benches and a Full Bench. The former has jurisdiction in matters relating to the regulation of judges, recusal and the transfer of cases between courts. The latter has competence to hear matters submitted to it by the First President of the Supreme Court, the *Procureur General* or by one-third of the Supreme Court judges. The last two Benches are not constitutional institutions so arguably have an unequal status and seem to deal with matters that do not fall within specifically defined substantive areas of law.

Each of the three constitutional Benches is composed of divisions with a specialised subject matter jurisdiction. For the purposes of this article, the relevant Bench is the Judicial Bench. It is composed respectively, of a civil, commercial, criminal, labour and customary division. Prior to 2017, each division had competence to hear final appeals on their specific subject matters whether based on the civil law or the common law. The position has now changed.

According to section 8 of the 2006 Supreme Court Law, as amended, the Judicial Bench is composed additionally of the CLD. Section 37-1 provides that the CLD has jurisdiction to hear appeals against final decisions of tribunals and judgments of courts of appeal in matters relating to the common law. In practice, this has been interpreted to mean cases where the subject matter of the original dispute and the trial decisions were governed by common law principles (Enonchong and Eware 2022, 2024). As such, cases falling within that category should no longer be heard by the other divisions of the Judicial Bench, irrespective of the subject matter.

Another important innovation as per section 8, is that judicial officers appointed to the CLD "must have an Anglo-Saxon legal background", that is, a background in the common law tradition and by implication, knowledge of the language (English) through which it is deployed.

From the above discussion, it could be argued that the reforms appear to have a broad scope, capable of addressing the grievances of the Anglophone common law practitioners, relating to their access to, and the unequal representation of the common law in the Supreme Court.

A brief assessment of the CLD

It is undoubted that the CLD has made a significant alteration to the structure of the Supreme Court. As demonstrated by Enonchong and Eware (2022, 2024), there have also been significant developments which respond positively to the concerns of the common law practitioners. For instance, due to the requirement that judges appointed to that division should have an Anglo-Saxon legal background, the judges are well versed in the common law as understood and practiced in the Anglophone regions (2022, 7–8). As such, appeals from those regions are heard applying common law principles, allowing some scope for legal continuity in the way that the principles are applied through the different levels of the judicial system. Moreover, the proceedings are now conducted exclusively in English, permitting common law advocates to participate fully in a language that they are familiar with (Enonchong and Eware 2022, 2024). Further, the judgments are written in English following a typical common law style of writing judgments, with more elaboration of the facts and clear distinction from previous cases with similar facts (Enonchong and Eware 2022, 2024) an approach necessary for the establishment of binding precedent (Tetley 2000). This is distinct from the more concise and formalistic approach of the civil law which the common law advocates found unhelpful. Significantly, with regard to duration, the CLD has embarked on a practice to ensure more timely hearing of appeals and delivery of judgments (Enonchong and Eware 2024). Whilst problems of delay may still persist due in part to the small number of judges in that Court, there is a marked improvement from the earlier periods when appeals could be pending in the Supreme Court for decades. For instance, Enonchong and Eware (2022, 2024) found that in 2019 alone, less than two years after it went into full operation, the common law division delivered judgments in at least 15 cases that had been pending before other divisions of the Supreme Court for periods ranging from 14 to 34 years. It would not be preposterous to suggest that an additional factor that contributed to the more expeditious approach of the CLD was the familiarity of the judges with the legal principles and practices on which the cases were based.

Despite these achievements, there remain critical concerns which go to the heart of the common law identity. They undermine the capacity of the CLD to achieve its full potential in effectively addressing the concerns of the advocates. The main issues relate to the influence of the 2006 Supreme Court Law which is problematic to the effectiveness of the CLD (Enonchong and Eware 2022, 2024). It deprives that division of full autonomy from the Judicial Bench and imposes civil law procedures

which may lead to internal incoherence with substantive and procedural laws applied in the CLD. To explore the latter point more effectively, it may be helpful to first explain the theoretical perspective before demonstrating the problem as presented in the CLD.

The incoherence of substantive and procedural law in the CLD

To begin with, a system of law includes its substantive and procedural law. Substantive law is the embodiment of principles that define rights and duties, while procedural law comprises the rules by which substantive law is enforced. Substantive law is interpreted and applied in consideration of the fundamental values that underpin the particular legal system on which the law is based. Dworkin for instance enjoins courts to endeavour to interpret and apply the law in a way that demonstrates that they are reflecting the principles embodying the system of law such that it 'express a single, coherent scheme of justice and fairness' (Dworkin 1986, 219). Sally Engel Merry describes this phenomenon, in relation to interpretation by courts in a pluralistic legal system as considering "a particular 'legal sensibility' enshrined in the judicial forum" (Engel Merry 2012, 71). There is therefore, an inherent logical connection between substantive and procedural laws emanating from the same system which ensures coherence, or what some scholars describe as the unity of law or legal principles in a legal system (MacCormick 1984; Raz 1994). That coherence can be disrupted when the two dimensions of the law are not logically connected, for instance due to their unrelatedness arising from the differences in their provenance and or the fundamental values on which they are grounded. Unless specific measures are adopted to align substantive law and procedure, their application may lead to undesirable outcomes for instance on justice, certainty, predictability and legitimacy. This may explain why in Canada, the interpretation and application of harmonised statutes have been facilitated by specific legislative instruments to take into account the legal sensibilities of the two legal traditions (Grenon 2005).

In Cameroon, one of the major concerns that undermined the application of the repealed harmonised 1967 Penal Code was the incongruence in the application of principles and procedures from different legal traditions. As discussed by Ajanoh (1998) areas such as bail and habeas corpus (distinct to the common law) operated differently in the High Courts in the two jurisdictions with different consequences for the accused. As a matter of procedure in criminal matters, the prosecution relies on the report of the police officer who effected the arrest and detention of an accused as evidence for the prosecution. Ajanoh (1998) notes that in several cases in the civil law jurisdictions, where a police officer failed to appear in court to be questioned on their report, the court would rely on that report as incontrovertible evidence. This placed a higher burden on the defence to refute the evidence in the police report. Moreover, the prosecution would rely on that report to advise the court to dismiss a bail or habeas corpus application and the court would generally rely on the prosecution's advice. Whereas, in the common law jurisdictions where the concepts of bail and habeas corpus are well developed and understood, the

courts would not unduly rely on the advice of the prosecution to make a decision. Rather, the court would order the release of a detainee as of right following a determination of their unlawful detention. The problems with the incongruent application of the harmonised 1967 Penal Code accounted in significant part, to the government's decision to draft a harmonised criminal procedure code to align the criminal law principles with practice and procedure (Ajanoh 1998).

In the Supreme Court, such complexities can emanate from the broad application of the 2006 Supreme Court Law which does not consider the legal sensibilities. In terms of the procedural requirements, including the procedure for submitting an appeal, the 2006 Law is applicable to all the divisions of the Supreme Court. As the CLD is subsumed under the structure of the Judicial Bench, it must apply the same procedures as other divisions. The problem is that the procedures are based on the civil law rather than the common law. As the two systems are different, application of civil law procedures may lead to internal incoherence in the determination of cases based on substantive common law principles and potentially undermine the development of binding precedent which is a distinctive feature of the common law.

One procedural aspect which initially proved problematic was the requirement to cite the law relating to the grounds of appeal verbatim, failure of which an appeal would be dismissed (Enonchong and Eware 2022, 2024). This implied that even in serious cases impinging on a fundamental right such as the right to liberty, a victim of unlawful detention would continue to suffer from such a violation. Whereas, as was reiterated by the Court of Appeal in Buea (a common law jurisdiction) in *The People v Thio Thomas* (2009)[8] it is an established principle in the common law jurisdictions that mere technicalities should not be relied upon to undermine substantive justice. The CLD judges have been able to mitigate this hurdle by relying on section 35(2) of the Supreme Court Law which permits the Court to raise a ground of appeal on its own initiative. In this way, the Court can wave aside technical issues such as the non-verbatim reproduction of the law. This innovative approach adopted by the judges to pursue justice is commendable. Yet, the role of the judge should arguably not be extended to resolving such procedural incongruity created by the law to avoid the risk of straying into the legislative domain. More particularly, the judges can hardly be expected to develop innovative and lawful mechanisms to avoid all potentially incongruent procedures. For instance, the use of the judge-rapporteur (a civil law feature) which is etched on the procedural fabric of the Supreme Court. One major drawback of the typical rapporteur system is the potential for a judge-rapporteur to exert disproportionate influence on the decision of the court as other judges rely extensively on the advice provided by the single judge-rapporteur in a matter before the court (Cheruvu 2024). Whereas, in a typical common law systems, the judges assigned to a case write their separate opinion on the case. Further, the rapporteur system is based substantially on written submissions and a lack of an established practice of oral debates. In a criminal appeal for instance, the defence is not accorded the opportunity for examination and cross-examination of the material which is used by the rapporteur to prepare the advice to the Court. Examination and cross-examination are important elements in the process of discovering or ascertaining the truth in the common law system, without which the

rapporteur may base the advice to the Court on questionable evidence. The rapporteur system is not one that the CLD judges can lawfully overlook or apply selectively, irrespective of potential difficulties posed in the proper administration of justice.

What these issues highlight more generally, is the place of the common law within the Supreme Court. The issues demonstrate that the common law continues to assume a subordinate position in that Court. The amendment of the 2006 Law introduced provisions that go as far as accommodating the common law within the civil law oriented structure of the Supreme Court. It does not provide a sufficient basis for the common law to develop its distinctive identity within that Court or to assume an equal position with the civil law. In effect, it implies that the potential equality of the common law is overshadowed by the persistent influence of the Supreme Court's civil law orientation. It is argued that the reforms could have gone further to provide the CLD sufficient basis to operate as distinct and equal to the civil law, particularly because the civil law orientation of the Supreme Court inevitably imposes a perception of predominance in favour of the latter. The underlying issue which exacerbates this situation is the constitutional position of bijuralism. The latter is a fundamental feature of the country's constitutional identity, yet the Constitution does not contain a robust affirmation of that identity (Fombad 1997). In addition, the Constitution does not make unequivocal statements about the parity of the two legal traditions. The argument here is that a strong constitutional foundation for bijuralism as a constitutional identity inevitably demonstrates the importance of the two legal traditions. Further, constitutional affirmations of equality would clearly establish the normative parity of the two legal systems. These considerations would have significantly influenced the approach to the reconstruction of the Supreme Court to ensure that the reconstructed edifice effectively reflects the bijural identity of the country and the equality of the two legal traditions that it represents. This is so because the Supreme Court is the ultimate point at which the two systems meet and therefore it stands as a natural symbol of bijuralism.

Bijuralism as a constitutional identity

This section explores the concept of constitutional identity and how it is constructed. Against that backdrop, the application of constitutional identity to the Cameroonian context will be discussed. It will demonstrate the distinctive ways in which the social and legal context have framed the construction of bijuralism as a constitutional identity in Cameroon.

Constitutional identity

The concept of constitutional identity has been defined as referring to the "essentially constitutive part of a constitution which reflects the essence of a particular community" (Zhai 2020) or a collective identity exhibited in salient characteristics of the particular community, and reflected in constitutional norms and how these norms have been interpreted by the judiciary (Rosenfeld 1995). Similarly, constitutional identity is used to describe "the special identity of a nation/people that is

also expressed, determined, and shaped by the constitution" (Polzin 2017, 1599). This identity can be constructed in at least two ways.

The first way, according to Michel Rosenfeld is through the constitution (Rosenfeld 1995, 2009). Constitutional identity can be constructed through a dynamic interaction between the two elements of the self-identity, that is, sameness and selfhood, to create unity within a polity (Rosenfeld 2009). These elements can be located within the diverse identities that make up a polity. The dynamic interaction is the process through which a divided polity can create a common identity "rooted in a shared constitutional text" (Rosenfeld 1995, 1060). Rosenfeld argues that constitutional identity is constructed over time, from national, ethnic, cultural, historical, and political identity, through a dynamic process that involves both the negation (rejection) of these identities and the incorporation and rearrangement of salient features of the same identities (Rosenfeld 2005, 2009). Negation and incorporation can be seen as a process of sifting and refinement of the key features that constitute a polity at a given time and this process is always "open to further elaboration and revision" (Rosenfeld 1995, 1053). Constitutional identity according to Rosenfeld (1995) is not static – it could be evolutionary, accommodating developments in society such as a new collective aspiration or a new or renewed consciousness about selfhood. Yet, the evolutionary process must preserve those threads of continuity, the essential features which sustain the image of the constitutional identity.

The second approach to constructing constitutional identity, following Gary Jacobsohn is through experience (Jacobsohn 2006, 2010). He argues that constitutional "identity emerges dialogically and represents a mix of political aspirations and commitments that are expressive of a nation's past, as well as the determination of those within the society who seek in some ways to transcend that past" (Jacobsohn 2010, 7). Emphasis is placed on the importance of the dialectic relationship between the essential constitutional commitments and the external environment in which the constitution operates. It is this disharmony that drives the development of a constitutional identity and the clarification of that identity (Jacobsohn 2010). Thus, in this approach, disharmony, conflict, disagreement are neither unusual nor undesirable. In fact, disharmony is the essential element which fuels the dialogic process leading to the emergence of those unique features reflecting the essence of a particular community. Given the relevance of disharmony, an accurate account of a polity's constitutional identity cannot be constructed without acknowledging the disharmonic constitution (Jacobsohn 2010).

Although Rosenfeld and Jacobsohn differ in terms of their approach to how constitutional identity emerges, it is clear that both scholars are preoccupied with how divided societies can construct unity in the midst of diversity. Both approaches are cognisant of the conflict inherent in the process of constitutional identity formation. As seen earlier, Jacobsohn's construction is founded on disharmony, whilst Rosenfeld acknowledges that the complex dynamic interaction between the elements of selfhood can "evoke complementarity and at other times contradiction" (Rosenfeld 2009, 27). Moreover, like Rosenfeld, Jacobsohn recognises that constitutional identity is not immutable – constitutional identity can change, "but it is resistant to its own destruction" (Jacobsohn 2010, 7), implying that change must preserve the underlying core assumptions of that identity. Similarly, like Rosenfeld, Jacobsohn acknowledges

the role of constitutions in constructing a constitutional identity. For instance he notes that the commitment expressed in a preamble often provides the pathway to the construction of constitutional identity (Jacobsohn 2010).

The above approaches align with conceptions of constitutional identity that seek to understand the connections between the text of the constitution and national identity. Accordingly, the constitution can influence the development of a national identity which can in turn influence the development of a constitutional identity (Polzin 2017; Rosenfeld 2009; Jacobsohn 2010). Nevertheless, the extent to which the national identity can develop into a constitutional identity depends on the extent to which the national identity "is marked by the constitution itself" (Polzin 2017, 1603). The preamble is a good part of the constitution which "define[s] the constitutional identity and, as such, … define[s] who the 'we' is" (Orgad 2010, 738). Preambles express an identification or an understanding of the key distinctive features of a people or country, drawing from its national history and other conditions within that country. Further, preambles can be seen as constituting "a political resource for the consolidation of national identity," they can also forge a common identity (Orgad 2010, 722, 731). According to Polzin, some constitutional provisions can reflect or indicate the norms that constitute the constitutional identity of a country. These norms can be seen as such because they express the national, cultural or historic peculiarities that are relevant to the national collective identity of a community (Polzin 2017).

In post-colonial divided societies like Cameroon, constructing a constitutional identity is not unchallenging. Jan Erk for instance acknowledges this fact when he states that "[d]istilling one constitutional identity from the multitude of constituent peoples inhabiting one country is a challenge" (Erk 2023, 166). He reflects on the unsuccessful attempts by many African countries in the aftermath of colonialism, to construct aspirational constitutional identities which prioritised Western constitutional ideologies, undermining the complexities of the pluralistic societies (Erk 2023, 158–163). Such endeavours have continued long after colonialism with varying degrees of success, indicating the enduring challenges relating to constructing constitutional identity in pluralistic societies, whether in post-colonial contexts or otherwise. Nevertheless, as demonstrated below, it is possible to delineate a constitutional identity or what may be considered as the core fundamental understanding of selfhood and autonomy in post-colonial divided societies.

Cameroon's bijural constitutional identity

In Cameroon, bijuralism can be considered as expressing a fundamental constitutional identity; first, from the perspective of the content of the 1996 Constitution and, second, from the context in which the Constitution operates. This will be illustrated through an exploration of the historical development of the constitution and the socio-political context of Cameroon. The aim is to demonstrate that bijuralism as a constitutional identity can be inferred from the 1996 Constitution.

Bijuralism is a defining feature of Cameroon's constitutional identity, constructed from a dimension of its national identity as expressed in the Constitution. To begin with, paragraph 1 of the Preamble of the Constitution states that, "we" the people

of Cameroon are proud of "our linguistic and cultural diversity, an enriching feature of our national identity". Culture can be interpreted broadly to include legal culture (Engel Merry 2010), referring to "the network of values and attitudes relating to law, which determines when and why and where people turn to law or government or turn away" (Friedman 1969, 34). Similarly, Roger Cotterrell (1997) and Rodolfo Sacco (2008) define legal culture with reference to traditions and values in the society in which law exists. From these definitions, law is seen through both the sociological context and "law in the books" context, with legal culture encompassing tradition. As such, in this article, the approach offered by Jaakko Hussa (2012) will be adopted in regarding legal culture and legal tradition as having no important differences in the epistemological sense. Reverting to the preambular provision in the Constitution of Cameroon, the network of values and attitudes towards law is underpinned by at least two major perspectives; the civil law and the common law. Thus, the Preamble's formulation of "cultural diversity" must be interpreted as including the civil law and the common law legal traditions. It is significant to note that the expression appeared initially in the 1972 Constitution which instituted a unitary political system in Cameroon. In that Constitution, national identity was referred to as "national personality," a concept which like national identity reflects a collective self-perception of the individuals or community within the state. Its restatement in the 1996 Constitution and the change of reference to "national identity" is indicative of the salience of "linguistic and cultural diversity" as distinctive features of the Cameroonian society. Unlike most constitutional preambles, article 65 of the 1996 Constitution provides that the preamble is an integral part of the Constitution. As such, it has legal force equal to other provisions of the Constitution. Arguably, the preamble has laid the foundations for the development of a national identity which in turn has influenced the development of a constitutional identity that includes the two legal traditions.

Other provisions of the Constitution reflect the salience of the two legal traditions as expressing a constitutional identity. For instance, article 68 states that legislation which was applicable in the two federated states of Cameroon shall remain applicable insofar as they are not repugnant to the Constitution or have not been repealed. As the federated states were based on separate legal traditions, article 68 is a reaffirmation of the existence of that distinctiveness. The significance of this provision can be understood better from its historical trajectory. The 1961 Federal Constitution which cemented the union of the two previously separate sections of Cameroon, was careful to recognise that the territories had important distinctive features which they had brought into the union. Despite the efforts to craft national unity, certain features such as the distinctive legal traditions were accorded some level of recognition in their own right. Thus, article 46 of the 1961 Federal Constitution made provision for the continued application of legislation from the two Federated states, in so far as they did not conflict with the Federal Constitution. Given the common law context of the former British colony the laws emanating from that section of the country included statutes, judicial precedent and laws of equity (Southern Cameroons High Court Law 1955). When the federal system was dissolved and a unitary political system introduced in 1972, a new Constitution was adopted and it continued to pay deference to the two legal traditions. Article 38 of the 1972

Constitution replicated the provision which mandated the continued application of legislation from the previously federated states. The implications of the continued recognition of difference may be appreciated better in the light of the fact that the changes to the political and constitutional system in 1972 were wide ranging and included the establishment of a uniform judicial system. Some of the changes, the latter in particular could be considered an act of negation– a break with the previously separate judicial systems. In the midst of these transformations, the Constitution continued to recognise the existence of two legal traditions. Article 68 of the current 1996 Constitution is therefore a continued acknowledgement of the bijural identity of Cameroon.

In addition to the constitutional construction, bijuralism can be considered as expressing a constitutional identity from the socio-political context in which the Constitution operates. Considering its history of colonialism and its dual legal heritage, law and practice in Cameroon have developed to be defined by that heritage. The two English speaking regions continue to follow practices that are grounded in the common law (Fombad 1997; Nfobin 2019). With respect to legal texts, this has remained the case in the areas of law which have not been harmonised (Time 2000). Even in relation to harmonised laws, for instance, the Criminal Procedure Code (CPC), it is the case that common law practitioners have been inclined to apply these laws in consonant with their common law heritage (FAKLA 2021). Court room protocols have continued to be influenced by the common law heritage (Fombad 1997). The situation is not dissimilar in the French speaking regions where civil law practitioners have also adhered to the practices that are influenced by their civil law heritage (Fombad 1997; Nfobin 2019). Of course, identity in this sense is not immutable given that society evolves with time. Yet, some core features are retained in the midst of change. In that connection, the process of harmonisation of some national laws has meant an attempt at the amalgamation of tenets emanating from both legal traditions. However, that is not to indicate that the common law and civil law traditions have ceased to exist as distinct systems. Instead, harmonisation can be seen as part of a dialogical process of constructing unity in diversity. In acknowledging that reality there is no intention here to undermine the challenges and controversies surrounding the process of harmonisation of laws in Cameroon, which itself is fraught with issues of underrepresentation of the common law in drafting committees and in the substantive provisions of harmonised law (Fombad 1999). In some cases (for instance the OHADA discussed earlier), unijuralism has been opted for in disregard of the common law. Admittedly, a more satisfactory approach to harmonisation would ideally give due consideration to both the common law and the civil law, as Smith (1968) and Fombad (1997) argued was the case with the now repealed 1967 Penal Code. In fact, it appears that the necessity for due consideration of the two legal traditions is not lost on the executive, given that decades ago the protracted process of drafting a harmonised criminal code was attributed partly to the need for time to develop a proper understanding of the two legal traditions (Ajanoh 1998). More recently, the drafting of a harmonised family code has been paused to properly consider both legal traditions (Chatué 2013; Asanga 2020). Despite the challenges and imperfections, it is contended that harmonisation represents a 'disharmonic' dialogic process which is a continued

recognition of the composite traditions of the legal system. Following Jacobsohn's account of the emergence of a constitutional identity discussed previously, it is such a disharmonic process which paves the way for the development of a constitutional identity.

Bijuralism has continued to endure through the political and constitutional changes that the country has undergone. Bijuralism is part of the collective memory that has persisted over time as part of the "cultural personality" which forms the core of its constitutional identity. That accounts for the fierce resistance of common law practitioners to attempts at undermining the bijural character of the country. Bijuralism in Cameroon has, borrowing the words of Jacobsohn (2006, 373), "developed over time, evolving in tandem with the habits and experiences of the body politic."

The 2017 reforms – a missed opportunity?

Despite the constitutional construction of bijuralism and the socio-political context discussed above, the Constitution is silent about the equality of the two legal traditions. In addition, arguably, the constitutional construction of bijuralism could be more forthright. In that respect, the political crisis which began in 2016 leading to the establishment of the CLD was an opportune moment to remedy some of these deficiencies. It is acknowledged that the legislative measures relating to the establishment of the CLD have gone a long way in addressing some of the difficulties faced by the common law practitioners and as seen in the achievements of that Court, the government acted judiciously in attempting initial solutions to the crisis. Nevertheless, in the circumstances, legislative measures are considered insufficient to address issues of constitutional identity. It is argued that constitutional reforms are necessary for a more unequivocal statement about Cameroon's bijural constitutional identity and to provide a stronger normative basis for recognising parity of the two legal traditions particularly at the level of the Supreme Court. For the latter, the establishment of a common law bench would be a more appropriate measure to achieve this. To develop these arguments, the constitutional construction of bilingualism will be analysed and compared to that of bijuralism to demonstrate that the former has been better established as a constitutional identity and that a similar approach could be adopted in the case of bijuralism. In addition, the Supreme Court will be presented as a key institution that has significant impact on the expression of bijuralism in Cameroon.

Constitutional identities – a comparison

As noted previously, Cameroon is officially bilingual. Note however that the more appropriate linguistic characterisation would be multilingual, as there are several indigenous languages spoken in Cameroon (Etchu 2002). Nevertheless, English and French are constitutionally the official languages. Unlike bijuralism, bilingualism is firmly recognised as a constitutional identity beginning with the preamble which recognises Cameroon's linguistic diversity as an enriching feature of its national identity. Other provisions of the Constitution affirm this. For instance, article 1(3)

provides that English and French shall be the official languages and it goes further to state that both languages have "the same status." This is an unequivocal expression of the equal status of the two languages. The same provision vests a duty on the state to "guarantee the promotion of bilingualism throughout the country". As discussed earlier, the Constitution provides that laws should be published in the Official Gazette in English and French. It is clear that the firmer endorsement of bilingualism as a constitutional identity and the parity of the two languages can be contrasted with the position of bijuralism. It may be worth acknowledging here that in practice, like the common law, English has been systemically undermined (Enonchong 2007; Fombad 1997; Konings and Nyamnjoh 1997; Simo 2017). During the early post-independence period, the policy of bilingualism was supported at the highest political echelons and attempts to promote it were conspicuous, although some times, the reality was different (Constable 1974).

Nevertheless, due in part to the stronger normative basis for the equality of English and French and the duty of the state to guarantee and promote these languages, measures have been adopted to that effect, including institutionalisation. For instance, in the early reunification period two national language institutes were established in the Anglophone and Francophone regions and state bilingual secondary schools were also established with the number progressively increased over the years (Constable 1974). Other measures included the compulsory teaching of the two languages as part of the national curriculum and their inclusion in all final examinations for secondary and high schools (Kouega 2007). In 1991, the Prime Minister at the time, Mr Sadou Hayatou, issued Circular N° 001/CAB/PM which amongst other things required public servants with public facing duties to communicate in a language that would be understood by the public and the publication of official documents, international agreements, treaties and court decisions in both official languages. More recently, in 2019, Law No. 2019/019 on bilingualism was adopted in the context of the Anglophone crisis as a measure to reinforce the normative and practical basis for the use of both languages and in particular, to promote the equality of status and use. This law has since enhanced in practice, the use of English in the public service and in particular in public communications (Akumbu 2020). For instance COVID-19 related communications to the public were issued in English and French (Akumbu 2020). A national commission on bilingualism was also established by Decree No: 2017/013[9] with a mandate to, inter alia, monitor the implementation of article 1(3) of the Constitution and to propose measures to enhance bilingualism. In July 2017, in a bid to promote bilingualism in compliance with obligations under the bilingualism law, the then newly appointed Secretary General at the Ministry of Justice urged heads of services and other employees within the Ministry to obtain training in the national languages through the Pilot Linguistic Centre (Ojong 2017). The stronger constitutional pronouncement has also provided a basis for decisions in legal disputes like *Foto Joseph* where the Court referred to the equal constitutional status of the official languages to decline to apply the OHADA Treaty which at the time was exclusively in French. It is argued therefore that a stronger constitutional affirmation of the equality of the two legal traditions has potential to enhance the normative basis for and the practical application of the two legal traditions, and in particular, the erstwhile undermined

common law. Simo (2017) similarly underscores the relevance of establishing a clearer normative basis for the application of bijuralism in Cameroon. Certainly, there are limits to which constitutional provisions can effectively develop and entrench a constitutional identity. Nevertheless, as discussed earlier in relation to the construction of constitutional identities, the constitution provides a good normative foundation on which to further develop and consolidate that identity.

Undoubtedly, issues of constitutional identity can be addressed through the courts, for instance, by clarifying the scope or content of a constitutional identity in judicial decisions. That is exemplified in the recent decision of the Constitutional Council in France in *Société Air France* (2021)[10] affirming as part of the French constitutional identity, the principle of prohibition of delegated public power to private entities. Nevertheless, in some circumstances, the political process may be more suitable (Śledzińska-Simon 2015) and it is not uncommon for constitutional amendments to be used as a means of creating a more inclusive constitutional identity (Dixon 2012). As argued by Śledzińska-Simon, the government and parliament can be agents of the "constitutional self, and courts are there only to optimize the outcomes of the political process" (2015, 127). The context of the political crisis in Cameroon presented an opportune moment for the political actors to seek to firmly establish the equality of the common law, an issue which was at stake. A constitutional amendment would have been an appropriate measure to reinforce bijuralism as a constitutional identity with a concomitant clear expression of equality in the use and application of the common law and civil law. A constitutional foundation is more likely to provide the common law a place of equal prominence and status and constitutional amendments are naturally a process that involves the political branches (in Cameroon, as per article 63(1) of the Constitution this refers to the executive and the legislature).

The Supreme Court as a site for the expression of bijuralism

The Supreme Court is a symbolic institution not only due to its status as the Court with final jurisdiction in Cameroon. It is the point of convergence of the two legal traditions. Its position at the apex of the judicial architecture of Cameroon accords it a unique status in terms of symbolising the co-existence of the two legal traditions. This is the situation in Canada. Historically, the Canadian Supreme Court was characterised by the tendency to undermine the minority civil law tradition and to adopt an approach to the interpretation of laws which in essence assimilated the civil law (LeBel and Le Saunier 2006). However, that position has changed following the need to reflect the equal status of the two legal traditions and criticism from civil law practitioners (LeBel and Le Saunier 2006). Now, the Canadian Supreme Court "is often seen as a symbol of the co-existence of both common law and civil law traditions" (Allard 2001). It has enabled the development of a harmonious judicial dialogue between the civil law and the common law in a way that both systems can be mutually supportive, yet distinct and autonomous on an equal basis (LeBel and Le Saunier 2006). That approach has also been facilitated by statutory provisions which recognise the equality of the two legal traditions and the need to reflect their distinctive influence in interpretation of statutes, particularly harmonised

federal statutes. For instance, the Federal Law – Civil Law Harmonization Act, No 1, S.C. 2001, which, according to c. 4 is "[a] First Act to harmonize federal law with the civil law of the Province of Quebec and to amend certain Acts in order to ensure that each language version takes into account the common law and the civil law". William Tetley notes that the "two legal traditions therefore continue to be living realities in the highest court of the land, and they interact with one another without compromising the integrity of either system" (Tetley 2000, 737).

In Cameroon, the establishment of the common law division is a positive step towards strengthening the Supreme Court as a symbol of bijuralism. It is argued that this can be taken further through an elevation of the CLD to a bench. A common law bench would allow scope for the use of legal procedures and concepts and methods or rules of interpretation that will cumulatively enhance the internal coherence of the common law, consequently strengthening its distinct identity.

Moreover, given the breadth of the CLD's subject matter jurisdiction as per the 2006 Supreme Court Law, it is essentially acting as a bench. Whereas, all other appeals from the civil law jurisdictions covering various subject matters are heard by specific divisions under the Judicial Bench. From the perspective of efficacy, it would be more prudent to elevate the CLD to a bench to afford it sufficient resources at the administrative level (the registry) and to deal with the diverse subject matters. Additionally, this would allow for the creation of special divisions that can deal with the distinct subject matters. Enhancing the efficacy of the institution is another way of ensuring that the common law develops satisfactorily and in a way that is visible to the populations. Any potential obscurity or inefficiency may reinforce perceptions of discrimination or further persuade sceptics who regard the establishment of the CLD as a token gesture intended to mollify dissatisfied common law advocates, without addressing the fundamental source of their concerns.

Further, from a political perspective, raising the CLD to a bench would more appropriately demonstrate a political will to reinforce the equal status of the common law. Given the current administrative arrangements and material jurisdiction of the Judicial Bench as per the amended 2006 Supreme Court law, it is in effect a 'civil law bench'. It is composed of specialised divisions that receive cases on diverse subject matters based on the civil law. The common law should be similarly represented to demonstrate equality. In addition, the creation of a bench will more satisfactorily address the concerns of the Anglophone advocates who had originally requested the creation of a common law bench (Enonchong and Eware 2022, 2024). The government's decision to create a division instead, was politically unwise from the perspective of the common law advocates who regarded this as further evidence of the absence of a genuine commitment to accord the common law an equal status with the civil law. Understandably, due to the political tension at the time, the government was under pressure to arrive at a quick solution. A solution which would have involved a constitutional amendment may have been impractical given the inherently protracted process of constitutional amendments. However, additional efforts should have been invested subsequently to systematically address the fundamental problems relating to the unequal treatment of the common law and the potential for a common law bench to address this issue. As the institution that represents the common law identity at the apex level of the Supreme Court, the

CLD has the potential to develop the common law in the lower courts and in the wider society. As argued by Simo, the CLD "could assume a broader role on [the common law's] sustenance and development, which would go beyond hearing and deciding common law appeals" (Simo 2017). These measures would additionally reinforce the commitment of the political branches to the equality and continued existence of the common law. Otherwise, common law advocates and the Anglophone community that identify with the common law identity may continuously seek to negate their subjectivity to the civil law in order to maintain the identity of the common law. It is therefore vital that every effort is made to sufficiently structure and equip it to achieve its full potentials.

Of course, it may be argued that creating a common law bench is not the only approach to consolidating a common law identity at the level of the Supreme Court. Canada for instance has a different approach. According to section 6 of the Canadian Supreme Court Act, the Bench of the Canadian Supreme Court consists of nine judges amongst whom must be three civil law judges, with all judges versed in both legal traditions (Tetley 2000; Nasager 2020). In addition, in cases applying the civil law, the leading judgements are generally written by the civil law trained judges (L'Heureux-Dubé 2002; Tetley 2000). That approach has been acknowledged as a commendable way through which the Canadian Supreme Court protects and represents the civil law (Schertzer 2016). The approach has obviated the need for establishing a separate court or institution to hear cases based on the minority civil law. Three things must be noted here. First, although that approach has enhanced the application of the civil law in the Canadian Supreme Court, it is not a perfect system and has not completely assuaged feelings of injustice about the less than perfect application of the civil law on the basis (amongst other things) that common law trained judges still have to hear cases based on the civil law (Shoemaker 2012). Second, because Canada has not developed a separate institution to hear civil law matters, it's current approach is reasonable to ensure that civil law judges are included in an influential way on the panel of judges hearing cases based on the civil law. Third, in recognition of the need for continuous improvement of the system, a new policy was introduced in 2016 to ensure that judges appointed to the Canadian Supreme Court were functionally bilingual in English and French (Nasager 2020). The position is therefore different to that of Cameroon where the option adopted to enhance representation of the common law in the Supreme Court is the establishment of the CLD. It is therefore important that the CLD can achieve that purpose to its maximum potential.

Conclusion

Constitutional identity is not static and the process of construction involves negation, rearrangements and reincorporation. The previous position which undermined the common law identity can be actively negated with a concomitant rearrangement to allow for equality and an incorporation into the constitution in an unambiguous way. Constitutional identity is an important element of national unity – the latter being a project that has occupied the present government from time immemorial. As such, any constructed identity must breach the gap between self and other – in this case, bijuralism as a constitutional identity should be constructed in a way that breaches

the equality gap between the common law and the civil law. As suggested generally by Rosenfeld, 'taking [these] differences into account may lead to a more satisfactory constitutional identity than simply glossing over them'(Rosenfeld 1995, 1085).

The events leading to the violent conflict in Cameroon appear to have been predictable, given the long history of the common law's marginalised position in the bijural legal system. Yet, the government's concession to establish the Common Law Division within the Supreme Court must be embraced positively, particularly in the light of the improved access to that Court for common law litigants and practitioners. However, as this article has demonstrated, the reforms do not go far enough to address the root causes of the common law's marginalisation. This can be significantly addressed by an unequivocal constitutional affirmation of bijuralism as a constitutional identity, a process which would normatively entrench the equality of the common law and civil law traditions. Moreover, at the level of the Supreme Court, elevating the status of the CLD would be a further affirmation of the equality of the common law, addressing sentiments of marginalisation of that legal tradition, concomitantly enhancing its consistent application. The government's efforts are laudable. Yet, the door to further reforms of the Supreme Court and the Constitution is not yet closed. Admittedly, further reforms, and in particular, constitutional amendments, are not without challenges, the most arduous in this case being the political will. The executive, in particular the President and the legislature must have the political will to initiate and see through the amendment of the relevant constitutional provisions relating to the Supreme Court. Whilst this may be challenging, as suggested elsewhere (Enonchong and Eware 2024, 49), political representatives in Parliament can be lobbied (for instance by common law advocates) as part of the process of introducing a dialogue on constitutional amendment. The government would be hard pressed to refuse to engage in a dialogic process with Parliament on further measures to address the Anglophone crisis, as this would negate its expressed commitment to addressing the same. The Minister of Justice had acknowledged that efforts made so far at harnessing national unity, including measures undertaken in the wake of the Anglophone crisis can be perfected (Esso 2017).

Notes

1. Official Languages Act [OLA], R.S.C. 1985, c. 31 (4th Supp.).
2. *Canadian Pacific Railway Company v. Robinson*, (1891) 19 S.C.R. 292.
3. *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53.
4. Decree No. 96/177 of 5 September 1996 ratifying the Treaty on the Harmonisation of Business Law in Africa (OHADA).
5. Akiangan Fombin Sebastian v Foto Joseph & Others, Suit No. HCK/3/96 of 6 January 2000 (unreported).
6. *Limbe Urban Council v Isidore Bongham* discussed in Leno (2016).
7. Decree No.2012/344 of 16 July 2012 on the ratification of the Treaty relating to the revision of the Treaty on the Harmonisation of Business Law in Africa (OHADA).
8. *The People v Thio Thomas* discussed in Yanou (2015).
9. Decree No: 2017/013 of the 23rd January 2017 to lay down the establishment, organisation and functioning of the National Commission on the Promotion of Bilingualism and Multiculturalism, ss. 1(1), 3(1)(2).
10. *Société Air France*, Decision n° 2021-940 QPC of 15 October 2021.

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ORCID

Laura-Stella Enonchong http://orcid.org/0000-0002-0622-0982

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