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The Harmonization of Business Law in Africa: Is Article 42 of the OHADA Treaty a Problem?

Nelson Enonchong*

Abstract

The primary function of the Organization for the Harmonization of Business Law in Africa (OHADA) is to modernize and harmonize the business laws of member states. The wider objective of OHADA is to attract foreign investment into the OHADA zone and to achieve economic integration in Africa as whole, as other African countries join OHADA. However, article 42 of the treaty establishing OHADA stipulates that French is the working language of the organization. This paper argues that this provision does not facilitate the goal of economic integration in Africa and that in one member state, Cameroon, article 42 presents serious constitutional and human rights difficulties. The paper suggests that article 42 should be amended in order to make it easier for key OHADA objectives to be attained and in order to remove the serious problems created in Cameroon.

INTRODUCTION

On 17 October 1993, 14 Central and West African countries¹ signed a treaty establishing the Organization for the Harmonization of Business Law in Africa, generally referred to by its French acronym, OHADA.² Two additional states³ have since joined OHADA. The principal objectives of OHADA are to harmonize and modernize business laws in Africa so as to facilitate commercial activity, attract foreign investment and secure economic integration in Africa. These are laudable objectives which fall within the framework of the objectives of the New Partnership for Africa's Development (NEPAD) agreed in June 2002 at the G8 Kananaskis summit.⁴ Article 42 of the OHADA Treaty states that French is the working language of the organization. This is perhaps not surprising since most of the current 16 member states are French-speaking.⁵ Indeed, the OHADA Treaty was signed under the auspices of a summit of *La francophonie*.⁶

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1 They include Benin, Burkina Faso, Cameroon, Central African Republic, the Islamic Federal Republic of the Comoros, Congo, Côte d'Ivoire, Gabon, Equatorial Guinea, Mali, Niger, Senegal, Chad and Togo.

2 In full, Organisation pour l'Harmonisation en Afrique du Droit des Affaires.

3 Guinea and Guinea Bissau.

4 See B Delaye "Foreword" in B Martor et al (eds) *Business Law in Africa: OHADA and the Harmonization Process* (2002, Kogan Page) at xxviii.

5 The only exceptions are Equatorial Guinea (where Spanish is spoken), Guinea-Bissau (where Portuguese is spoken) and the English-speaking provinces of Cameroon.

6 Short hand for the Organisation Internationale de la Francophonie, which is roughly the French equivalent of the British Commonwealth.

However, article 42 of the OHADA Treaty appears to present an obstacle rather than an avenue towards the attainment of some key OHADA objectives. Moreover, article 42 presents serious difficulties in one member state, Cameroon, where the Constitution makes provision for two official languages: English and French. This paper examines article 42 in the light of the objectives of OHADA and exposes the serious problems it creates in Cameroon.

OHADA OBJECTIVES

Two OHADA objectives most particularly affected by article 42 are economic integration and increased foreign investment into OHADA countries.

Economic integration in Africa

OHADA hopes to promote economic integration in Africa through the harmonization of the business laws of member states. This is achieved by means of Uniform Acts which, under article 10 of the Treaty, are directly applicable in all member states, in the same way as European Union Regulations are directly applicable in EU member states. The objective of economic integration is not limited to integration within the current 16 member states or among francophone African states, but extends to integration in Africa as a whole. Thus, in the preamble of the Treaty, the member states reaffirm their commitment to the establishment of an African Economic Community and express their conviction that their membership of the Franc Zone⁷ constitutes a major asset for the progressive realization of their economic integration and that this integration “must be carried on in a larger African framework”. In keeping with this objective, article 53 states that the Treaty is open to all member states of the African Union (AU).

Since economic integration in Africa is an objective of the Treaty, and since French is not the only language used in Africa, it is curious that the Treaty should stipulate in article 42 that French is the working language of the organization. This provision certainly cannot make it easy for

7 The Franc Zone is an economic and monetary area whose membership consists predominantly of former French colonies in Africa and France. It is divided into two principal sub-zones: one for West Africa, the West African Economic and Monetary Union, more commonly known by its French acronym, UEMOA (for Union Economique et Monétaire Ouest Africaine), and the other for Central Africa, namely, Communauté Économique et Monétaire de l’Afrique Centrale (CEMAC). There is monetary co-operation between France and the members of the Franc de la Coopération Financière en Afrique (CFA) Franc Zone. This co-operation is based on principles which include: (a) fixed parity of the CFA Franc with (the French Franc initially and now) the Euro (the exchange rate is at time of writing 1 Euro = 655.957 FCFA); and (b) convertibility guaranteed by the French Treasury. Upon the introduction of the Euro, the European Council of Ministers decided, on 23 November 1998, to authorize France to continue its existing agreements concerning exchange rate matters with UEMOA and CEMAC.

non-French speaking African countries to take up the invitation offered by article 53 to join OHADA. And it is perhaps not surprising that few have actually done so. Thus, as indicated above, since the original 14 member states signed the Treaty, only two additional states have joined the organization. The Democratic Republic of Congo, a French-speaking country, has expressed an interest in joining. If it does, the total membership will rise to 17, compared to 53 members of the AU.

So far no English-speaking country has joined.⁸ Even Mauritius, where the OHADA Treaty was signed, has not been tempted. In 2002, Mr N A D Akufo-Addo, the attorney general and minister for justice of Ghana at the time, who himself had practised corporate law for many years in France and some francophone African states, warmly welcomed the OHADA initiative and said that it could be a useful tool for facilitating economic integration in Africa.⁹ He said it was time for Ghana to have an in-depth look at the possibilities of joining the OHADA initiative. Consequently, he established the Ghana National Committee on OHADA to examine this possibility. However, Ghana has yet to join OHADA, and although this author does not know what the Ghana National Committee on OHADA recommended,¹⁰ it would be surprising if article 42 did not feature in the recommendations.

One obstacle to non-francophone African countries joining OHADA is the perceived civilian nature of its laws as contained in its Uniform Acts. In other words, so long as the laws of OHADA continue to be based largely on the French civilian model,¹¹ it will be very difficult to persuade African countries with different legal traditions, such as the common law countries of West and East Africa or the Roman-Dutch countries of Southern Africa, to join. To be sure, this is a problem relating to the substance of the law rather than the language in which it is expressed. However, the stipulation in article 42 that French is the working language of the organization is another very visible stumbling block for anglophone countries that may wish to join. In practical terms, it means that the meetings of the Council of Ministers will be conducted in French, the proceedings of the Court of Justice and Arbitration in Abidjan (Côte d'Ivoire) are in French, French is the language of instruction at the OHADA Regional Training Centre for Legal Officers in Porto Novo (Benin), and French is the working language of the Permanent Secretariat in Yaounde (Cameroon). How, for example, would

8 With the exception of the English-speaking provinces of Cameroon, as to which see the discussion below.

9 See Delaye "Foreword", above at note 4 at xxii.

10 The author's efforts to obtain information about the recommendations of the Committee from the Ghana Ministry of Justice and the Attorney General's Department came to nothing.

11 There is a hint that this is beginning to change. The draft OHADA Uniform Act on Contracts is based on the model of the UNIDROIT Principles of International Commercial Contracts rather than on the French Civil Code, and the working party included a Ghanaian and an Egyptian expert. See M Fontaine "The Draft OHADA Uniform Act on Contracts and the UNIDROIT Principles of International Commercial Contracts" (2004) 3 *Uniform Law Review* 573.

English-speaking citizens of countries such as Ghana, Nigeria or South Africa take part in proceedings in the OHADA Common Court of Justice and Arbitration?¹²

It has been said that the work of OHADA “is not sufficiently known to the Anglophones in its geographical area”.¹³ This is not surprising. For example, the current draft OHADA Uniform Act on Contracts and the explanatory notes, both prepared by UNIDROIT, are available in French only. This means that lawyers in English-speaking countries who are unable to read French are denied the opportunity to read these documents to learn about what is being proposed.

It is submitted that for the objective of economic integration in Africa through OHADA to be achieved, it will not only be necessary for the substantive law of the existing Uniform Acts to be amended to reflect the other legal traditions in Africa, but it will also be necessary for article 42 of the Treaty to be amended so that French is not the only working language of the organization. The amended article 42 should adopt a more inclusive approach along the lines of article 25 of the Constitutive Act of the AU, which lists no less than five languages as the working languages of the Union.¹⁴ This will increase knowledge of the work of OHADA, foster a better understanding of its objectives and make it easier for non-French speaking Africans to embrace it.

Attracting foreign investment into OHADA countries

Another important objective of OHADA is to increase foreign investment in the OHADA zone, and the preamble of the Treaty expresses the desire for OHADA business laws to be applied in a way that guarantees legal stability of economic activities and in order “to favour expansion” of economic activities “and to encourage investment”. However, since OHADA Uniform Acts are drafted and published in French, there is a problem of accessibility to non-French speaking foreign investors. Although the Uniform Acts have been translated into and published in English, it is widely accepted that the English translations are not always accurate or comprehensible.¹⁵ This makes it unsafe for English-speaking investors or their English-speaking advisers to rely on the English version of the

12 It will be interesting to see how the citizens of Equatorial Guinea and Guinea Bissau participate in the activities of the various organs of OHADA, especially with respect to proceedings at the Common Court of Justice and Arbitration in Abidjan.

13 S K Date-Bah “The UNIDROIT Principles of International Commercial Contracts and the harmonisation of the Principles of Commercial Contracts in West and Central Africa: reflections on the OHADA Project from the perspective of a common lawyer from West Africa” (2004) 2 *Uniform Law Review* 269 at 270.

14 If art 42 is amended, it will be necessary to amend art 63, which says that the Treaty is drafted in French. This will remove any doubts and confusion that may arise as to whether the French version is the authentic or authoritative version.

15 For example, art 3(2) of the Uniform Act on Securities states that the undertaking may be contracted without the “creditor’s” authority when, as stated in the French version, it means the “debtor’s” authority. Even the running head in the special issue of the

Uniform Acts. Whereas French-speaking investors around the world and their French-speaking advisers have easy access to OHADA laws and may thereby be encouraged to invest in the OHADA zone, English-speaking investors in Asia, Europe and North America are not being encouraged in the same way. This is surprising considering that English is a major language of business all over the world.

It is therefore hoped that the OHADA member states will do more to make OHADA laws easily accessible to potential English-speaking investors or their English-speaking advisers. One way to achieve this is, as suggested above, to amend article 42 so that Uniform Acts should be drafted and published in English as well as any other languages specified in the amended article 42.

THE PROBLEMS IN CAMEROON

As indicated above, Cameroon is one of the original signatories of the OHADA Treaty in 1993. A year later, the Cameroonian parliament, by Law No 94/4 of 4 August 1994, authorized the president of the Republic to ratify the Treaty. Two years later, by decree No 96/177 of 5 September 1996, the president ratified the Treaty, thus incorporating it into Cameroonian law.¹⁶ This has given rise to the question whether the effect of article 42 of the Treaty renders application of the Treaty in Cameroon unconstitutional as being inconsistent with article 1(3) of the Cameroonian Constitution, which states that English and French are the official languages of the country and that both languages have the same status. However, there is another issue which commentators have failed to address but which calls for investigation; this is the question whether, even if application of article 42 is technically not unconstitutional in Cameroon, its application in Cameroon may nevertheless amount to an infringement of the human rights of the English-speaking people of Cameroon protected under international human rights instruments including the African Charter on Human and Peoples' Rights which prohibit both discrimination on the ground of language and domination of one people by another. We will return to this point after examining the question of constitutionality. Similar difficulties arising in Cameroon caused by the language provisions of the CEMAC Treaty will also be explained.

The constitutional problem

It has been said that the "imposition of French as the only official language of the Uniform Acts is viewed as unconstitutional and has led to serious

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Journal Officiel, which carries the English version of the Uniform Act on Securities, incorrectly states "uniform Act relating to commercial companies and economic interest group".

16 See art 45 of the Cameroonian Constitution.

resistance to the Uniform Acts in the English-speaking provinces of Cameroon".¹⁷ This is a serious problem which arises from a conflict between article 42 of the Treaty and constitutional bilingualism in Cameroon.

Bilingualism in Cameroon

Cameroon is the only member state that is, by its Constitution, officially bilingual and bi-jural.¹⁸ The problem with article 42 is that it is manifestly incompatible with article 1(3) of the Cameroonian Constitution¹⁹ in which the bilingual nature of the state is enshrined. Article 1(3) stipulates that "The official languages of the Republic of Cameroon shall be English and French, both languages having the same status. The state shall guarantee the promotion of bilingualism throughout the country". To re-enforce the point, article 31(3) stipulates that "Laws shall be published in the Official Gazette of the Republic in English and French".

The reason for these constitutional provisions on bilingualism is to be found in the constitutional evolution of Cameroon. What is today the Republic of Cameroon is the product of a union between Southern Cameroons, which prior to independence in 1961 was administered by the United Kingdom under the United Nations Trusteeship system, and the Republic of Cameroon, which before its independence in 1960 was administered by France under the same United Nations Trusteeship system. It is as a result of this historical development that the people of Southern Cameroons are English-speaking and the people of the Republic of Cameroon are French-speaking.

In 1961, the people of Southern Cameroons voted in a plebiscite to attain independence by joining French-speaking Cameroon, which had already gained independence from France. Following unification, the new country became a federation, known as the Federal Republic of Cameroon, under the 1962 Constitution. It was a two-state federation comprising the English-speaking Cameroon, which became the federated State of West Cameroon, and the French-speaking Cameroon, which became the federated State of East Cameroon. The federation was later replaced (in 1972) by a unitary state called the United Republic of Cameroon. The name of the unitary state was subsequently changed in 1984 to the Republic of Cameroon and, in 1996, there were further amendments to the Constitution.²⁰ However, since 1962 the Constitution has consistently maintained a provision confirming the bi-jural nature of the country²¹ and a separate provision (article 1(3)) stating

17 B Martor et al (eds) *Business Law in Africa: OHADA and the Harmonization Process* (2002, Kogan Page) at 23.

18 See art 68 of the Cameroonian Constitution.

19 Constitution of 2 June 1972 as amended by Law No 96-06 of 18 January 1996.

20 Law No 96-06 of 18 January 1996.

21 Currently this is art 68 of the 1996 Constitution. This provision still refers to "legislation applicable to the Federal State of Cameroon and in the Federated States". This is bizarre since there is no Federal State of Cameroon and there are no federated states within Cameroon.

that English and French are the official languages of the country and are of equal status.

From the historical evolution of the country, it can be seen that the bilingual character of the state as enshrined in article 1(3) is vital to guarantee equal treatment of the two peoples who came together to form the unitary state of Cameroon and to secure a peaceful co-existence. Discrimination against one people by another is liable to threaten the peace and stability of the country.²² Is article 42 of the OHADA Treaty discriminatory against the English-speaking people of Cameroon and therefore contrary to the equal status provision of the Cameroonian Constitution?

Equal status in general

Article 1(3) of the Cameroonian Constitution lays down the principle of equality of status when it states that both languages have “the same status”. But, beyond that vague generalization, it is by no means clear what equality of status means in practical terms and what, if any, rights it confers on citizens. Does it, for example, give officers and employees of state institutions equal opportunities to use the official language of their choice in discharging their office? Does it give to any member of the public the right to communicate with, and to receive information available from, state institutions in the official language of their choice? Does it guarantee equal rights and privileges as to use of both languages in all state institutions? Does it give equal opportunities to obtain employment in all state institutions without regard to first language learned? Or does article 1(3) confer all of these different rights? It is not entirely clear. However, it is submitted that equality of status involves at least equal rights and privileges as to the use of both languages and equal opportunities to obtain employment.

Equal rights as to use of both languages

Equal rights and privileges as to the use of both languages means that any act of parliament, ordinance of the president, treaty or convention, decree, order or regulation intended to apply throughout the national territory should be made, enacted, printed or published simultaneously in both official languages and both language versions shall be equally authoritative.²³ This is clearly the position in Canada, another bilingual country where English and French are the two official languages. In Canada, where

22 It is for this reason that Cameroon originally stayed out of both the Commonwealth, which is English-speaking, and its French counterpart, the Organisation Internationale de la Francophonie (La Francophonie), which is French-speaking. When Cameroon decided to become a member of La Francophonie in 1991, it also applied for membership of the Commonwealth of which it became a member in 1995. Canada is also a member of both the Commonwealth and La Francophonie.

23 It is, therefore, regrettable to notice that some judges, even in the English-speaking part of Cameroon, are under the erroneous impression that the French version of national laws are somehow more authoritative or, the “original”, in the sense that the English version is only a translation. See, eg, *The Liquidator, National Produce Marketing Board v Egbe Batuo* (2001) 2 CCLR 185, 194, per Fonkwe J.

the principle of equality of status is not only enshrined in the Constitution, as is the case in Cameroon, but is actually implemented in practice by the Official Languages Act,²⁴ equal rights and privileges as to the use of both languages mean that all instruments made or issued by a state institution shall be made or issued in both official languages.²⁵ Thus, in the landmark decision in *Re Manitoba Language Rights*,²⁶ the Supreme Court of Canada held that the unilingual Acts of the Legislature of Manitoba were invalid. The same position was again adopted by the Supreme Court of Canada in *Mercure v Attorney General of Saskatchewan*²⁷ where the court held that since the relevant statutes had not been enacted, printed and published in English and French they were invalid.

Equal rights as to the use of both languages also means that where a notice, advertisement or other matter is printed or published in both languages, it should be given equal prominence in each official language.

In Cameroon, although equal rights and privileges in the use of language may be recognized in principle, its application in practice leaves something to be desired. There is no specific legislation implementing the principle in practical terms. Consequently, the practice of state institutions varies considerably. For example, some laws and many presidential ordinances, decrees and ministerial orders or regulations are first enacted or published in French only, to be followed by an English version weeks or months later, if at all. A recent example is Presidential decree No 2006/441 of 14 December 2006. This was issued and published only in French although it is a decree appointing the vice-chancellor of the English-speaking University of Buea.²⁸ Similarly, the notices of some government departments are sometimes printed with the French version more prominently displayed than the English version.²⁹ Even the coins and notes of the national currency, which in the past were bilingual, have become unilingual in French only, as the banknote in the appendix of this paper vividly illustrates.³⁰ Even road signs in the English-speaking part of Cameroon are sometimes printed with the French version more conspicuous and prominent than the English version.³¹ Discriminatory practices of this kind are to be condemned as

24 RS 1985, c 31 (4th supp), s 13.

25 Comp Sec 12 of the Official Languages Act of Canada.

26 [1985] 1 SCR 721.

27 [1988] 83 NR 81.

28 The same is true of Presidential decree No 2006/442 of 14 December 2006 appointing officials in the 6 state universities in Cameroon. See the government's newspaper, *Cameroon Tribune*, 15 December 2006.

29 A notable and most shameful example is the sign on the building housing the national parliament. The French version of that sign, "Assemblée Nationale", is at least 4 times larger than the English version, "National Assembly", which is so small it is almost hidden underneath the French sign.

30 The reason for the currency becoming unilingual is to be found in the CEMAC Treaty, as explained below at 113-114.

31 A notorious example is the traffic signs on the road between Tiko and Limbe, both towns in the English-speaking part of the country. The signs in French are in bold

flagrant violations of the Constitution. Yet it is one thing for a provision in the Constitution to be infringed in practice by such discrimination, it is quite another for the discrimination to be put on a legal basis or to be institutionalized, and that is the effect of article 42 of the OHADA Treaty in Cameroon, since official documents of the organization will be published in French. Moreover, although there may be English translations, the French version remains authoritative, since the relevant Uniform Act will have been enacted in French. Consequently, in the case of a conflict between the two, the French version will prevail.

Equal opportunities for employment

The other aspect of equality of status is equal opportunities to obtain employment. Since the Cameroonian Constitution proclaims that the two official languages have equal status, it is not too much to say that this requires that citizens of Cameroon should have equal opportunities to obtain employment and promotion in state institutions without any discrimination in favour of one official language. This principle is already recognized in Canada and is given effect by Part VI of the Official Languages Act.³² So, too, in Cameroon, in keeping with the constitutional requirement of bilingualism, the state must ensure that employment opportunities into and within state institutions are open to both English-speaking and French-speaking Cameroonians. It is true that the practice of the Cameroonian government in this respect leaves something to be desired.³³ Yet, whatever may be the shortcomings of the practice in Cameroon so far, it does not seem to have been laid down in law that the working language of any of these institutions is only either English or French. Such a domestic law will clearly be inconsistent with article 1(3) of the Constitution. Does it make any difference that such a law is introduced through an international instrument such as a treaty? To put it another way, would the constitutional rights of English-speaking Cameroonians not be violated if they are denied employment in OHADA institutions simply because they cannot speak French?

As already indicated, the OHADA Treaty creates certain institutions to serve the organization. These include the Common Court of Justice and Arbitration, the Regional Training Centre for Legal Officers, and the Permanent Secretariat. Citizens of contracting states are eligible for employment by these institutions. But since French is the only working language of the organization, an English-speaking citizen of Cameroon,

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and more prominent letters and are written on reflective panels so that they are far more visible in the dark than the signs in English, which are impossible to see except at very close range. Indeed, in some places the local people have reacted angrily to this sort of blatant discrimination by spraying graffiti over the more prominent French versions of the road signs.

32 Comp Sec 39(2) of the Official Languages Act of Canada.

33 For example, for several years, the language of instruction in the National Training School for the Military has been French.

who is otherwise qualified for a job with any of the institutions, will be denied the job simply because he is not French-speaking. This is discrimination against English-speaking Cameroonians in relation to recruitment into OHADA institutions which, since they are open to Cameroonians as a result of a treaty signed by Cameroon, must be regarded as state institutions for purposes of constitutional rights.

Further discrimination resulting from article 42

Article 42 also discriminates against anglophone Cameroonians in another important respect, namely, lack of authoritative information about the law in English, since the OHADA Treaty itself and the Uniform Acts passed under it are drafted and published in French only. For, as indicated above, the English translations that are sometimes available are not authoritative and are not always accurate.

Article 42 also results in discrimination in Cameroon in respect of access to justice. As explained above, it is impossible for English-speaking Cameroonians to present their case in English in the OHADA court in Abidjan. Yet a Cameroonian is constitutionally entitled to speak English in a court set up by the state, which includes the OHADA court. In Canada, for example, it is settled that a person is constitutionally entitled to speak French in court in New Brunswick³⁴ (which is an English-speaking province of Canada). And in *Mecure v Attorney General of Saskatchewan*,³⁵ the Supreme Court of Canada quashed a conviction which was secured in a trial conducted entirely in English when the accused, whose native language was French, demanded to have his plea entered in French. The court held that the accused had the right to use French in his trial and to have his statements recorded in the French language, and the failure of the court to comply with his demand to have his plea entered in French vitiated the trial. It can, therefore, be seen that in denying English-speaking Cameroonians the opportunity to be heard in English in the OHADA court, article 42 of the Treaty is manifestly incompatible with the Cameroonian constitutional principle of equality of status for both official languages. That being the case, the question which arises is this, why did the Cameroonian parliament authorize its ratification?

Discussion of article 42 in the Cameroonian parliament

The issue of conflict between article 42 and the Constitution was raised faintly during deliberations in the National Assembly on the bill to authorize the president of the Republic to ratify the OHADA Treaty. In a report to the full Assembly, Mrs Delphine Medjo, MP, on behalf of the Foreign Affairs Committee, stated that, with respect to article 42 of the Treaty, Committee members “expressed their worries about such a

34 *Société des Acadiens du Nouveau-Brunswick Inc v Association of Parents for Fairness in Education* [1986] 1 SCR 549.

35 [1988] 83 NR 81.

provision considering the bilingualism in force in Cameroon”.³⁶ The response of the minister of justice, as recorded in the same report, was that the fact that French was “the working language did not constitute an obstacle and that it was up to Cameroon to include elements of its bilingualism in the conception and drawing up of uniform instruments”.³⁷ It is not clear whether this answer convinced members of the Foreign Affairs Committee who adopted the bill and recommended it to the full Assembly. But, with respect, the minister’s answer is less than persuasive. In fact, it misses the point altogether. First, the minister failed to explain how Cameroon can deal with the issues of discrimination, for example, in employment and access to justice identified above. Secondly, since the working language of the organization is French, how can Cameroon “include elements of its bilingualism in the conception and drawing up of” Uniform Acts as the minister suggests?

The minister’s evasive response was directed at the issue of Cameroon’s bi-jural character protected under article 68 of the Cameroonian Constitution (whereby the English common law system applies in anglophone Cameroon and the French civil code system applies in francophone Cameroon), whereas the concern of the Committee members was clearly on the separate issue of bilingualism enshrined in article 1(3) of the Constitution. Since Cameroon is a party to the process of drawing up OHADA Uniform Acts, it is obvious that Cameroon can argue for the inclusion of elements of its common law into any proposed Uniform Act.³⁸ But that is an entirely different matter from the issue of language and the principle of the equal status for English and French as laid down in article 1(3) of the Constitution. The minister’s answer to the Committee completely fails to address the issue of bilingualism and equality of status of the two official languages of Cameroon.

Since article 42 of the Treaty is incompatible with article 1(3) of the Cameroonian Constitution, the question arises, what is the effect of the incompatibility in Cameroon? In particular, is application of the OHADA Treaty in Cameroon unconstitutional as a result?

Can the OHADA Treaty be declared unconstitutional in Cameroon?

One view is that the Treaty is, as a result of this conflict, unconstitutional in Cameroon.³⁹ That may be so. However, for it to be treated as unconstitutional with the effect that it is a nullity in Cameroon, the Treaty has to be declared unconstitutional by a competent authority. But it is doubtful whether there is any institution in Cameroon that is competent to declare

36 Report No 2114/AN on Bill No 555/PJL/AN (June 1994) at 3.

37 *Id* at 4.

38 This is the position – at least in theory. In practice, there is no evidence of Cameroon including elements of its common law system into any of the Uniform Acts that have been passed so far.

39 For example, I Njoya “OHBLA Treaty – an unruly horse?” (2001, paper presented to Magistrates of the South West Province) at 5.

the OHADA Treaty unconstitutional, in spite of the manifest incompatibility of the treaty provision with article 1(3) of the Cameroonian Constitution. This calls for further explanation. The starting point is that in Cameroon, as in many other jurisdictions, the constitutionality of a law or treaty is a matter that can be determined by a particular institution only. Thus, the answer to the question whether article 42 is, or may be declared, unconstitutional in Cameroon depends on the answer to three questions: (i) which institution has jurisdiction to rule on the constitutionality of treaties? (ii) who has locus standi to invoke that jurisdiction? (iii) when can the jurisdiction be invoked?

(i) Only the Supreme Court has jurisdiction

In Cameroon the question whether or not a law or a treaty provision is unconstitutional is one which, by the Constitution, only the Constitutional Council has jurisdiction to determine. Article 46 of the Constitution gives the Constitutional Council “jurisdiction in matters pertaining to the Constitution”. By the same provision, the Constitutional Council “shall rule on the constitutionality of laws”. And, as if for the avoidance of doubt, article 47(1) makes it plain that the Constitutional Council “shall give a *final* ruling on the constitutionality of laws, treaties and international agreements” (emphasis added). This means that ordinary courts do not have jurisdiction to rule on the constitutionality of laws or treaties. But the fact that only the Constitutional Council can pronounce on the matter does not in itself give rise to any difficulty. The difficulty in getting a ruling on any issue of constitutionality arises from the limitations placed on the number of persons who can ask the Council for such a ruling.

It must be pointed out that since the institution of a Constitutional Council was provided for by the Constitution in 1996, it has yet to be established some ten years later. Consequently, under article 67(4) of the Constitution, the Supreme Court performs the duties of the Constitutional Council until the Council will be set up.

(ii) Only very few have locus standi

In some African countries, such as Ghana and South Africa, locus standi to challenge the constitutionality of laws is not limited to a few officials. In these countries, any interested person can challenge the constitutionality of any enactment.⁴⁰ This contrasts sharply with the position in Cameroon.

Article 47(2) of the Cameroonian Constitution specifies the class or category of persons who have locus standi to refer “matters” to the Constitutional Council. The categories are: (i) the president of the Republic; (ii) the president of the National Assembly; (iii) the president of the Senate; (iv) one-third of the members of the National Assembly; (v) one-third of the senators; and (vi) presidents of regional executives, but only in cases where the interests of their regions are at stake. Since the Senate and Regional

⁴⁰ See art 2 of the 1992 Constitution of the Republic of Ghana, and secs 167(5)–(7) of the 1996 Constitution of the Republic of South Africa.

Executives have not yet been established, it means that until those institutions are set up, only the president of the Republic, the president of the National Assembly and one-third of the members of the National Assembly currently have *locus standi* to refer a matter to the Supreme Court (or Constitutional Council if and when it is eventually established). This is a very short list. Moreover, in most cases the few officials who have *locus standi* to refer the question of constitutionality of bills to the Supreme Court are the very people who would have presented the bills to parliament. It is therefore unlikely that they would question their own bill. It is, perhaps, for this reason that there appears to be no instance in Cameroon when a bill that has been tabled in parliament has ever been referred to the Supreme Court for an opinion on whether it is constitutional.

Be that as it may, where a bill has been passed into law or a treaty has been ratified, it is doubtful whether it is permissible in Cameroon for anyone to question its constitutionality.

(iii) Can a treaty be declared unconstitutional after it has been ratified?

As has been noted, article 47(2) provides a list of persons who may refer “matters” to the Constitutional Council. This tends to suggest that the relevant persons may refer any “matter” to the Council, including the question whether a treaty which has been ratified is constitutional. However, article 47(3) appears to lay down a special rule with respect to laws and treaties. It provides that “Laws as well as treaties and international agreements may, *prior to their enactment*, be referred to the Constitutional Council”⁴¹ by those who have *locus standi* under paragraph (2) above. There are two possible ways of looking at these provisions.

The first is that the constitutionality of a law or treaty may not be challenged after it has been enacted or ratified. This view finds some support in article 47(3) which expressly states that “laws” may, prior to their enactment, be referred to the Constitutional Court. It could be argued that the use of the word “laws” in this context means bills, and that article 47(3) clarifies the general word “laws” in articles 46 and 47(1) to exclude bills that have already been enacted into statute. Another argument in support of the view that once a law has been enacted or a treaty has been duly ratified it is no longer possible to question its constitutionality is that article 47, like much of the Cameroonian Constitution, is modelled on the French Constitution of 1958, as amended. And, as is well known, in France the constitutionality of a law or a treaty can only be questioned before the law is enacted or the treaty ratified.⁴² Moreover, article 44 of the Cameroonian Constitution tends to support this view. It states that where

⁴¹ Emphasis added.

⁴² For example, Cass Crim 26 February 1974, D Somm 1974.273, note Vouin. See also B Rudden (ed) *A Sources-Book on French Law* (3rd ed, 1991, Oxford Clarendon Press) at 96; J Bell, S Boyron and S Whittaker *Principles of French Law* (1998, Oxford University Press) at 149.

the Constitutional Council finds a provision of a treaty or an international agreement unconstitutional, authorization to ratify and the ratification of the treaty or agreement shall be deferred until the Constitution is amended. This tends to suggest that the constitutionality of a treaty can only be determined by the Constitutional Council before the treaty is ratified. If this view is correct, it follows that since the OHADA Treaty has already been duly ratified, its constitutionality can no longer be challenged under the present Cameroonian Constitution, even though the Treaty and the Uniform Acts passed under it are inconsistent with the Constitution. However, it is submitted that this view should be rejected.

The preferable view is that, under article 47, the Constitutional Council has jurisdiction to rule on the constitutionality of enactments and treaties that have been ratified. First, some support for this view may be derived from paragraph 2 of article 47. This is a broad provision which allows for a wide range of unspecified “matters” to be referred to the Constitutional Council. Those matters, it could be argued, include the constitutionality of laws that have been enacted as well as treaties that have been ratified. Seen in this way, paragraph 3 is a provision which does no more than make it clear that the constitutionality of a law or a treaty may also be questioned even before the law has been enacted or the treaty has been ratified. In other words, one need not wait until a bill has become law or a treaty has been ratified before its constitutionality can be questioned. Paragraph 3 therefore only facilitates early challenge of a bill or treaty, so that any unconstitutionality identified at an early stage may be put right before the bill is passed or the treaty ratified. To put it another way, paragraph 3 is only an enabling provision. It enables early challenges; it does not preclude later (ie post ratification) challenges.

Secondly, there is additional support for this view in the language of articles 46 and 47 under which the Constitutional Council has jurisdiction to rule on the constitutionality of “laws”. The argument would be that a bill is not a law until it has been enacted. Therefore, the jurisdiction of the Constitutional Council to rule on the constitutionality of laws is not limited to bills, but extends to and covers laws, which have been enacted. If so, the same applies to a treaty which has been ratified. Further support for the view that the constitutionality of a law may be challenged after it has been enacted may be derived from a recent bill tabled by the government in parliament on 14 December 2006⁴³ to set up Elections Cameroon (ELECAM), an organization that will be responsible for organizing and supervising elections in Cameroon. The bill provides details on how ELECAM will operate in conducting elections in Cameroon. However, the bill anticipates the possibility of the Constitutional Council ruling that the law setting up ELECAM is unconstitutional and therefore ELECAM is incompetent. Clause 41 of the bill provides that if ELECAM is declared “incompetent by the Constitutional Council, the President of the Republic shall, under article 5

43 No 805/PJL/AN.

of the Constitution, take the requisite corrective measure". Clause 41 will be meaningless if the Constitutional Council is unable to declare that the law setting up ELECAM is unconstitutional. If the Constitutional Council has jurisdiction to declare an enactment to be unconstitutional and invalid, then it follows that any law which authorizes the president of the Republic to ratify a treaty or convention may be declared to be unconstitutional with the consequence that the relevant treaty or convention will be inapplicable in Cameroon. This includes the OHADA Treaty.

The human rights issue

It is now generally accepted that language rights are fundamental human rights.⁴⁴ For example, the Canadian Supreme Court has repeatedly expressed the view that "language rights belong to the category of fundamental rights".⁴⁵ And, as La Forest, J, has observed in the *Mecure* case, "It can hardly be gainsaid that language is profoundly anchored in the human condition. Not surprisingly, language rights are a well-known species of human rights and should be approached accordingly".⁴⁶ Language rights are guaranteed under international human rights instruments, such as the International Covenant on Civil and Political Rights,⁴⁷ the African Charter on Human and Peoples' Rights,⁴⁸ and the Universal Declaration of Human Rights.⁴⁹ Therefore, even assuming (contrary to the contention above) that the constitutionality of applying the OHADA Treaty in Cameroon cannot be challenged because the Treaty has already been ratified, it is nevertheless possible that application of the Treaty in Cameroon, at least in anglophone Cameroon, may be challenged on the ground of human rights violation. That possibility arises from the fact that application of the Treaty discriminates against English-speaking Cameroonians and may amount to domination of the minority English-speaking Cameroonians by the majority French-speaking Cameroonians, contrary to articles 2, 13 and 19 of the African Charter on Human and Peoples' Rights (the African Charter).

Articles 2, 13 and 19 of the African Charter

In the preamble of the Cameroonian Constitution, which, by article 65 is "part and parcel of this Constitution", the people of Cameroon "affirm our attachment to the fundamental freedoms enshrined in the Universal Declaration of Human Rights ... and The African Charter on Human and Peoples' Rights". The African Charter has been signed and ratified by

44 For example, M Taborly "Language rights as human rights" (1980) 10 *Israel Year Book on Human Rights* 167.

45 *Société des Acadiens* case, above at note 34 at 578. See also *Re Manitoba Language Rights* case, above at note 26 at 744.

46 [1988] 83 NR 81 at [48].

47 Art 27.

48 Arts 2, 13 and 19.

49 Art 2.

Cameroon. It states in article 2 that “Every individual shall be entitled to the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as, race, colour, sex, *language*”.⁵⁰ This provision mirrors article 2 of the Universal Declaration of Human Rights.⁵¹

Among the rights guaranteed under the African Charter, to which every individual should be entitled without distinction as to language, are those stated in article 13(3) to the effect that every individual shall have the right of access to public services “in strict equality of all persons before the law”. Article 42 of the OHADA Treaty denies this right to anglophone Cameroonians on the basis of language, since English-speaking Cameroonians cannot present their case in English in the OHADA Common Court of Justice and Arbitration. They are, therefore, denied access to justice in their own language, a right recognized and protected by the Constitution of their country. Since for Cameroonians the OHADA Treaty makes a distinction on the basis of language between French-speaking Cameroonians who are allowed access to the services of OHADA institutions and English-speaking Cameroonians who are denied these services, it cannot be said that English-speaking Cameroonians receive equal access to OHADA public services “in strict equality” with their fellow French-speaking Cameroonians. Application of the OHADA Treaty in Cameroon is thereby in breach of article 13(2) read together with article 2 of the Charter.

The state of Cameroon may also be in breach of article 19 of the African Charter which provides that “All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the *domination of a people by another*”.⁵² It may be argued that by imposing French, as the working language of OHADA in Cameroon, and by imposing the OHADA laws, derived from French civil law, in the anglophone provinces of Cameroon where the common law is applicable, the francophone majority in Cameroon are carrying out a practice of domination of the anglophone minority.

This contention gathers strength from the fact that OHADA is not just a minor change in the law. It is a fundamental and wide-ranging change carried out through Uniform Acts that cover a huge variety of subjects, with a potential to be limitless under article 2 of the Treaty.⁵³ Take the example

50 Emphasis supplied.

51 “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

52 Emphasis supplied.

53 So far there are 8 Uniform Acts on a range of subjects, including General Commercial Law, Commercial Companies and Groups of Companies, Securities, Summary Debt Collection Procedures and Measures of Execution, Insolvency and Liquidation Proceedings, Arbitration Law, Business Accounts and Carriage of Goods by Road. Under art 2, Uniform Acts could be adopted on any subject not listed in art 2 if it is agreed upon by the Council of Ministers in keeping with the objectives of OHADA.

of company law. Prior to OHADA, there were two systems of company law operating side by side in Cameroon. The French derived system applied in francophone Cameroon and the English derived system applied in anglophone Cameroon. OHADA did not introduce a system which takes account of both systems in Cameroon. It simply imposed in anglophone Cameroon the French system which was applicable in francophone Cameroon. This has caused great resentment and has led to the “serious resistance” mentioned above against OHADA Uniform Acts in the anglophone provinces of Cameroon.

Imposition of French civil law from francophone Cameroon on anglophone Cameroon is often resisted as a form of domination. In *Meme Lawyers Association v Court Registrars*,⁵⁴ for example, the practice in francophone Cameroon whereby a claimant was required to pay a fee of 5 per cent of the amount of his claim before the claim could be listed for a hearing was extended to anglophone Cameroon by a ministerial circular.⁵⁵ A group of lawyers in anglophone Cameroon brought an action in the High Court seeking in effect a declaration that the ministerial circular was unconstitutional and illegal in the common law jurisdiction of Cameroon. The High Court declared that the ministerial circular had no effect in anglophone Cameroon and that in the anglophone provinces of Cameroon, the collection of 5 per cent of the amount of a claim as the condition precedent for filing a claim was illegal.

A contention on behalf of the government that application of the rule to anglophone Cameroon was the result of an international agreement was rejected. After referring to article 68 of the Cameroonian Constitution, which maintains the two systems of law in Cameroon, Ayah, J, stated that it is “idle to contend that supra-national civil procedure codes signed and ratified by Cameroon take precedence over the Constitutional saving provision”. He went on to state that:

“the Cameroonian reality is that the Republic is made up of two distinct components: the French-speaking part and the English-speaking part. Any international instrument is applicable subject to that reality. The point is very clear: Cameroon takes precedence”.⁵⁶

The learned judge continued that if any representative of Cameroon at international negotiations “consciously or otherwise” represents only the interests of a section of the Cameroonian reality, “the consequence will be grave constitutional crisis”.⁵⁷ Whether or not the judge’s statement about the constitutionality of a ratified treaty is correct is not the point here. The point is that this case demonstrates the serious resistance in English-speaking Cameroon against domination by the French-speaking majority

54 (2001) 1 CCLR 11.

55 Circular No 00012 MJ/SG/DAG of 13 May 1996 of the Minister of Justice.

56 (2001) 1 CCLR 11, 17.

57 *Ibid.*

who seek to impose their system of law on the English-speaking minority. In the context of OHADA, when imposition of substantive law is added to imposition of French as the only working language, it is difficult not to regard the OHADA drive in anglophone Cameroon as domination prohibited under article 19.

It may then be argued that in Cameroon the OHADA Treaty is incompatible with articles 2, 13(3) and 19 of the African Charter. If application of OHADA laws in Cameroon amounts to a violation of rights protected under the African Charter, a difficult problem presents itself in the domestic context: which of the two conflicting treaties prevails under domestic law in Cameroon?

Conflicting treaty obligations

The conflict between two international treaties should be distinguished from a conflict between an international treaty and national law. Article 45 of the Cameroonian Constitution provides that duly ratified treaties and international agreements override national laws. Therefore, in the case of such a conflict, a national judge will simply apply the international agreement and refuse to apply the national law to the extent of the incompatibility. But the Cameroonian Constitution does not make provision for a situation where there is a conflict between two international agreements, both duly ratified by Cameroon.

The conflict between the OHADA Treaty and the African Charter may present itself in the context of a commercial dispute. One litigant before a domestic court in Cameroon may base his claim on a provision of the OHADA Treaty or a Uniform Act made under the Treaty and, in answer, the other party may rely on the African Charter to argue that the OHADA provision is not applicable since it infringes Charter rights.⁵⁸ It is not clear how a national judge in Cameroon would resolve a dispute of this kind. Yet it is clear that, if indeed there is a conflict and the national judge applies the OHADA law which infringes a Charter right, Cameroon will be in breach of its international obligations under the Charter. In such a case, the African Commission and the African Court (when established) can declare that Cameroon is in breach of the provisions of the Charter. Indeed, if it is true that no court in Cameroon has jurisdiction to entertain an action alleging that the implementation of the OHADA Treaty in English-speaking Cameroon is in breach of the African Charter, then it means that any complaint to the African Commission will easily satisfy the requirement of exhaustion of local remedies since, *ex hypothesi*, there will be no local remedy to exhaust.

The reverse is also true. If the national judge applies the African Charter and refuses to apply the OHADA provision, the party relying on the OHADA provision could appeal all the way to the Common Court of Justice and

⁵⁸ The consequence would be that national law, which may be favourable to the party relying on the African Charter, should apply.

Arbitration which will declare that the OHADA provision is applicable in Cameroon. That court is not concerned with the internal arrangements of Cameroon and has no jurisdiction to decide on the constitutionality of any laws in Cameroon. Nor will the OHADA court be concerned with the application of the African Charter in Cameroon. The OHADA court will be concerned only with the provisions of the Treaty. At that level, it will be a matter of Cameroon's international obligations under the OHADA Treaty rather than Cameroon's internal arrangements or the enforcement of Charter rights. The sole question will be whether the Treaty provisions apply to the whole of Cameroon and the OHADA court will be bound to apply the OHADA Treaty and answer the question in the affirmative.

The potential conflict between Cameroon's international obligation under the OHADA Treaty and its international obligations under the African Charter must be a matter of some embarrassment for the Government. For this reason the Cameroon Government should be leading discussions to secure agreement for the revision of article 42 of the Treaty.

The Related Problem under the CEMAC Treaty

The constitutional and human rights difficulties created in Cameroon by article 42 of the OHADA Treaty are similar to those presented by its counterpart provision in the treaty establishing the Economic and Monetary Community of Central Africa (CEMAC). CEMAC is one of the two principal sub-zones that make up the Franc Zone; the other principal sub-zone is the Economic and Monetary Union of West Africa (UEMOA).⁵⁹ The Franc Zone is an economic and monetary area whose membership consists predominantly of former French colonies in Africa⁶⁰ and France. The member states of OHADA are all members of the Franc zone. It is, therefore, not surprising that, as indicated earlier, in the preamble of the OHADA Treaty the member states express their conviction that their membership of the Franc Zone constitutes a major asset for the progressive realization of their goal of economic integration in Africa.

The CEMAC Treaty was signed on 16 March 1994 in N'Djamena, Chad, and is now in force in six central African states, including Cameroon.⁶¹ Article 7 states that the Treaty will be drawn up in English, French and Spanish. This is quite proper since although most of the six member states are French-speaking, Cameroon is officially bilingual in English and French and Equatorial Guinea is Spanish-speaking. However, the same article 7 states that the French version will be authoritative where there is a difference

⁵⁹ See note 7 above.

⁶⁰ In West Africa, Benin, Burkina Faso, Côte d'Ivoire, Guinea Bissau, Mali, Niger, Senegal and Togo. In Central Africa, Cameroon, Central African Republic, Congo, Gabon, Equatorial Guinea and Chad. The Federal Islamic Republic of the Comoros is also a member of the Franc Zone.

⁶¹ The other member states are the Central African Republic, Chad, Congo, Equatorial Guinea and Gabon.

between the various language versions. This must be problematic in Cameroon for the reasons discussed above.

If article 7 of the CEMAC Treaty gives cause for some concern, article 42 of the Protocol to the Treaty relating to the Institutional and Legal System of the Community is even more worrying. It bluntly states, like article 42 of the OHADA Treaty, that the working language of the Community is French. Needless to say, this provision is open to similar objections as those raised against article 42 of the OHADA Treaty.

The CEMAC Treaty introduced a monetary union in Central Africa, Union Monétaire en Afrique Centrale (UMAC). UMAC's monetary policies are carried out by a single central bank, the Banque des États de l'Afrique Centrale (BEAC). It is BEAC that issues the CFA Franc in the CEMAC area. As a result of article 42, the legal currency in Cameroon issued by BEAC is no longer bilingual in English and French. It is now only in French, as can be seen from the sample in the appendix to this piece. This is a blatant violation of article 1(3) of the Cameroonian Constitution. And it is worth noting that the CEMAC Treaty has far-reaching consequences for all Cameroonians. It creates not only a monetary union, but also an economic union, a Community Parliament and a Community Court of Justice. All these institutions are staffed by civil servants to provide service to the public. Since the working language of the Community is French, how would English-speaking Cameroonians serve or be served at any of these public institutions? How would an English-speaking Cameroonian participate in deliberations of the Community Parliament or in proceedings in the Community Court of Justice, whether as judge, advocate or litigant?

CONCLUSION

There is something to be said for the idea of a uniform law applicable in a large number of African countries as a tool for economic integration and as a way of encouraging foreign investment into Africa.⁶² Those who have worked for the creation of OHADA are therefore to be congratulated. However, this paper has endeavoured to show that Article 42 of the OHADA Treaty does not assist the organisation in achieving these commendable objectives. The paper has also demonstrated that in prescribing French as the working language of OHADA Article 42 presents serious constitutional and human rights difficulties in Cameroon. This is a matter of some embarrassment to the Cameroonian Government which had, perhaps negligently, failed to realise that Article 42 is inconsistent with the provisions of the Cameroonian Constitution. It has also been shown that the same error was made when the Government signed and ratified the CEMAC Treaty and the Protocol or addition to the Treaty relating the Institutional and Legal System of the Community, with the visible consequence that the currency of the country,

62 See 'Gbenda Bamodu "Transnational Law, Unification and Harmonization of International Commercial Law in Africa" (1994) 38/2 *Journal of African Law* 125.

issued by the Bank of Central African States (BEAC) is not in both official languages as required by the constitution.⁶³

It is hoped that in future the Cameroonian government when negotiating international treaties and conventions will remember that Cameroon is both bi-jural and bilingual and will represent the interests of both sections of the country. Monetary union or the harmonisation of business law should not be achieved at the expense of constitutional and human rights safeguards and the rule of law. The case for an amendment of Article 42 of the OHADA Treaty along the lines suggested in this paper is compelling either on the ground of removing obstacles to the attainment of the key OHADA objectives of securing economic integration in Africa and attracting foreign investment or in order to remedy blatant constitutional and human rights violations in Cameroon⁶⁴ or on both of these grounds. It is hoped that the required amendment will come sooner rather than later.

63 See sample banknote in appendix.

64 The language provisions of the CEMAC Treaty should be amended for this reason alone.

Appendix
Example of Cameroonian Currency

