

The copyright of this thesis vests in the author. No quotation from it or information derived from it is to be published without full acknowledgement of the source. The thesis is to be used for private study or non-commercial research purposes only.

Published by the University of Cape Town (UCT) in terms of the non-exclusive license granted to UCT by the author.

THE SEPARATION OF POWERS IN AFRICA:

18

A COMPARATIVE ANALYSIS OF CAMEROON AND SOUTH  
AFRICA, (c. 1961 – c. 1996), WITH SPECIAL REFERENCE TO  
NATION-BUILDING.

SUBMITTED IN FULFILMENT OF THE REQUIREMENTS FOR THE  
MASTER OF ARTS DEGREE

AKOH HARRY ASANA

UNIVERSITY OF CAPE TOWN

APRIL 2000

Dedication

Above all else she taught the power of *Agapé*.

Dedicated with love to my grandma

Amara Anah Anya.

University of Cape Town

## ACKNOWLEDGEMENT

I wish to thank the Almighty God for all, without him nothing would be possible and through him all things are.

My sincere thanks to Professors Christopher Saunders and Patrick Harries in the Historical Studies Department for the supervision, inspiration and understanding that guided me all through this project. My thanks also go to Sarah Jagwath and Anashiri Pillay of the Department of Public Law. Many thanks to Mandy Findeis for her support and understanding.

My heart goes out to my family; Amarah Anah Anya, Hannah Akoh, Baudouin Akoh, Valery Akoh, Solange Akoh and Ronan Cahill for the prayers, support and love.

Thanks to Eric Ketchemin for proof reading the scripts.

My love to all those special friends living and dead who helped me and without their assistance this project would never have materialised.

## TABLE OF CONTENTS

i)	Dedication	i
ii)	Acknowledgement	ii
iii)	Table of Contents	iii
iv)	Table of Cases	vi
v)	List of Maps	vii
vi)	List of Acronyms and Abbreviations	x
vii)	Abstract	ix
viii)	Introduction	1

### Section One

#### Chapter One:

##### Separation of Powers in South Africa with reference to Nation-Building

i)	Background	1
ii)	Pre-Union South African Constitutions	10
iii)	Cape	10
iv)	Natal	12
v)	Orange Free State	13
vi)	Transvaal	14
vii)	The Union Act of 1909	15

#### Chapter Two

##### The South African Act of 1961 and Nation Building

I)	Separation of Powers in the Act	23
II)	Protests Resistance and Conflicts	26
III)	Labour Legislation in the South African State	28
IV)	Bantustan Policies And Black Resistance	31
V)	Separation of Powers in the Constitution of the TBVC states	37
VI)	Separation of Powers in the Constitution of 1984	42
VII)	Mass Resistance	45
VIII)	Legal Apparatus of Repression: the Courts	46
IX)	Armed Forces: Police And the Army	48
X)	Resistance to Military Rule: Politics of War Resistance Movements	50
XI)	State of Emergency	52
XII)	Resistance from the International Community	55

#### Chapter Three

Constitutional Transition to the New Dispensation	
1) Interim Constitution Act	60
11) Separation of Powers in the Interim Constitution	60
111) Demise of Parliamentary Sovereignty	62
1V) The Bill of Rights	64
V) Affirmative Action	65
VI) Aspects in the making of the 1996 Constitution	66
VII) Separation of Powers in the 1996 Constitution	68
VIII) Counter-Majoritarian Dilemma	70

## SECTION TWO

### Chapter Four

#### Separation of Powers in Cameroon with References to Nation Building

1) Background	76
11) Separation of Powers under German Colonial Administration	76
111) Separation of Powers under Mandate and Trusteeship Rule	78
1V) Separation of Powers under British Rule	79
(a) Clifford Constitution and Power Separation	79
(b) UN Charter	80
(c) Richards Constitution	80
(d) Macpherson Constitution	82
(e) Lyttelton Constitution	85
V) Separation of Powers Under French Administration	86
VI) Power Separation in the Trusteeship Under French Administration	88
V11) The Quest for Reunification	91
Conclusion	94

### Chapter Five

#### Separation of Powers in the Federal Constitution of 1961

1) Making of the Constitution	96
11) Fouban Conference and the Outcome of the Federal Constitution	98
111) Separation of Powers in the Federal Constitution	100
1V) Executive Power and Anglophone Problem	102

V)	Centralisation	105
VI)	Coalition Building	107
V11)	Government by State of Emergency	108
V111)	Unitary Constitution of 1972 and the Separation of Powers	110
V111)	The Anglophone Problem	114
1X)	Resistance and Opposition by a Minority	117
X)	International Character of the Problem	121

### SECTION THREE

#### Chapter Five

Comparative Analysis	119
1) Constitution Making Process	124
11) Influence of Common law/ French and Roman Dutch Systems	125
111) Separation of Power Provisions	127
1V) Use of Law	128
V) Use of Force	130
VI) Resistance	131
VII) International Element	132
Conclusion	132
Bibliography	135

## Table of Cases

Bangindawo v Head of the Nyanda Regional Authority; Hlantlala v Head of the Tembuland Regional Authority (1998) 3 BCLR 314 (Tk).69

Collins v Minister of Interior (1957)11AD 552

Dissident Deputies (Cameroon)

Du Plessis v De Klerk (1996) 5 BCLR 685 (55)

Executive Council of the Western Cape Legislature v President of the Republic of South Africa 1995 (4) SA 877 (CC)

Geelong Harbour Trust Commissioners v Gibbs Bright & Co 1974(2) ALR 362 at 369

Harries and others v Minister of interior and Others (1952) SA 428A

Hess v State (1895) 2 Off Rep 112 at 116

INS v Chadha, 462 US 919, 972-73

Marbury v Madison Case5 US (Cranch) 137 (1803)

Msido v Moriarty SC 539

Namibian Opinion, (1971) ICJ 54, (1996) 5 BCLR 685 (55)

Ndlwana v Hofmeyer NO and Others 1937 (AD) 229 at 237

Ngcobo v Ngcobo (1929) AD 233

Re: Certification of the Constitution of the Republic of South Africa 1996 (4) SA 744, 1996 (10) BCLR 1253 (CC)

Rex v Maboko (1910) TS 445.

Rex V Nalana, (1907) TS 407

Rex v. Ndobe (1930) AD 484.

S v Beard 1965 (4) SA 543 (ECD)

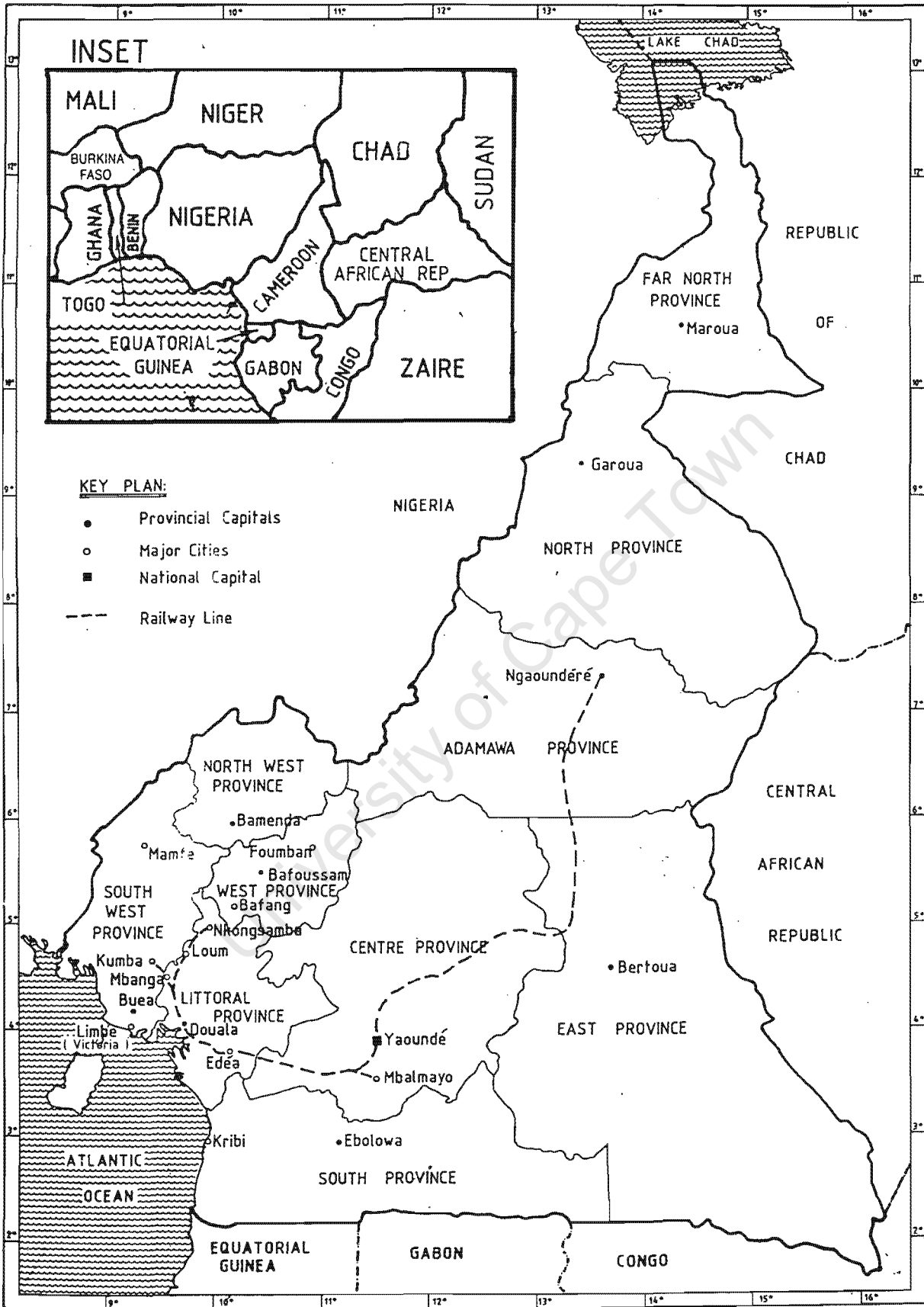
S v Cheadle 1976 (1) SA 703 (A)

S v Fazzie and Six Others 1964 (4) SA 637 (AD)

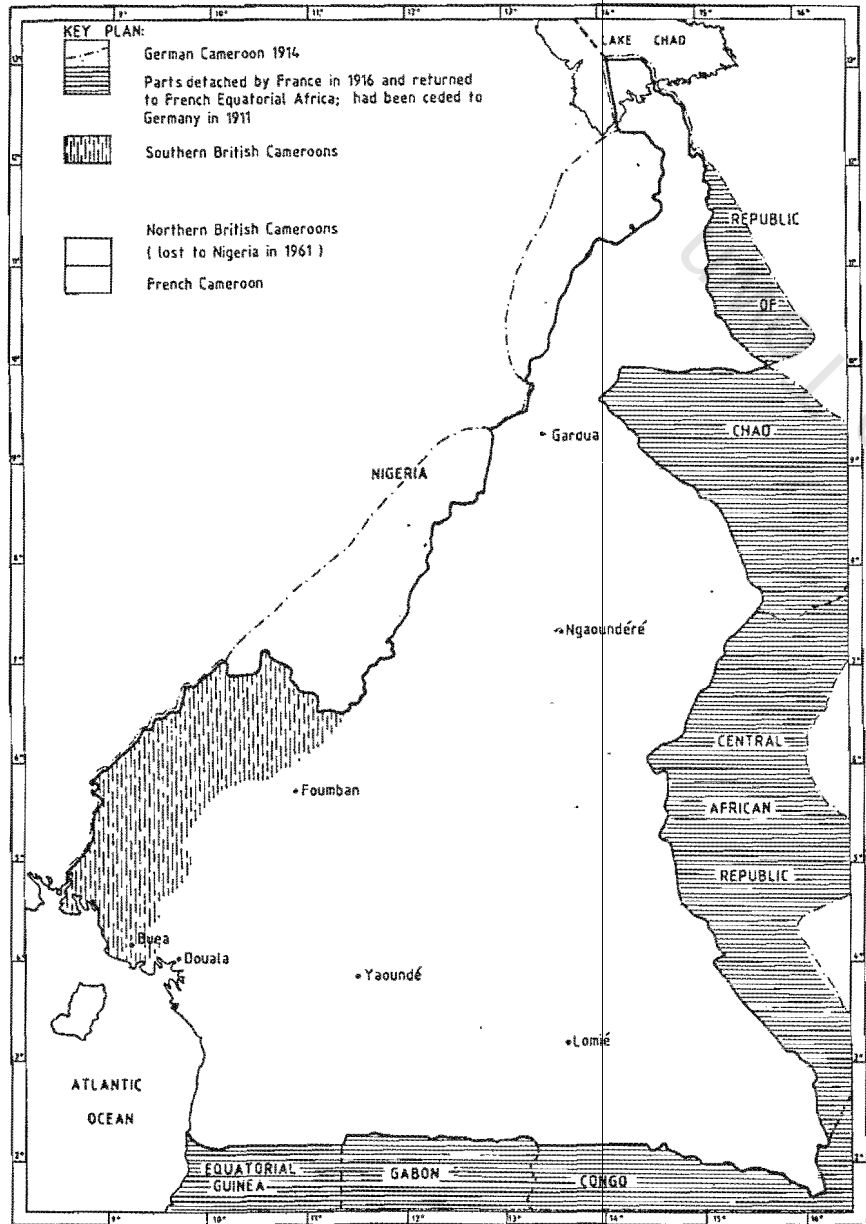
S v Makwanyane1995 3 SA 391 (CC), (1995) 6 BCLR 665

S v Naicker 1967 (4) SA 165

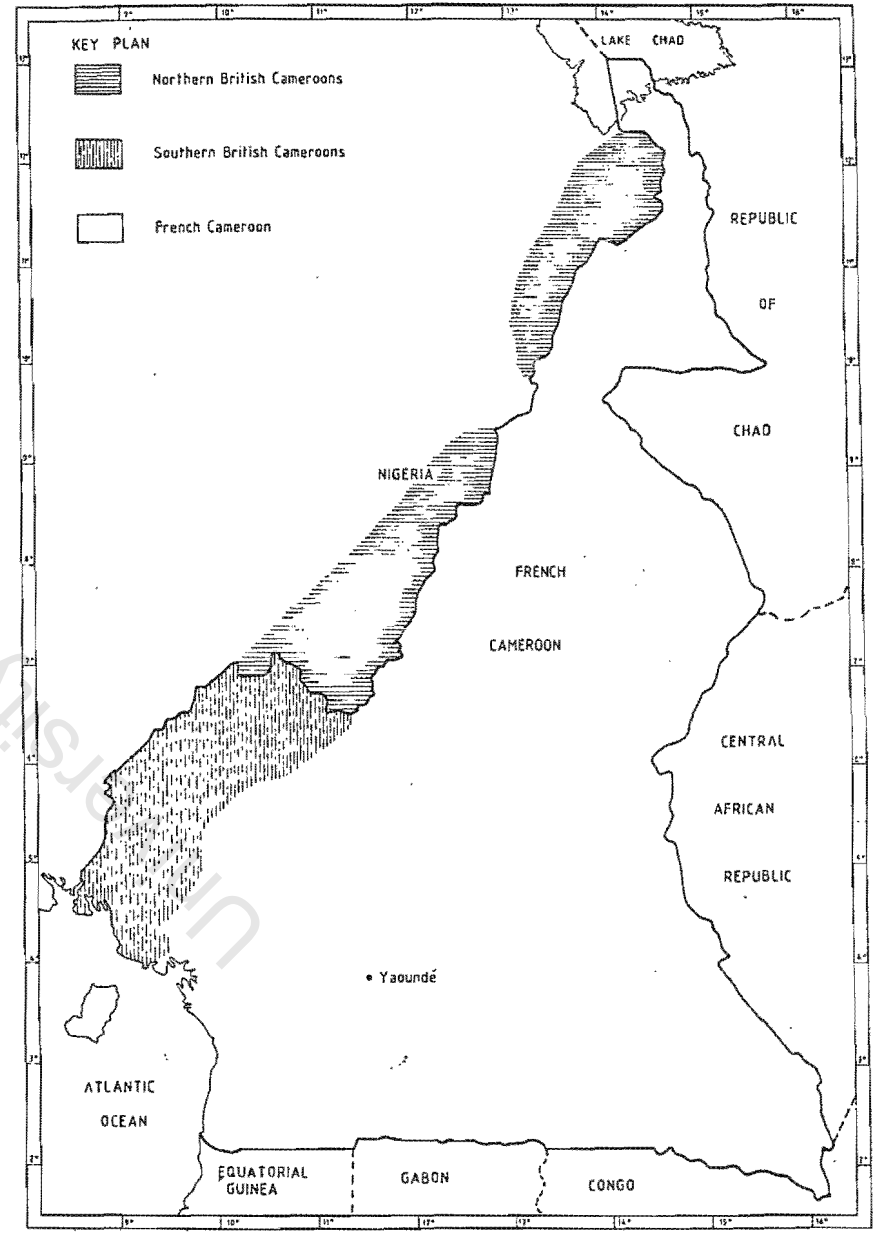
S v Nelson Mandela 1952 (3) SA 140



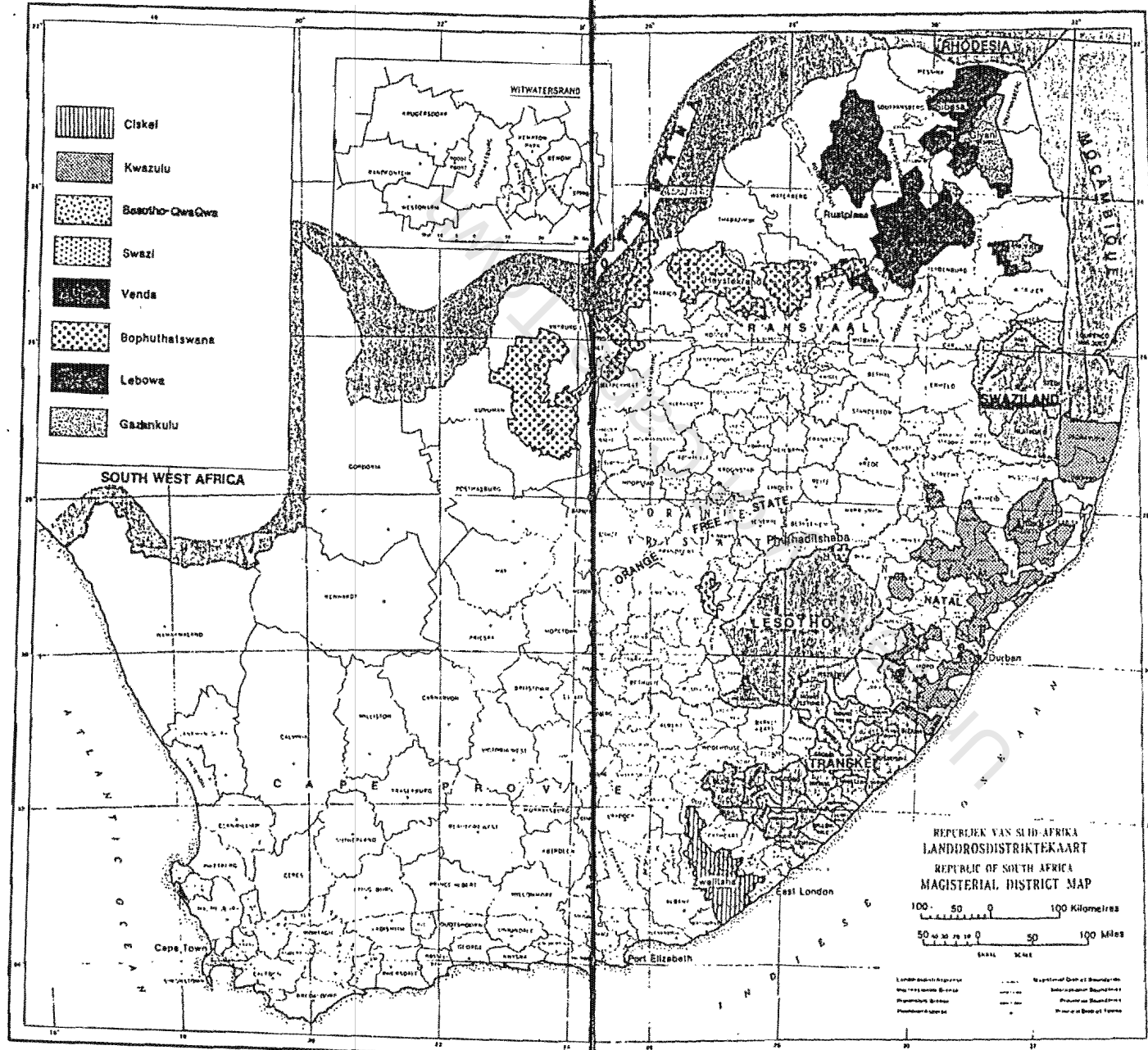
Republic of Cameroon (inset shows Cameroon in relation to neighboring states)



MAP 2.1 The making of Cameroon



MAP 2.2 The Cameroon Mandate



Map Consolidation Proposals.

## List of Acronyms and Abbreviations

The following are used in this thesis:

AAC	All Anglophone Conference
ANC	African National Congress
AWB	Afrikaner Resistant Movement
BDC	Bloc Democratique Camerounaise
CFA	Communauté Financiere Africaine
CNU	Cameroon National Union
CODESA	Congress of a Democratic South Africa
COSATU	Confederation of South African Trade Unions
COSAWR	Congress of South African War Resisters
CPDM	Cameroon People Democratic Movement
CPNC	Cameroons People National Congress
ECC	End Conscription Campaign
ESOCAM	Evolution Sociale Camerounaise
GCE	General Certificate of Education
IFP	Inkatha Freedom Party
KNC	Kamerun National Congress
KNDP	Kamerun National Democratic Party
KPP	Kamerun People's Party
MK	Umkonto we Sizwe
MPNP	Multi Party Negotiation Process
NCNC	National Council of Nigeria and Cameroons
NP	National Party
PQ	Poqo
SACC	South African Council of Churches
SACP	South African Communist Party
SADF	South African Defence Force
SAP	South African Police
SCNC	Southern Cameroons National Council
SDF	Social Democratic Front
SWELA	South West Elites Association
TBVC	Transkei, Bophuthatswana, Venda and Ciskei

TRC

Truth and Reconciliation Commission

UDM

United Democratic Movement

UPC

Union des Populations du Cameroun

University of Cape Town

## ABSTRACT

Too often writers have focused on the economic and political factors in attempting an answer to the question why so many conflicts in Africa? This study breaks new grounds and seeks to demonstrate the role of law in these conflicts. The focus here is on the constitutional law paradigm of the separation of powers.

The research is an investigation of the primordial role of the law in causing conflicts in Africa, rather than enhancing nation building. In the case of Cameroon and South Africa it seeks to demonstrate that the crises that dominated them from 1961- 1996 was as a result of constitutional manoeuvres.

The hypothesis investigates the separation of powers between the judiciary, legislature and executive in Cameroon and South Africa, which far from enhancing nation building has often been a source of conflict. The manipulation of the constitutions in Cameroon by the francophone majority and in South Africa by the white minority undermined nation building and laid the seed beds for conflicts in the period under survey.

It was established that apartheid was born as a result of the absence of the separation of powers between the three organs of the state. Similarly Anglophone marginalisation in Cameroon it is submitted was due because of the lack of a similar separation.

Although this is an interdisciplinary study, the methodology used has been very legally oriented. That means relevant case law, statutes and constitutional provisions were used as the greatest source of authority. References were made to case law from different jurisdictions often to illustrate some concepts and their limitations

## INTRODUCTION

*It is now accepted that a people denied effective political participation and basic human rights have under International law, the right to "alter, abolish, or overthrow any form of government that becomes destructive of the process of self-determination and the right to individual participation."*<sup>1</sup>

The desire to check the abuse, arbitrary use and the concentration of powers has dominated various polities throughout time. The seventeenth-century French philosopher Montesquieu in *De L'Esprit Des Lois* adumbrated on what became the Western world's approach to this problem. Montesquieu argued along the line of Aristotle that a separation of powers between the executive, legislature and the judiciary is fundamental to limiting and checking power abuse. It was thus previewed that a division of powers amongst the three organs of the state would prevent power from accumulating in one hand and thus avoid its misuse.

The separation of powers between the executive, legislature and judiciary presupposes that it is inadmissible for any of the branches to single-handedly make laws, adjudicate or allege breaches of law and administer justice. Thus it is agreed that rules are made by one organ of the state, applied or executed by another and interpreted yet by a third party. The three branches of government are rendered independent but co-ordinated. In *Re: Certification of the Constitution of the Republic of South Africa*<sup>2</sup>, the situation is aptly described thus:

The principle of separation of powers on the one hand recognizes the functional independence of the branches of government. On the other hand the principle of checks and balances focuses on the desirability of ensuring that the constitutional order, as a totality, prevents the branches of government from usurping power from one another. In this sense it anticipates the necessary or unavoidable intrusion of one branch on the terrain of another. No constitutional scheme can reflect a complete separation of powers; the scheme is always of partial separation. In Justice Frankfurter's words "the areas are partly interacting, not wholly disjointed."

The view here is that the concentration of power is the real definition of tyranny. This concept of the separation of powers has evolved and is virtually present in most constitutions of the

---

<sup>1</sup> Kader Asmal, *Reconciliation through Truth: A Reckoning of Apartheid's Criminal Governance*, (Cape Town: David Phillip Publishers, 1996), p. 186.

world. However, there is no yardstick for the measurement of this separation. Thus slight differences would be found in the constitutions of the United States and France and between them and Britain. What is however accepted, as underlying the principle is the system of checks and balances, which means that the separation cannot be absolute.

There is however a current view that has dominated American scholars in the twentieth century. This view is based on governmental inefficiency as the cost of the separation of powers. This view incorrectly assumes that congressional authority conflicts with the interests of effective execution of public policy and that the separation of powers is antithetical to the centralised power occasioned by developments in industrialisation and immigration. These critics argue that the American system is ill suited to enhance good governance. Jessica Korn in, *The Power of Separation* argues that this is a mischaracterization of the actual principles of the American separation of power. Montesquieu and Locke had “placed great stress on the separation of powers as a requisite for a rule of law in the public interest.”<sup>3</sup> Executive, judicial and legislative powers are separated to enhance the specialisation that comes from a division of labour.

The system of parliamentary sovereignty which is operational in Britain (and was inappropriately transplanted to South Africa) succeeds on the predominance of two balanced parties. The parliament in Britain is today no longer considered to be “a sovereign institution” with much of its powers delegated to the executive. The British Prime Minister therefore appears aspiring the executive powers and status akin to the US president.

The African Indigenous order shared the necessity to prevent absolutism, but premised its own remedial solutions on three core issues; consensus, compromise and revolt. Consensual decision-making was so central that a decision that failed to meet with this requirement was not to be respected. Compromise was thus the midway before the last resort, which was revolt. Where there was abuse of power or threat to abuse, the people always had the option to revolt by seceding or migrating. This partly explains the migratory patterns in Africa prior to 1800 and offers an answer to the predominance of secessionist warfare in the continent. However, this African

---

<sup>2</sup> 1996 (4) SA 744, 1996 (10) BCLR 1253 (CC)

<sup>3</sup> Jessica Korn, *The Power of Separation*, (New Jersey: Princeton University Press, 1996), p.16

approach was swept under the carpet during colonisation and has in some instances seen little light and consideration.

This research seeks to investigate the constitutional paradigm of the separation of powers with references to nation building. It involves a review of the constitutions of both Cameroon and South Africa with focus on the separation of powers. The extent to which this failed to prevent abuse in the two countries and the nature of the conflicts.

The importance of this study lies in its attempt to focus on possible new methods of conflict resolution and prevention in Africa. The examination of the conflicts that reigned in South Africa and Cameroon offers an insight to the cause of the problems. It thus identifies a way of preventing such conflicts in future if adequate attention is paid to the separation of powers. By attempting to situate the importance of the separation of powers to nation building and stability it brings in the issue of conflict resolution. An examination of the nature of parliamentary sovereignty in South Africa and presidential executive in Cameroon necessitated the birth of apartheid and Anglophone marginalisation.

This is an interdisciplinary pioneering study. Firstly as mentioned above, by exploring the separation of powers as a potent source of conflict and secondly in comparing aspects in the constitutional history of South Africa and Cameroon. Much has been written comparing South Africa to European countries like Britain, America and Holland. And much has been written on Cameroon and France, Britain and the United States. But little has been written comparing aspects in the constitutions of African countries. And even less between Cameroon and South Africa.<sup>4</sup>

Lastly this study confirms the importance of the separation of powers as being fundamental to the rule of law and to the guarantee and protection of basic human rights. Wherever there have been too much powers in the hands of one organ without any corresponding checks and balances, the situation has given rise to abuses. In South Africa under parliamentary sovereignty apartheid was borne. In Cameroon presidential executive gave rise to Anglophone marginalisation. In Europe the concentration of such powers gave rise to fascism in Germany under Hitler and in Italy under Mussolini. In all these systems there were violations of human

rights and crimes against humanity. An attempt to redress the situation gave rise to a *Reichstaat* or a constitutional state in which all organs of the state are subordinate to the constitution and appropriate checks and balances are established, making manipulation of the constitution very difficult.

There is a review of primary and secondary sources. But there is a very negligible amount of literature comparing constitutional law and nation building in Africa. And even much less between Cameroon and South Africa. This area is a relatively new field. A plethora of journals provided critical discourses on aspects in the law. *South African Law Journals* contained articles that raised salient and pertinent issues with respect to the separation of powers and the judiciary in South Africa under apartheid. Although they did not establish the direct connection between the separation of powers and the nature of the laws, yet some of these articles written by judges illuminated the nature of the influence of the parliament on judicial thinking.

*African Journal of International Comparative law*, covers a broad spectrum of legal areas and often highlights the lacunae and trends in law in both countries. *African Studies Journal*, *Democracy and Democratisation*, *Human Rights Quarterly*, *Amnesty International*, *Transparency International Report*, *Jeune Afrique*, the strength of some of the articles in these journals is limited by the absence of a comparative element between Cameroon and South Africa.

However, there have been some contributions that touched on the central issues although with a fairly limited investigation on the significance of the separation of powers. Francis Nyamnjoh & Piet Konnings "The Anglophone Problem" in *African Studies Journal*, Mukum John "Effective Constitutional Discourse as an Important First Step to Democratisation in Africa- *Democracy And Democratisation In Africa* and Achilles Mbembe's "Provisional Notes On the Post Colony." Enonchong Nelson's "The New Cameroonian Constitution: Old Wine in New Bottle" *NUCS Journal* focuses eloquently on the separation of powers, but compares the relevant provisions with countries in Europe and America. Ajanoh Sone highlights the tension

---

<sup>4</sup> Mukum J., "Effective Constitutional Discourse," in *Democracy and Democratisation in Africa*, (Leiden: J Brill, 1997). P.77 Mukum compares makes a limited comparison between Cameroon and South Africa.

in “The Administration of Criminal Justice in Cameroon: Realities of the Application of the Uniform Penal Code” – *African Journal of International Comparative Law*.

Some scholars like VJ Ngoh, *1884-1985: A Hundred Years of Cameroon History*, Eyongetah and Brian, *A History of the Cameroons*, Neville Rubin, *Germans in the Cameroons*, all focused broadly on the making and the different constitutions that prevailed in Cameroon. No details were paid to the relevant constitutional clauses. Kofele Kale (ed.) *An African Experiment in Nation Building: The Bilingual Cameroon Republic since Reunification*, contains articles that focus on the abuse of power as a result of lack of separation. Richards Joseph (ed.) *Gaullist Africa: Cameroon under Ahmadou Ahidjo* proved very vital in the investigation of the hypothesis in this study. While David Gardinier, *Cameroons: UN Challenge to French Policy*, contained some very invaluable arguments on the contribution of the colonial policy to the separation of power in the constitution of 1959.

Literature on South Africa was enhanced by the availability of law Reports unlike in Cameroon. The various law reports offered a good opportunity for the analysis on the development of the law in South Africa from a lack of judicial review to a Constitutional state. Bennett TW's two books, *Customary law And the Bill of Rights*, *African Customary Law*, produce significant information on the nature of the African approach to power abuse but fail to relate this to the current set up. Dion Basson, *South Africa's Interim Constitution*, Nicol M. *The Making of the New constitution*, De Villiers Bertus, *Birth of a Constitution*, Gloppen S., *Battle Over the Constitution*, all these writers opened up issues on the transition to a Constitutional State in South Africa, often with references on the past situation.

Many texts on South Africa have extensive material on laws that created conflicts under Apartheid and these include Abel Richard, *Politics By Other Means*, Gavin Cawthra, *The Surplus People and Forced Removals in South Africa*, Christian & Murray (eds.) *No Place to Rest; Forced Removals and the law in South Africa*. But these writers did not pay any attention to the recurring nature of the absence of a check and balance on powers. Kader Asmal's, *Reconciliation through Truth*, proved very vital in framing and forming the hypothesis. His work offers an academic and technical view on the role of the law in South African Constitutional History.

There are some writers who have researched extensively on this field with sound findings. Nwabuzue, *Constitutionalism In Emergent African States*, Greenberg, Katz (et al), *Constitutions And Democracy: Transition in the Contemporary World*, Mann C. (ed.) *Law in Colonial Africa*, Ogwurike C., *The Concept of law in English Speaking Africa*. These writers either failed to touch on Cameroon or treated it in a passing. Nevertheless some of their findings hold true for Cameroon and South Africa. Gerhard C. *Separation of Powers* poses some jurisprudential arguments on the doctrine of the separation of Powers. The Internet was a unique source of research for the most recent findings.

This work is divided into three parts; the first part deals with South Africa and consists of three chapters, while part two treats Cameroon with an equivalent number of chapters. Part three comprises the comparative analysis and the Conclusion.

In chapter one there is an investigation of the indigenous constitutional Order as the first step to identify the necessity to check the abuse and concentration of power. The African approach is thus contrasted with the Western doctrine of the separation of powers. Then there is a study of the constitutions of pre-union South Africa up to the Union Act of 1909 to highlight the contribution of each of these to the 1961 Constitution. The separation of powers is thus highlighted as pivotal in laying the groundwork for the emergent abuses.

Chapter two treats the Constitution Act of 1961 and focuses on parliamentary sovereignty as providing the guise for apartheid. The hob-nob of legislation enacted by the parliament is analysed alongside the bantustan policies. The use of force and the growing character of the resistance gave rise to the 1983 constitution.

The last chapter on part one deals with the rebuilding of a new society with the central role of the constitution and not less the separation of powers. This chapter raises serious legal concepts like counter majoritarianism, Bill of rights amongst others with a view to demonstrate the related nature of the power separation and nation building.

Part two opens up with a similar investigation of the Indigenous Constitutional order in Cameroon. But goes further to compare this with the uncoded English Common law and Islamic jurisprudence on power abuse. This chapter seeks to relate the consequence of the partition of Cameroon on power separation and Anglophone marginalisation.

Chapter five, which covers the constitution of 1961, raises questions and arguments that the current anglophone problem is largely as a result of the absence of power separation. The violations and human rights abuses are researched within this background. The unitary constitution of 1972 and subsequent amendments simply narrate the similarity with the South African case.

In Chapter six the 1996 constitution is examined as failing to 'rise up to an historic occasion' at resolving the Anglophone problem. This chapter unlike the last one on South Africa does not raise concepts like the Bill of Rights. As the findings show unless there is a separation of powers between the executive, judiciary and executive, then there can be no talk of the protection and guarantee of basic human rights.

The last part thus compares the relevant elements of this study in the constitutional history of South Africa and Cameroon from 1961-1996. It focuses on the making of the constitutions, the separation of powers within them, abuse of powers, resistance and the use of force. The conclusion confirms the cycle that without any limitation, excess power shall be abused. But in the case of South Africa there is hope. However, Cameroon's inability to learn its own lesson raises doubts.

## CHAPTER I

### THE SEPARATION OF POWERS IN SOUTH AFRICA<sup>5</sup> WITH REFERENCES TO NATION BUILDING.

#### HISTORICAL BACKGROUND

The constitutional law background of South Africa for purely analytical convenience has been divided into three major sub groups.<sup>6</sup> With each phase covering a distinct but interrelated progression to the new dispensation. These phases include:

- A) The Indigenous Constitutional framework.
- B) The Pre-Union Constitutions:
  - i) The Cape
  - ii) Natal
  - iii) Transvaal
  - iv) Orange Free State
- C) The Union Constitution of 1909.

#### A) THE INDIGENOUS CONSTITUTIONAL FRAMEWORK

It is now trite knowledge to assert that African states had a thriving jurisprudence and a well-established legal system before the advent of Europeans.<sup>7</sup> In the various nation-states of Southern Africa like elsewhere on the African continent, this law was not coded and comparable to the Common law and Roman Dutch law.<sup>8</sup> It is for this reason that through out this work reference is made to the African Indigenous law as opposed to the notorious usage of African Customary law, which reflected the European mindset at the time, that Africa was incapable of a legal system. Much has been written already on the various branches like Family law, succession and contract but

---

<sup>5</sup>Some constitutional issues are treated here while their impact is seen in the period from 1961-1990.

<sup>6</sup>Kennedy T., *law and Custom of the South African Constitution*, (London: Oxford University Press: 1937), p.399.

<sup>7</sup>Bennett T.W., *African customary law*,( Cape Town: Juta and Co.1991), p.66

<sup>8</sup> Ibid.

the focus of this research lies on the constitutional law sphere where less has been written.

African Indigenous constitutional law centred basically on the relationship between the rulers and the ruled, with the consensual approach to decision making.<sup>9</sup> Thus when Montesquieu<sup>10</sup> pursuant of the Western constitutional history recommended the separation of powers to avoid absolutism and tyranny, the Africans shared his fear but provided a different remedy, which centred on three cornerstones: consensus, compromise and revolt.<sup>11</sup> The powers to make laws did not vest with the rulers but with their councillors and the people. A close look at the organisation of the various nation-states revealed that, there existed a council of advisers, in the Zulu kingdom called “*Amakosi*” who exercised similar powers to the western legislature. An “*Amakosi*” also acted as an arbitrator in civil disputes and sat as assessors to the “*Kgosi*” (-a term distorted by the colonial vocabulary chief).<sup>12</sup>

There was at all times the tensions of centripetal forces prevalent in “centralised state societies and centrifugal forces” prevalent in acephalous societies. The chief was in constant challenge by rivals and competitors that could sway allegiance by revolt or secession in the event of any abuse of power. The situation is best described below

...The chief and his subjects are...involved in a perpetual transactional process, in which the former discharges obligations and in return, receives the accepted right to influence policy and command people. The degree to which his performance is evaluated as being satisfactory is held to determine the extent of his legitimacy, as expressed in the willingness of the Tsidi to execute his decisions.<sup>13</sup>

Thus the Xhosa constitutional law maxim: *Kgosi ke kgosi ka batho* (a chief is a chief through his own people).<sup>14</sup> Through this process the limitation on powers was ensured and participatory governance encouraged. A situation which comparatively speaking made it much more difficult to see a despot in these African states than in

---

<sup>9</sup> Ibid.

<sup>10</sup> Montesquieu, *De L'Esprit Des Lois*, (Oxford: Clarendon Press, 8<sup>th</sup> Edition), p.345

<sup>11</sup> Bennett, *African customary law*, p. 67

<sup>12</sup> Caesar Molebatsi, *Two Way*, SABC I, 12<sup>th</sup> July, 1999

<sup>13</sup> Bennett, *African Customary law* p.67

<sup>14</sup> Ibid.

their Western counterparts. In sum therefore the indigenous African law focused primarily on the relation between the *kgosi*, *amakogsi* and their people and power abuse was checked through a consensual decision-making process, compromise and revolt or secession as the last option. Perhaps this explains the predominance of secessionist warfare on the African continent A situation markedly different from the 'winner-take-all' system that was later introduced by the Europeans.

## **B) THE PRE-UNION CONSTITUTIONS**

Before the founding of the Union in 1909 there were four separate colonies in South Africa. Each with its own constitution and laws imported from Europe stock, barrel and lock. There is a review of each colony its constitutions and the relation this had with building the nation-colony. Towards the establishment of the Union, what constituted the most remarkable contribution by each colony to the Union Act that laid the basis for subsequent South African constitutions. From here certain key features that permeate the South African constitutional history will be highlighted.

### **I) THE CAPE OF GOOD HOPE.**

Four major areas of the constitutional history of the Cape are distinguished.<sup>15</sup> These include the Dutch East India Company, the British crown colony government, Representative and Responsible governments. The Dutch East India Company at the Cape followed a custom of the company that all decisions are taken in council. As their population grew with new migrants it became necessary to separate powers.

The Burghers entertained judicial disputes with the landdrosts having jurisdiction on appeal and criminal cases. The governors went about their duties 'by and with the consent of the council' (to adopt a peculiarly British phrase). Thus the Cape had no formal constitution, but the practice and procedure of the "council of India" was adopted.<sup>16</sup> Some of the legislation in Holland applied in the Cape. Today the common

---

<sup>15</sup> Kennedy, *Law And Custom of the South African Constitution*, p.4

<sup>16</sup> Ibid.

law of South Africa comprises the Roman Dutch law of Van Riebeeck, herein lies a significant contribution of this phase to the modern dispensation.

Under the British the situation saw a marked change. The governor had absolute authority and embodied the three branches of government. He abolished the council and ruled solo. With the arrival of the 1820 settlers there was a vigorous strife and campaign for representative government. One of the first demonstrations between the conflict provoked by the concentration of power. The uneasy relation between the colonists and the governor led the appointment of the advisory council. The governor presided over the council behind closed doors and the council was neither representative nor popular.<sup>17</sup> This gave rise to greater dissension, despite the introduction of a new constitution in 1834 with provision for separation of power between the executive council of five, a legislature and the courts.

Following the discontent greater concessions were made. The Crown authorised the governor with the consent and advice of the legislative council to define a new constitution. A representative constitution was then introduced.<sup>18</sup> It could be discerned from here, the constant tendency to change or manipulate the constitution to obtain a given situation this is a manoeuvre that was employed by the apartheid governments to ensure their status quo. Secondly the franchise question of the non-Europeans was first treated by this constitution. Franchise was open to any British subject who met the dual wage and property qualification.<sup>19</sup> Thus Africans who drew an annual salary to the tune of fifty pounds and a property value of twenty-five pounds could be registered voters. A feat which angered the Boers and provoked the trek and was later to be the bone of contention in the making of the Union.<sup>20</sup>

The representative government was doomed from the start; it was increasingly becoming clear that the colonists wanted a responsible government. They wanted the officers of government to be appointed from amongst the members of both houses and they should hold office as long as they possess the confidence and can ensure the co-

---

<sup>17</sup> Ibid., p. 10

<sup>18</sup> Ibid., p. 13

<sup>19</sup> Section 5 Ordinance 29 of 1852(Cape of Good Hope constitution).

<sup>20</sup> Kennedy, *Law And Custom of the South African Constitution*, p.13, *Rex v. Ndobe* (1930) AD 484.

operation of the legislature.<sup>21</sup> This marked the beginning of the parliamentary system of government in South Africa and the desire to check the concentration of powers.

Responsible government came to the Cape against the backdrop of a wider federation of the various colonies, the discovery of gold fields in Kimberley and the requests for a greater autonomy by the Eastern cape. Thus the constitution<sup>22</sup> met the aspirations of the colonists and provided:

While the governor of a colony under the parliamentary system remains as formerly personally responsible to the crown through the secretary of state...the members of his executive council, who are his constitutional advisers, now share and so far as the colony is concerned, entirely assume the responsibility which devolved upon the governor exclusively, of framing of policy of local government...measures for the sanction of legislature...superintending and controlling all public affairs...<sup>23</sup>

## II) NATAL

Of all the other colonies Natal had the greatest connection with the Cape. It was therefore logical that the constitutional battles were fought in the Cape while the results were reaped in Natal. All the institutions granted the Cape were transplanted to Natal. However, the contribution by Natal to the Union was not based on this, but on absolute and despotic powers of the lieutenant governor as supreme chief of the "natives". The Natal constitutional history identifies six periods beginning with a committee of management, a *volksraad*, a district of the Cape, a Crown Colony, a representative and responsible government.<sup>24</sup>

The early British settlers in Natal engaged primarily in commercial activities with the Africans. They selected a committee of management to oversee their affairs. This committee levied taxes, settled differences and distributed land. It was in this domain that they came in conflict with the Zulus in a battle where they suffered heavy casualties. The important thing here being that the separation of powers was done on a

---

<sup>21</sup> Minutes of the Cape of Good hope Legislative council No., p.3

<sup>22</sup> Act No. 1 of 1872.

<sup>23</sup> Kennedy, *Law And Custom of the South African Constitution*, p.18

<sup>24</sup> *Ibid.*, p.19

collective basis. With the Volksraad, the Dutch migrants in 1838 elected a people's council of twenty-four members and a president. The council was responsible for making laws, which it tabled, informally to the white settlers for approval. It operated similarly to the Landdrosts system in the cape, with power over judicial issues. And as a district of the Cape, Natal simply was administered and enjoyed the prevalent institutions.<sup>25</sup>

The powers of the governor-general under the system of responsible government towards the Africans were omnipotent.<sup>26</sup> He could divide the various kingdoms, destool their rulers and appoint their subordinates over them. He had the authority to imprison or fine anyone for disregard of his authority and no court could question the authority of "any order, proclamation or of any other act or matter whatsoever, committed, ordered, permitted, or done either personally or in council."<sup>27</sup> This provision of the Natal constitution ultimately found its way into the Union Act of 1909<sup>28</sup> and was basically the powers of the state president under apartheid towards the Africans. This was the beginning of the sowing of the seed that with time produced the conflicts and crippled the country.

### III) ORANGE FREE STATE AND THE TRANSVAAL

The Orange Free State and the Transvaal could be dealt with collectively because their evolution is not very dissimilar. With the first part of their histories being separate, but subsequently when they came under British control, their constitutional development was very much akin to each other.

The Orange Free state adopted the grondwet (which in Dutch means Basic law) and had their inspiration from two main sources; the American constitution and as far as possible their burgher law.<sup>29</sup> The constitution so adopted had a well separated and equally defined executive, legislature and judicial branches. The constitution like the American model was fundamental and could be amended only by a three-fourths

---

<sup>25</sup> Cockram G., *Constitutional law in the Republic of South Africa*, (Cape Town: Juta & co. 1975) p.18ff

<sup>26</sup> Native Administrative law of 1875, amended in 1887.

<sup>27</sup> Ibid.

<sup>28</sup> Section 147, Section 1 of the native Administration Act (1927)

majority in two successive annual sittings of the *Volksraad*. The president was the head of the executive. A commandant appointed by him was in-charge of African affairs, the commandant had elaborate powers but not as despotic as that of the Natal lieutenant governor.

Interestingly the first abuse of this vast powers is seen in the Orange Free State and not in Natal. No white person could settle in areas defined as the “native territory.” Trade with the Africans was forbidden, liquor consumption prohibited, and Africans were excluded from the affairs of the state, for which they were taxed.<sup>30</sup> They were also disenfranchised. Thus it from the Orange State that the first racist laws were implemented. The next feature from the Orange State was the supremacy of the constitution over the legislature, executive and the courts a situation that caused the judicial conflicts but did not survive into the Union Act.

#### IV) THE TRANSVAAL REPUBLIC

Like the others Transvaal had its own *grondwet* in 1858. What they considered invaluable from the Cape they retained and what was irrelevant they ignored. The separation of powers was guaranteed. The president had to come from the protestant church and be above thirty. He performed his duties alongside the council. The judicial power was vested in the courts. Here the chief justice kotze had in the two-land mark cases of 1895 and 1897<sup>31</sup> asserted the supremacy of the constitution and power of the courts to test the validity of any legislation against the constitution. A situation that would only be regained in the 1993 constitution.

Meanwhile the *Volksraad* started off as a single chamber, but by 1890 was amended to create a bicameral legislature. This was largely due to the crises provoked by the denial of franchise to the *Uitlanders*.<sup>32</sup> With the growing number of immigrants to the mines and gold fields in Johannesburg the attempts to deny them political rights

---

<sup>29</sup> Kennedy, *Law And Custom of the South African Constitution*, p.28

<sup>30</sup> These segregationist laws are contained in some documents from the commandant.

<sup>31</sup> *Hess case and Brown v Leyds N.O.*, (1897) 4 Off. Rep.17

<sup>32</sup> Kennedy, *Law And Custom of the South African Constitution*, p.36

propelled them to the Boer war just like the denial of these rights to the Africans would later overthrow the system. The contribution from the Transvaal is vividly summarised in this piece of legislation “the people desire to permit no equality between the coloured races and the white inhabitants.”

In conclusion therefore it could be said that just as the colonial constitutions in Africa provided the framework for subsequent independent governments in Africa, so too the constitutions of the four colonies were pooled for the creation of the Union. Each colony had its own contribution, but prior to the establishment of the Union all the colonies had come under the aegis of “her majesty’s government.” Thus they had similar institutions and constitutions. It could therefore be said that the creation of the Union was a landmark political gain, but less so in terms of our constitutional focus of the separation of powers.

### **C) THE UNION ACT OF SOUTH AFRICA, 1909**

It may be necessary to discuss here the major issues that became bones of contention to the convention drafting the constitution. This is imperative because the constitution of 1961 does not answer these questions, but simply incorporates them. Yet these are the provisions that were potentially very disastrous to the state. In fact all the laws of exclusion had their roots in this epoch. The constitutional debates centred on the form of the constitution, the enfranchisement of the African peoples and the provincial powers. Under examination it is evident that the separation of powers underlined these debates.

On the form of the constitution the delegates had the views of Natal for a federal constitution<sup>33</sup> (a view still prominent today, by the Inkatha Freedom party) and Transvaal’s fear of using her reserves for the other colonies that were not well off. But the federal option was never given a chance. Instead the cry for a less central system of governance was championed. This method of reducing the powers of the central government vis-à-vis the provinces is a fertile area of research outside the scope of

---

<sup>33</sup> John Benyon (ed.), *Constitutional change in South Africa*, (Pietermaritzburg: UNP, 1978), p.7

this work. A central government with local councils was found to be inadequate and left too much power at the centre. The delegates therefore borrowed from the experience of Switzerland<sup>34</sup> on a system of proportional representation. By borrowing from other constitutions we are brought in contact with the origins of the South African constitutional hybrid system. However, despite all the central government was left with too many powers.

To examine the franchise question we may begin with the definition of certain key terms in the South African lexicon, like African, natives, coloured persons and Malay<sup>35</sup>. The word natives refer to the indigenous races of Africa, what at that time they called Bushmen, Hottentot and Kaffirs. Today the Bushmen and Hottentots are referred to by their name Khoisan. While kaffir initially an Arabic word for non-Muslims has been substituted for the various Bantu peoples; Zulu, Xhosa, Ndebele, Swana and others.<sup>36</sup> The word coloured referred to peoples, who are neither European nor African, but excludes the Asiatic and includes some people known as the Cape Malay. This classification formed the foundation of the 1951 Act that survives till date in South Africa. And it was by this classification that people's lives were ruled.

Besides the Cape, the other colonies of Orange and Transvaal had no non-European with voting rights. On the contrary, white immigrants in the Transvaal mines were denied political rights and this provoked various conflicts that culminated in the Boer war of 1899. In Natal a few Africans had the voting rights. The property and wage qualification existed for all. The major question before the delegates was whether or not the voting rights should be extended to the non-Europeans. The simplistic approach adopted was revealed in the Transvaal and Orange States maxim that 'once anyone but the European were granted the franchise, no one could tell where the matter could end.' In drawing from the experience of the British government in Africa, the delegates contended themselves in that, the British government had always excluded the Africans from the colonial legislatures. Although finally Africans were admitted based on the principle of equality. Thus the Union Act went through the

---

<sup>34</sup> Ibid., p. 15

<sup>35</sup> As defined in these Acts, Native Taxation and Development Act, No. 41 of 1925, Liquor Act No.30 of 1928.

<sup>36</sup> Wesseling, *Divide and Rule*, (Oxford: OUP,1995), p.188

British parliament without any change in this issue. The Union was of more importance than the voting rights of the Africans.

The Europeans considered the separation of powers a *conditio sine qua non* for nation building. But this was necessary only as long as it applied to them. The importance is demonstrated in the symbolic separation of the spheres of power in the different provinces. With the Cape having the seat of parliament, Bloemfontein the Supreme Court and Pretoria the Executive.

### THE SEPARATION OF POWERS PROVISION IN THE UNION ACT

Legislative power in the Union was vested in the king, the senate and the Assembly.<sup>37</sup> Parliament had the authority to change electoral qualification of voters, but may not change the Cape franchise<sup>38</sup> until two-thirds of the total members agree thereto. The widest authority of the parliament is seen in section 59 where parliament had powers to make laws for the peace, order and good governance of the union. Section 152 asserts the supremacy of the parliament "...parliament may by law repeal or alter any of the provisions of this Act." Thus parliament could amend the constitution and it repeatedly did so with as little constitutional difficulty, as it altered any other law. The danger in this unchecked power is demonstrated later. The only exceptions were the entrenched provisions<sup>39</sup>, where no amendment could be made except with the assent of two-thirds majority (per section 35).

The parliament was so supreme that even the judiciary could not check it. Judicial power was not co-ordinate with parliament and thus any difficulty that parliament faced was constitutionally set aside. Thus the Union parliament was the first of all Dominions parliaments to have parliamentary sovereignty. Why the British gave only the South African parliament this privilege lies outside our scope, but all we know is that an unfettered parliament was created by an Act of the British parliament that ran amok. The judiciary had its Supreme Court with an appellate division and a chief justice and four judges of appeal. According to section 101 the judges could not be

---

<sup>37</sup> Section 19

<sup>38</sup> Section 35

<sup>39</sup> Section 35 and 137, which dealt with language parity and the Cape Franchise. However, the *Harris Case* also touched on the issue of entrenched provisions. See *infra*.

removed from office, although this provision did not override the Section 152 which gave parliament the right to change all laws.

The executive power was vested in the Governor General<sup>40</sup> who besides exercising presidential prerogatives enforced the will of parliament. The departments of the state were simply to carry out the tasks as defined by the parliament.<sup>41</sup> Even the ministers were put under this hierarchy, with the provincial executives exercising similar powers as before. The executive was also in charge of the African affairs with the powers all vested in the person of the Governor-general. The wide range of powers was further complicated because it was not affected by legislative competence of parliament. The governor-general exercised the same powers that existed in the Natal constitution. Such powers including the royal prerogatives, recommending amendments, convening and dissolving parliament, dismissing ministers, assenting or reserving bills should not blind the researcher as to the difference between prestige and power a situation better demonstrated in the Cameroonian experience. Real power in the Union was with the parliament and not the executive.—

Thus in the following analyses we will examine the way the Union parliament went about its task unguided and unchecked. Even as a subordinate legislature until 1931 when the Westminster statute was passed it went about its task with little limitation. After that statute however, the Union parliament did as it wished, it promulgated a wide range of laws that broke the fabric on which it was supposed to build and thus created tension as the oppressed created associations to resist these laws; inevitably provoking clashes and conflicts.

## **LAWS OF EXCLUSION**

The attempt by the South African constitution to play a dual role of building a nation with one segment of the population while sowing seeds of discord with the other could not be effectively combined. This was primarily because of a distorted separation of powers, with the principle of parliamentary supremacy often employed to give legitimacy. But it only unveiled an improper transplant done by borrowing on

---

<sup>40</sup> Section 9

a philosophy which was selectively applied. Dicey's argument <sup>42</sup> on parliamentary sovereignty was based on the premise of majoritarian democracy which accepts that the people voted the legislature and its will was paramount. In South Africa however, this doctrine was adopted despite the absence of a democratically or majority elected legislature. This anomaly forms the bedrock of the subsequent conflicts.

The Africans who lacked any form of representation therefore were legislated upon. They were not consulted for any real issues and because they lacked representation parliament was not responsible to them.<sup>43</sup> Thus these exclusion laws were made possible by the absence of a separation of powers that represented everyone. This tension was further aggravated by the wide powers bestowed on the Governor-general who was not 'subject to the supreme court or any other court of law' for whatever actions.<sup>44</sup> Thus besides the fact that he was imposed on the people the Governor-general was above the law and had a parliament to his side.

The first port of call is the Native land Act of 1913, whose primary responsibility was to maintain the status quo. Where the Africans who formed over eighty per cent of the population owned only eight per cent of the land. The transfer and ownership of land was regulated by the 'supreme chief.' No African could acquire land from anyone but a fellow African and the lands so traded had to fall within the areas described in the schedule. The formation of the African National Congress (ANC) was a direct response to the prevailing situation. An amendment in parliament in 1927 provided an inadequate relief in terms of easing the restrictions on land acquisition.<sup>45</sup>

The taxation policy of the Africans was regulated by Development Act of 1925, which was very burdensome and incongruous.<sup>46</sup> The Africans were taxed for their huts, personal tax, and location tax and because of disparity of income levels a separate tax policy was developed for them. The taxation of minimal income and even from those who did not work who were over the age of eighteen marked the beginning

---

<sup>41</sup> Section 16

<sup>42</sup> Geoffrey M. *Constitutional Theory*, (Oxford: Clarendon Press, 1971), p3

<sup>43</sup> This argument (as explained in chapter two) was raised by the defence in the Rivonia Trial.

<sup>44</sup> Section 40, Native Administration Act 1927.

<sup>45</sup> Kader Asmal, *Reconciliation through truth*, (Cape Town: David Phillip, 1996), p.7

<sup>46</sup> Weihahn Commission Report, p.348

of labour conflicts. Africans were now forced into low paid employment where whites had declined for an increase in pay. This led to the mine strikes in 1914 and 1923 in a situation where Africans could not be members of the trade Unions.<sup>47</sup> It was in this same Act that the classification of races was done. It provided the foundation for racial segregation as a person's life work, play, income and even death was regulated by it. For example where the law stated that Asiatic could not own immovable property.

Freedom of movement was limited in the Urban Areas Act, 1923. This Act was intended to check the presence of Africans in certain places. It required them to possess the passbook, which carried a person's name, tribe, and place of birth. Failure to show a passbook in certain cases constituted a criminal offence. Employers had to see the passbook to grant employment. But in some cases they wanted cheap labour they circumvented this requirement.<sup>48</sup> The passbook was such a burden that Gandhi organised a peaceful demonstration and by 1957 when it was extended to women it led to the women uprising.<sup>49</sup>

The Native Contract Act (1932) provided a detailed arrangement for a master-servant contract of employment. The contracts were not to be longer than three years and could not be terminated until three months prior to its end. When called upon to leave his land the African was required to move all buildings and materials unless he had obtained the materials free of charge from his employer or owner of the land. The greatest injury caused by this Act was that it fostered an established slavery and servitude, similar to what obtained in the United States after the manumission of the slaves.

With respect to the African Indigenous law the repugnance proviso prevailing in British Dominions was applicable. Which stated that any principle of the indigenous law contrary to the (Western) ideals of civilisation was invalid. Thus African marriages were not recognised by the laws, as lobola was considered repugnant to the

---

<sup>47</sup> Ibid.

<sup>48</sup> Patrick Harries, Unpublished interviews with Chief Makuleke

<sup>49</sup> Kader, *Reconciliation through Truth*, p. 160

western values.<sup>50</sup> The application of the African law was limited to Africans only and would cease if a European was party to the dispute and the courts did not automatically take judicial notice of custom, it had to be proven.<sup>51</sup> Thus although African law had been recognised by the British earlier and codified in Natal the disregard for it and the pressures to conform led to the conflicts today that the official version of the African law do not represent what the position of the law at that time was.<sup>52</sup>

Thus the cornerstones of apartheid were passed during this period. The Population Registration Act 1950 was a metamorphosed version of the Native taxation and Development Act. It accorded the racial classifications The Black Urban Areas Act metamorphosed into the Pass laws. The Group Areas Act was actually an offshoot from here and actually metamorphosed three times, originally Act 41 of 1950, then Act 77 of 1957 and Act 36 of 1966. The intention was to classify Urban Areas according to race.<sup>53</sup> The parliament under apartheid also went ahead to prohibit marriage and sexual intercourse, between white people and other races.<sup>54</sup> The Reservation of Separate Amenities Act 10 of 1960 whereby public facilities like hospitals, trains, beaches were segregated along racial lines.

With increasing political opposition to these racist laws, the government responded by introducing legislation that infringed on human rights in order to stifle opposition. The first of these was the suppression of communism Act (1950) which outlawed the communist party and prohibited the advocacy of communism. The lacuna in this Act was that the definition of communism was extremely broad and its repressive provisions were used against people who were clearly not communists. Over the years it was repeatedly amended and its provisions made more brutal until it was finally baptised Internal Security Act in 1976.<sup>55</sup> This law itself was an evolved version of the Riotous Assemblies Act of 1914, intended primarily to deal with industrial disturbances.

---

<sup>50</sup> *Rex V Nalana*, (1907) TS 407, *Rex v Maboko* (1910) TS 445.

<sup>51</sup> *Msido v Moriarly* SC 539, *Ngcobo v Ngcobo*

<sup>52</sup> Bennett, *African Customary law*, p. 68

<sup>53</sup> SALJ, VII. Pp. 21-23

<sup>54</sup> Mixed Marriage Act 55 of 1949, Immorality Act 23 of 1957.

<sup>55</sup> SALJ, V.II5 p.26

Thus far we have demonstrated the manipulation of the constitution by a white minority through the application of the principle of parliamentary sovereignty. However, before the establishment of the Union the various colonies all employed a system for white benefit. In such cases it increasingly became difficult for them to build the fragile nations with their inhumane administration of the Africans. This ultimately led to conflicts that the separation of powers was supposed to avoid. A situation markedly different from the Indigenous African order. It is precisely because of the concentration of powers in the hands of the parliament, that Blackstone espoused “what parliament doth, no power on Earth can undo.”<sup>56</sup> But in next chapter we examine how the people could undo what parliament had done, by their resistance and conflicts.

---

<sup>56</sup> Kennedy, *Law And Custom of the South African Constitution*, p. 56

## CHAPTER II

### SEPARATION OF POWERS IN SOUTH AFRICA.

*The struggle in South Africa (was) not a struggle between two races for domination, but it (was) a struggle between the protagonists of racial domination and the advocates of racial equality... ”<sup>57</sup>*

### THE REPUBLIC OF SOUTH AFRICA CONSTITUTION ACT OF 1961<sup>58</sup>

The South African parliament enjoyed a high level of immunity under the guise of parliamentary sovereignty. This was in many ways very dissimilar to the concept as it operated in England<sup>59</sup>. The *raison d'être* of the new constitution<sup>60</sup> was to remove the last checks and balances in its way. As analysed below this invariably turned the Parliament in South Africa unlike that of England into a *force major*.

Mention will be made intermittently of the constitutions of the Bantustans as a manifestation of the concentration of powers. It could equally be argued that the type of constitutions that operated in the TBVC (Transkei, Bophuthatswana, Venda and Ciskei) mirrored states that could easily be constitutionally manipulated. With the lack of popular legitimacy and the relevant checks and balances it was clear that there would be power abuse.

### THE SEPARATION OF POWER PROVISIONS IN THE ACT<sup>61</sup>

The 1961 constitution does not differ significantly from the Act of 1909 in the areas deserving our attention. Parliamentary sovereignty was expressly provided for “Parliament shall be the sovereign legislative authority in and over the Republic.”<sup>62</sup>

---

<sup>57</sup> Report of the UN Expert Group on South Africa, April 1964.

<sup>58</sup> Act No 32 of 1961

<sup>59</sup> Supra

<sup>60</sup> Ibid.

<sup>61</sup> Ibid.

<sup>62</sup> Section 59(1). This section was quoted alongside many others by the state in the *Harris Case*, to justify the authority of parliament to legislate or amend any laws it deemed necessary. A view that was quashed in the judgement.

There was thus no issue that fell outside its legislative competence. The parliament could prolong its life span, pass legislation that was retrospective in operation, making what was illegal legal or vice versa as it did with the Terrorism Act of 1963. In *S v Fazzie and six others*<sup>63</sup> the court tried and sentenced the accused based on this retrospective legislation. Their offence was undergoing military training outside the country and usually the sentence was twenty years. Like most of such laws they were intended to destabilise the resistance.

The place of the judiciary under the constitution of 1961 was described in Section 59(2), which forbade the courts from challenging the validity of an Act of Parliament, but could adjudicate the validity of any Act that purported to amend or repeal the entrenched clauses.<sup>64</sup> The only remaining entrenched clauses in the new constitution protected 'equal freedom, rights and privileges' of Afrikaans and English as the two official languages of the Country. The background of this clause can be traced from the resistance by the courts to the usurpation of their powers.<sup>65</sup> Thus the resistance by the courts was not a resistance to the unjust laws but to the powers they had traditionally considered to be theirs.<sup>66</sup> The state president headed the executive. He was the commander in chief of the South African Defence Force had powers to declare a state of emergency.<sup>67</sup> This power was used to call up the army to assist the police in civil unrests.

The validity of the entrenched clauses in the South African Act was considered in a series of constitutional disputes relating to the binding effect of extraordinary parliamentary procedures and the competence of courts of law to invalidate enactments of a sovereign legislature. As far back in the case of *Hess v The State*<sup>68</sup> Kotze, CJ stated in *orbiter dictum* that the court was competent to test the validity of

---

<sup>63</sup> 1964 (4) SA 673 (AD)

<sup>64</sup> Section 108 and 118

<sup>65</sup> The dismissal of Kotze as chief justice in Transvaal when he stated that courts have the competence to test the validity of all parliamentary enactment. A view supported in the case of *R. v Ndobe* (1930) AD 484. In *Harries and others v Minister of interior and Others* (1952) SA 428A, this judgement was followed. Section 2 of SA Amendment Act 9 of 1956 acknowledged the competence of the courts in this respect. This clause was subsequently re-enacted as Section 59(2) of the present constitution. Meanwhile through constitutional manoeuvre the Senate Act of 1955 had disenfranchised all rights pertaining to race and colour and the act was validated in *Collins v Minister of Interior* (1957) 11AD 552

<sup>66</sup> *Supra*, SALJ vol. 116 p.325

<sup>67</sup> Section 7(2) and 25(1)

parliamentary legislation. This opinion was contradicted in *Ndlwana v Hofmeyer NO and Others*<sup>69</sup> when Stafford, ACJ said *inter alia* that parliament's will as expressed in an act of parliament cannot in South Africa as in England be questioned by a court of law. The *Ndlwana Opinion* was overruled in the *Harris and Others v Minister of Interior* where the court finally held that South African courts were competent to test the legality of parliamentary enactments. The DF Malan government stating the situation was unacceptable challenged this ruling.

This situation is similar to that of the case of the *Dissident Deputies*<sup>71</sup> in Cameroon where the Ahidjo government unconstitutionally withdrew a case referred to the Supreme Court because the court was poised to make a ruling against it. The point here is that where power concentrated in one organ it is a real danger. In the US Case of *Immigration and Naturalisation Service (INS) v Chadha*<sup>72</sup> the Supreme Court struck down the legislative veto as unconstitutional since it unlawfully placed in Congress the typical day-to-day law enforcement functions of the executive. The Congress in trying to limit presidential powers had appropriated unto itself not only executive powers but had also violated the principle of bicameralism by enacting positive law without concurrence of both houses of Congress. The significance of these infractions was compounded by the fact that they resulted in the violation of liberties.

These three landmark cases in Cameroon, South Africa and the US point to the fact that a review of the powers of the executive and the legislature by the courts is primordial in the respect of rights. Under circumstances where these are not possible a guarantee of such rights is almost impossible.

With this it becomes evident that the 1961 constitution of South Africa was drawn as desired by the parliament. The Judiciary and Executive(as shown below) were

---

<sup>68</sup> (1895) 2 Off Rep 122 at 116.

<sup>69</sup> (1937) AD 229 at 137.

<sup>70</sup> Supra

<sup>71</sup> Infra

<sup>72</sup> 462 US 919 (1983) Although Justice White wrote the dissenting opinion, Jessica Korn has adequately argued in *Power of Separation*, that the dissent was based on the Wilsonian critique of the separation of powers. These mistaken expectations could not stand the scrutiny of the courts and her findings.

brought into effective use in the implementation of the will of parliament.<sup>73</sup> And it is from here that conflicts were borne and reached a point where those in power had to negotiate with the resistance movements.<sup>74</sup>

## PROTESTS, RESISTANCE AND CONFLICTS

This section establishes the link between the type of laws that were passed by parliament and the resistance to them. It seeks to correlate the effect of excess powers in the violation of rights and thus exploring the impact on nation building as societies are driven apart and engage in violent confrontations with each other.

The resistance to parliamentary exuberance through the apartheid state took diverse forms, which can basically be divided, into non-violent and violent methods. The non-violent resistance was conducted through protests and demonstrations such as stay aways, sit-downs, boycotts, petitions, strikes and court litigations. Like the African-Americans under Martin Luther king Jr., the first means of rebellion against the laws from parliament was through exhausting the non-violent methods. It was only when this channel was blocked and when it became increasingly clear that non-violence would not yield any results in South Africa that the people resorted to armed resistance. Mahatma Gandhi the godfather of non-violence had himself tried the philosophy in South Africa, to no avail.<sup>75</sup>

The peaceful means championed by the ANC in the resistance was lastly executed in the year our focus begins. The 1950s are referred to as the decade of defiance as South Africa witnessed an unprecedented resistance to the pantheon of repressive laws.<sup>76</sup> During the defiance campaign of 1952-1953, the ANC protested against apartheid laws and over eight thousand people were arrested. By 1956 the leaders were on trial for treason. In 1958 towards the run up to the parliamentary election a general strike was organised- the army was put on alert an indication that if the police failed, the

---

<sup>73</sup> Supra, see *R v Ndobe and Collins v Minister of Interior*

<sup>74</sup> John Benyon(ed.), *Constitutional Change in South Africa*, (Pietmaritzburg:UNP,1978), p.91

<sup>75</sup> Kader, *Reconciliation*, p. 10

<sup>76</sup> Gavin Cawthra, *The Apartheid War Machine: Brutal Force*, (London: Shadowdean Ltd, 1986), p.13

military through the South African Defence Force was to step in to suppress the rebellion. This marked the increasing use of the military in the crises that later befell the state. The Pan African Congress (PAC) and the South African Congress of Trade Unions (SACTU) alongside the ANC increased the momentum of their protests as the minority prepared to declare South Africa a white Republic, take her out of the Commonwealth and entrench racism.

In the Courts the Treason Trial commenced with a year - long preliminary hearing at the end of which ninety-one persons were indicted for treason and related charges. The charges were directed at the policies of the resistance movements. At the end of the first hearing the magistrate concluded that there was sufficient evidence to confirm “a dangerous conspiracy aimed at the overthrow of the state and such amounted to high treason.”<sup>77</sup> On appeal however, Rumpff, J. interrupted the final argument of the defence to acquit the accused by finding that the state had not succeeded in proving the necessary facts.<sup>78</sup> Although this trial marked a victory for the resistance it also hardened the government as it was bent on never allowing such to happen again.

The government’s next response was swift and brutal as the police massacred the protesters at Sharpeville in 1960. A state of emergency was proclaimed and thousands of people were arrested, detained and any attempt to organise a demonstration was also quelled. The government also invoked the Unlawful organisation Act to ban the ANC and PAC, which according to parliament the state President was authorised to declare as unlawful any act, organisation or assembly he considered a threat to public security.<sup>79</sup>

The banning of the channels of expressing their grievance meant that an alternative had to be sought elsewhere. The liberation movements therefore went underground. Having exhausted all the peaceful means of protests, the ANC in 1961 formed the Umkhonto we Sizwe (MK) its armed wing and PAC formed PoQo (PQ).

---

<sup>77</sup> Treason Case in Albertyn Hester’s “A Critical Analysis of Political Trials in South Africa 1948 – 1988,” Unpublished PhD. Thesis, Cambridge University, 1990), p.120

<sup>78</sup> Ibid.

<sup>79</sup> Asmal, *Reconciliation*, p.84

It can clearly be discerned from this that the oppressor defines the nature of a resistance because the government had inspired attempts to provoke violence. The Apartheid State had seriously miscalculated the African resilience in non-violence and interpreted adherence to non-violence as a weakness and a green light for government violence. Thus like the manifesto affirmed "...we have no choice but to hit back by all means within our power in defence of our people, our future and our freedom."<sup>80</sup>

For the next few years over two hundred sabotage operations were carried out directed at political, strategic and economic targets. Consistent with its Human Rights charter of 1955 the MK took pains to minimise loss of life. The regime responded to the armed struggle by increasing the legislation giving the police wider powers, intensifying repression and expanding the scope of security laws. The results were immediate as within a few years the leadership of MK – Nelson Mandela, Walter Sisulu, Govan Mbeki, Ahmed Kathrada and Dennis Golberg were given life sentence. The others withdrew into exile to prepare for a guerrilla warfare- the next dimension of the armed resistance. The Rivonia Trial at one level concerned legal arguments and proof, but at the core of the trial was fundamental battle of ideas. The accused, but for some few exceptions were found guilty of violating the anti-communism act. The impact of this case is best described thus:

This case represented a momentous defeat for the national liberation struggle. With one blow, the state completed its grip on the political arena, by capturing key leaders of the ANC and MK.<sup>81</sup>

## **LABOUR LEGISLATIONS IN THE SOUTH AFRICAN STATE**

Through labour relations we examine the effect of various laws in inequitably dividing the resources of the country. This offers a wider scope for conflict since it touched on the people's right to livelihood. The growing role of trade unions in

---

<sup>80</sup> Ibid., p.122

<sup>81</sup> Albertyn C. "Political Trials in South Africa." P. 241

fighting not only for fair labour practices, but also for political rights is also examined here.

With pressures from the limited land apportioned them<sup>82</sup> and the forced removals, the means of livelihood for a people formerly depended on land was inadequate. The labour policies were thus to force the Africans to go and sell as cheap labour to the white capitalists. From 1953 to 1979 Africans were prevented from joining trade unions. However, 1976 registered 172 trade unions, 83 with white membership only 48 coloured and Asian and 41 with mixed membership.<sup>83</sup> Black Trade Union although not prohibited could not be registered under the Act<sup>84</sup>, as the definition of "employee" excluded Africans. Also domestic servants, employees of educational institutions, farm workers, state employees receiving public funds did not fall under the aegis of the Act. This was an attempt to create division amongst the African population by offering preferential treatment to those in one profession over the others.

In the various protests up to 1964 no fewer than forty-five Union leaders were banned. The ordinary tactics of labour were criminalised and brought under the ambit of the Sabotage Act<sup>85</sup>. And sabotage included any act, which was committed with intent to cripple or seriously prejudice industry or undertaking to bring about any social or economic change in the Republic. Despite all these the unions were never effectively suppressed, the situation was so tensed and precarious that an Industrial Council was created with a primary duty to preserve industrial peace by preventing dispute and negotiating labour disagreements.<sup>86</sup>

The only provision of the Industrial Conciliation act that was directed against Black employees centred on the establishment of work committees at workshop level. This provision was not included in the original Act of 1956, but was in the Bantu Labour regulation amendment of 1973. The effect was to create a channel of releasing black grievances to management. Although agreements reached here could not be legally

---

<sup>82</sup> Land Act 1913/1936

<sup>83</sup> SA Official yearbook,(Pretoria: Department of Information, 1976) p.98

<sup>84</sup> Bantu labour Regulation Act

<sup>85</sup> Internal Security Regulation.

binding, as the Black Unions were not officially recognised in the act. The inadequacies of the machinery are reflected in the increasing number of strikes, most of which were unlawful.<sup>87</sup> In 1975, for example there were one hundred and eleven strikes involving black labour.<sup>88</sup>

Besides the resistance to organisational difficulty there is evidence of resistance towards labour policy in the Bantustan concept. Statutory reservation of skilled labour for whites and coloured was extended to the building industry.<sup>89</sup> In fact that Act stated that any employer who employed a Black contrary to the provisions of the Act would be criminally liable.<sup>90</sup> Equally the presence of about two million blacks from the neighbouring countries was always a potent source of conflict. These workers were not afforded any protection by the legislative framework. In fact in the Urban Areas Act it was specified that Black workers were not to stay in the Republic for up to seventy-two hours unless with certification. The pass laws were thus permeating all segments of life for the Africans and thus a gruesome burden heightening the conflict-ridden situation.

By 1979, therefore the government formed two commissions<sup>91</sup> to investigate and make possible recommendations that improve the labour relation within the state. The Wiehahn commission Report was tabled in parliament in May 1979 and recommended freedom of Association for all, full trade union rights for all the races amongst other issues. However, the commission fell short of pushing for more equitable representation of the Black workers. There was some opposition to the relatively mild Wiehahn commission Report from white workers who called for the banning of Black Unions.<sup>92</sup>

The next was the Riekert commission that called on the private sector to finance development in black areas, freedom of movement of labour, freedom of trade inter alia. In general the Wiehahn and Riekert commissions aimed at a better utilisation of

---

<sup>86</sup> Comparative Labour law Journal,( Vol. 3, 1979-80), p.293

<sup>87</sup> As per Bantu Labour relation Amendment act of 1973.

<sup>88</sup> Survey of Race Relations, (Cape Town: Juta, 1976), p.316

<sup>89</sup> Bantu Building workers Act.

<sup>90</sup> Section 1, 14, 15 and 19

<sup>91</sup> Wiehahn and Riekert Commissions

the country's black labour and the improvement of race relations to facilitate capital investments. Their findings confirmed the view that the manipulation of the constitution by an unfettered parliament gave rise not only to unhealthy nation building but undermined the economy as well. However, the Wiehahn Commission recommended and parliament enacted the labour Relations Act of 1981, stimulating the rapid growth of black trade unions, many of which joined to form Cosatu in 1985.

Although up to 1968 Africans could join multi-racial political parties, despite their lack of franchise, it had the advantage that it enabled them to participate in politics albeit indirectly. This situation was further complicated by the Prohibition of Political Interference Act<sup>93</sup>, which forbade racially mixed political parties. With virtually all-legitimate access of voicing their discontent blocked, it was precisely for this reason that the government feared the use of labour Unions for political ends. Thus the right to political participation was reserved, but allowing government a lot of discretion in regulating Unions and their rights.

The whole situation exploded in 1979 when the Mine Workers called a successful six-day wild cat strike which was regarded as the climax of the Unions protest against injustices in the labour legislation.<sup>94</sup> In the *Case of Metal and Allied Workers Union v BTR Sarmcol*<sup>95</sup>, the court found that the strike was due to the inability of big business concerns to recognise workers rights and unions. This strike was reminiscent of the 1922 Miners' strike that laid the groundwork for subsequent government legislation that kept the ethnic groups divided in the field of labour relations, thus hampering any unified resistance and any attempts at unity as well.

---

<sup>92</sup> Supra, *Comparative Labour law Journal*, p.289

<sup>93</sup> Act 51 of 1969

<sup>94</sup> See the Wiehahn Report for details of the legal consequences.

<sup>95</sup> Abel Richard, *Politics by other Means: Law in the Struggle Against Apartheid 1980-1994*, (Routledge: London, 1995), p. 146

## THE BANTUSTAN POLICIES AND BLACK RESISTANCE

An investigation of apartheid reveals that its policies were perfected over time.<sup>96</sup> The Bantustan policies cover the spectrum of activities by the government to create a 100% white state in South Africa with separate black “countries” on the periphery. It was considered possible and desirable to effect a radical separation of not only the blacks from the rest of the South African population, but also of the Black ethnic groups from each other.<sup>97</sup> It was envisioned that by creating separate homelands the resistance to apartheid would be brought under control both at home and abroad.

Parliament provided the necessary framework for government policies to realise the dream. The promotion of Bantu Self Government Act transformed the “reserves”<sup>98</sup> into ‘bantustans’ or homelands to which all blacks would be assigned on the basis of their ethnic origin. The architects of this unrealistic dream intended that eventually each homeland would eventually become a nominally independent mini-state within South Africa and that blacks would be entitled to full political rights within their respective homelands<sup>99</sup>. This was a myopic response to an unquenchable demand by blacks for full political and economic rights within South Africa. Instead of making any significant concessions the white minority attempted to entrench its dominant status by fragmenting the majority black population into smaller ethnic groups.

Due to the fact that political activists were restricted in movement, action and speech the bantustan policies were also intended to keep them at bay. As a result several people were charged with contravening their restriction orders. In *S v Beard*<sup>100</sup> it was held that a prohibition against attending gatherings was broken even where one isolated oneself from a party and only saw other guests occasionally. In similar circumstances like attending a diner party (*S v Naicker*)<sup>101</sup>, a tea party (*S v Cheadle*)<sup>102</sup> all amounted to a crime.

---

<sup>96</sup> Cawthra (et al), *The Surplus People and forced removals in South Africa*, (Braamfontein: Ravan Press, 1985) p. 109

<sup>97</sup> M.P. Vorster (et al), *Constitution of Transkei, Bophuthatswana, Venda and Ciskei*, (Durban: Butterworths, 1985) p.6

<sup>98</sup> Created by the Land Act of 1911

<sup>99</sup> Human Rights Report, *Crisis in the Crossroads*, (New York: Lawyers Committee, 1988), p.3

<sup>100</sup> 1965 (4) SA 543 (ECD)

<sup>101</sup> 1967 (4) SA 165 (CPD)

<sup>102</sup> 1975 (1) SA 703 (A)

To avoid certain ideological biases implicit in the appellation of 'homeland' or 'national state', references in the subsequent portions of this work will be a direct mention of the name of the territory involved (from Transkei, KwaZulu, Quaqua, Bophuthatswana, KwaNdebele etc). The social engineering that the government embarked upon to realise its Bantustan policies started with forced removals. By social engineering reference is made to the social and economic restructuring according to particularly defined objectives. More brusquely, but equally accurately, it means "pushing numbers of people around, forcing them to places defined by the white government."<sup>103</sup> The table below offers a picture of the total number of people forcefully removed from one area to another. A phrase preferable to 'resettlement' as used in the official versions which suggest some accrual of benefit to the people who are removed and disguises the coerced nature of the actions.

Table A: Estimated Numbers of Forced Removals, 1960-1983<sup>104</sup>

Farm Evictions	1 129 000
Black spots and consolidation	614 000
Urban	730 000
Informal settlement	112 000
Group Areas	860 400
<u>Infrastructure/strategic</u>	<u>103 500</u>
<u>TOTAL</u>	<u>3 548 900</u>

Table B; below combines the above data with the provinces from which the people were evacuated. This is necessary for the economic analyses that follow. The government executed this policy in an unprecedented way that by the 1980s, the population of the various territories reserved for blacks reached 52.7%, while the number living in Urban Areas dropped from 29.6 to 26.7%. Besides demonstrating the total number of forced removals the table above also highlights the network of legislation and regulation that was used to keep blacks out of 'white South Africa'. The words, 'farm', 'black spots', 'consolidation', 'urban', 'group areas' all formed

<sup>103</sup> Christian Murray, Cathy R.,(eds.), *No place to Rest: Forced Removals and the Law in South Africa*,(Cape Town: OUP, 1990), p.8

<sup>104</sup> Source, Platzy & Walker, *The Surplus People*, p.10

names of legislation that parliament produced to make legitimate what is normally obtained in war.

The population on white farms also fell drastically as agriculture became mechanised and many unskilled labourers were made redundant. Within the period in question foreign investments in South Africa increased and white South Africans overtook Californians as the single most affluent group in the world.<sup>105</sup> This left a scar on the mind of the resistance, because it became increasingly clear that the white government would rather have whites from elsewhere share the benefits from the land than for the blacks. Below is table B.

TABLE B: Provinces and their number of forced removals 1960-1983<sup>106</sup>

<u>Provinces</u>	<u>Removed</u>	<u>Under threat of removal</u>
Eastern Cape	401 000	457 000
Western Cape	32 000	425 000
Northern Cape	150 000	25 000
Group Areas	409 000	23 500
Orange Free State	514 000	150
Natal	745 000	619 000
<u>Transvaal</u>	<u>1 297 400</u>	<u>542 000</u>
<u>Total</u>	<u>3 548 900</u>	<u>1 934 650</u>

The removals were by themselves a thorn in the flesh of nation building in South Africa. But this was aggravated by the method of removals. While parliament wielded such amount of powers over resources and information, with a balance of power in their favour, it was clear that methods used would be wanting. Intimidation was widely used especially in Transvaal that was the richest and most affluent.<sup>107</sup> Those under threat of removals were subjected to much less injury like those that were actually removed. Thus Transvaal recorded the highest number of forced removals 1,297 4000, from 1960 to 1983. Buttressing the arguments that the resources of the country were limited to a chosen few.

<sup>105</sup> Christian & Cathy, *No Place to Rest*, p.9

<sup>106</sup> Platzy & Cheryl, *The Surplus People*, p. 11

In Natal intimidation was used but police, army and the courts were effective collaborators in the implementation of the policies. Intimidation was thus complemented by more effective methods of 'squeezing African population desperate for the security of a home of their own into the 'Bantustans.' Together with the influx control legislation limiting the number of people allowed to live and work in urban areas. The resisters to protest the policies used the courts, but the parliament reacted by legislating on areas in the law with lacunae. In 1977 when the demolition of the squatters at Modder Dam outside Cape Town was successfully challenged in the courts. The parliament moved in quickly to amend the Illegal Squatting Act by creating provisions that permitted the demolition without giving prior notice to the occupants. The resisters then proceeded to deal with the Act only in technical issues such as failure to qualify the relevant laws. In Driefontein by 1981 this method of resistance worked although its reward was too minute to make a difference or eliminate the fear of the threat of removal.<sup>108</sup>

Law was thus not a neutral arbiter between two equal parties, but a tool fashioned and controlled by the white minority. The major parameters have been exposed that parliament used in breaking the nation of South Africa. Parliament revealed its extremity by legislating the pushing of over 14 million people to about 8% of the most unproductive land. The whole set up was sanctioned by the excess power in the hands of the parliament.

---

<sup>107</sup> Ibid., p160

<sup>108</sup> Christian & Cathy, *No Place To Rest*, p. 37

**PARLIAMENTARY MANIPULATION OF THE BANTUSTANS:  
PERSPECTIVES ON THE CONSTITUTIONS OF TRANSKEI,  
BOPHUTHATSWANA, VENDA AND CISKEI.**

Transkei, Bophuthatswana, Venda and Ciskei were the four territorial patches granted nominal independence by South Africa parliament. They were rejected and accorded no corresponding status under international law.<sup>109</sup> Our concern here is to investigate these so-called 'states' as a product of the separate development policies, the functioning of the constitution as a demonstration of a manipulation by the white minority to further their objective and thus engineer disunity and conflicts.

The granting of 'independence' to Transkei marked a rapid progression of the separate development policies, which started burgeoning with the issue of 'homelands'.<sup>110</sup> The Transkei Act gave the Africans in the territory some legislative capacity similar to that given to the Union parliament by the British House of lords. The powers included amendment of South African legislation obtaining in the Transkei. The cabinet had executive powers, separate citizenship was provided to them and a high court was subsequently created.

The question that now arises is why did the Transkei authorities not overrule the South African provision and proceed to make their own laws? Firstly the territory known as Transkei was so small and very poor that it was economically dependent on South Africa. Secondly any laws enacted in the Transkei legislature was applicable only within the bounds of the territory and could thus not be applicable in the white areas. Thirdly any such attempts would have been playing well into the hands of the policies drawn by the whites. More so the leaders of these territories were very unpopular and had to be imposed on the people by the might of the South African Defence Force (SADF). Last and very significant was the fact that the South African parliament retained the right to legislate in these territories and to strike down any of their legislation since they fell within the ambit of Section 59(1).

---

<sup>109</sup> M.P. Vorster, *The Constitutions of TBVC*, p.1

<sup>110</sup> Transkei Constitution Act 48 of 1963

Transkei was used as a guinea pig on which the South African parliament developed its strategy, improved and perfected it for application on the other states. By 1971 citizenship of every African rested with one of the 'independent territories'.<sup>111</sup> This augured towards the goal of an 'all white state'. The government did so to propagate chaos and disunity and thus make it difficult for the resistance movements to operate.

This was a miscalculation and an underestimation of the legitimacy and intelligence of the resistance. The resistance spanned across the world from the Organisation of African Unity (OAU) to the Non-aligned Movement and the United Nations (UNO). These states were not regarded as objects in International law despite claims by the South African government to separate citizenship and statehood. Despite the arguments about the vagaries of the non-recognition theory in International law, the situation did not change<sup>112</sup>.

#### **THE SEPARATION OF POWER PROVISOS IN THE CONSTITUTIONS OF THE TBVC STATES**

It is important too note here that the constitutions of these states created an inept and inefficient framework that made it difficult for the governments to succeed. The apartheid governments went ahead to argue that if left on their own the blacks were corrupt then there was no justification why they should hand over power to them. The apartheid regime was thereby ignoring the role they played in masterminding the whole scheme.

A hybrid of laws actually existed drawn from the colonial British case in Africa to the European declaration of Human Rights in the supreme law of Bophuthatswana. In Bophuthatswana for example the Supreme Court had the 'testing rights' making the constitution guardian and creating a theoretical framework where the executive and judiciary were subjected to the constitutional control. In Ciskei despite profession of the regard of fundamental rights, the Assembly had power to impinge on them without any judicial interference. In Transkei the separation between the organs of

---

<sup>111</sup> Bantu Homelands Constitution Act 21 of 1971 later renamed National states Constitutions Act.

<sup>112</sup> Vorster, *The Constitution of TBVC*, p. 11

state existed. But the overwhelming presence of the South African government was always there.<sup>113</sup>

Diversification is visible in relation to the extent of the formal power of the head of state, ranging from the theoretically symbolic' head of state of Transkei to the extreme centralisation of power in the hands of the president of Venda. The role of the courts and the parliament all depended on the tribal diversity and the previous manipulative framework provided by the separate development policies. Indeed the constitutions taken collectively warrant certain basic observations.

The point has been registered of the recognition of diversities within some of these territories. This translated into the constitution envisioned under such limitation is a noble ideal of the desire that the same could be done for South Africa if the all the various resources could be pooled. This was a message the resisters understood.

The white minority created puppet states in a constitutional environment where the results that would be obtained would tally with the existing one party states in Africa. For instance with the clear fact that none of these states could sustain themselves the South African government through parliament provided funds to sustain a machinery that was not answerable to the people. The role of the SADF in these territories clearly confirms the arguments raised above. It is squarely because of the resistance to these institutions that the white government provided its forces to sustain the system that would apparently have failed.

The presence of the SADF in the TBVC states raises some pertinent issues. Since the resistance to theses states was on the rise with these areas becoming favourable seedbeds for the armed resistance and conflicts. The presence of the SADF was in line with the Area Defence structures against guerrilla activities or rural 'unrest', which were usually a trip hammer for the mobilisation of a powerful resistance. More so the SADF performed repressive functions for the Bantustan authorities and thus indirectly

---

<sup>113</sup> Ibid.,p18

for the central government in Pretoria, increasing their grip over the Bantustan regimes, but destroying any nation building attempts.

The organisation of the military units of the TBVC states was streamlined principally for counter-insurgency warfare along SADF lines.<sup>114</sup> With parliamentary assistance legislation defined the guidelines modelled after the reconnaissance commandos, that trained the built up forces of Transkei and Ciskei. These forces were then given full capacity to stifle political dissent. Obviously with the difficult financial situation in which they found themselves, they would never have been able to function at all, but for the lavish assistance they got from Pretoria. Priority was thus placed on the maintenance of the army than on the welfare of the people.

Like the rest of the country the TBVC states relied on the repressive legislation from parliament and the forces to enforce their rule.<sup>115</sup> Virtually all-repressive legislation passed by the South African parliament applied to them. In fact until a TBVC authority repealed central government legislation it remained applicable. And even where such laws were repealed laws embodying the same or sometimes-strengthened provisions simultaneously replaced it.<sup>116</sup>

The TBVC states were characterised by extreme repression and poverty and constituted sites of almost continuous conflicts. In Bophuthatswana for example the police and the army combined in mounting an extensive 'cordon', roadblock and other counter-insurgency operations. Involving both the urban and rural masses they raided their poverty stricken 'resettlement camps.' When a state relies heavily on the use of force at the expense of all else then something is wrong, in this case the separation of power.

Even when circumstances arose the TBVC state forces could not handle the resistance and challenges to apartheid, the SADF and the South African Police (SAP) were deployed. In Bophuthatswana and Venda these two combined to combat the guerrilla attacks. In Ciskei in the principal township of Mdantsane for example the forces were

---

<sup>114</sup> Gavin Cawthra, *Brute Force*, p.234

<sup>115</sup> Ibid.

employed to break a boycott against increased fares. A deployment of the police, military and the vigilante groups exceeded the 'reasonable force' required by law.<sup>117</sup> The forces opened fire, as they were wont to do and even took a whole stadium hostage to ascertain those leading the boycotts.<sup>118</sup> What the government failed to see in this strategy of increased reliance on the forces was that the more the people killed the more the number of young people who went 'into the bush' to join the MK.

Perhaps the greatest demonstration of the manipulation of the Bantustans is in a white paper signed between the SADF, SAP and the Transkei and Ciskei forces providing for the undermining of the official boundaries.

In order to further the mutual interests and to help ensure the national security of the independent states, military agreements are entered into with these states.... [Which] leads to the creation of a joint management body to Co-ordinate Corporation and aid in the field of training and standardisation with a view to joint action. The SADF recognises the supportive capabilities of the independent states...<sup>119</sup>

In fact from a pragmatic approach, it was precisely for their supportive role that these states were borne and then given military hardware. It provided Pretoria with a useful buffer to cater for the politically insensitive tasks of repression and to establish a secondary military structure for the front line operations. While at the same time the SADF and the SAP retained the power to intervene in these states to ensure operations were conducted to their satisfaction. This strategic cordon sanitaire is evident by the semi-circle they formed around industrial heartland of South Africa.<sup>120</sup>

This policy was itself plagued by problems. It gave rise to an uncomfortable relation between the white farmers at the periphery of the Republic and thus sharing borders with these states. Stock theft became the problem. Like in the liberation struggle led by Mao Zedong in China, tested in Zimbabwe stock theft was a standard practise by the guerrilla to replenish their scarce resources. The parliament reacted by legislation

---

<sup>116</sup> Ibid.

<sup>117</sup> Internal Security Act.

<sup>118</sup> Cawthra, *Brute Force*, p.235

<sup>119</sup> Ibid.

<sup>120</sup> Ibid.

empowering forces to flood these areas. A commission<sup>121</sup> created to recommend possible solutions to this problem suggested the allocation of more land to these states, not for their benefit but in order to reduce the total area of land to be patrolled by the SADF and the SAP. Meanwhile the MK responded with landmines.

Mention may be made here of the role-played by women in the resistance.<sup>122</sup> Although their role dates far back in the struggle, it is in the Bantustan years within the area under survey that a highly significant and vivacious women resistance is often discussed. During the Black consciousness protests, women groups such as the Black Women Federation saw active participation that at times provoked conflicts within the resistance.<sup>123</sup> However from Cape Town to Pretoria and from Grahamstown to Kimberley, the women demonstrated that they had become “to some extent an autonomous body, acting frequently on its own initiative in response to prevailing national and regional situation and pressures.”<sup>124</sup>

A current school of thought holds that there should be collective responsibility for the crimes against humanity committed under apartheid. Both on the side of the apartheid governments and the resistance movements for the violation of rights. This school even advocates that the Truth And Reconciliation Commission (TRC) is telling the story from the winning side.<sup>125</sup>

Be that as it may that is a blatant attempt to disregard the facts of history. It is conventional in western countries to vindicate the liberation movements, while the perpetrators of violations against human rights are held responsible (Chile, Portugal and Germany after 1945). More so collective responsibility is not readily applicable here especially when one takes into consideration the cause and effect theory. The resistance was created as an effect of the apartheid abuses. To ascertain where criminal responsibility lies is a matter for criminal lawyers and the ‘but for’ test. However, South Africa took the reconciliation through truth. (As shall be examined later).

---

<sup>121</sup> Van Der Walt Commission

<sup>122</sup> Cheryl Walker, *Women and Resistance in South Africa*, (London: Onyx Press; 1982) p.58

<sup>123</sup> *Ibid.*, p.169

<sup>124</sup> *Ibid.*

The ANC's armed struggle was definitely an instrumental factor in the constitutional review of 1984. MK had demonstrated an increasing ability to weather the storm and could hit targets through out the country. This dealt a serious blow to a country that benefited tremendously from co-operation with Nato (North Atlantic Treaty Organisation) and had the use of the most advanced weaponry in Africa south of the Sahara.

Just like military co-operation with the TBVC states did not alleviate the tension, so too the solution to the conflicts was not in armed response. The government's attempt at a new constitutional dispensation in 1984 was a lame step in the right direction as it fell short of equal rights for all. Rather it progressed on creating 'Bantustans' for the coloured and Indian peoples.<sup>126</sup> The armed struggle therefore played a relevant role in the overthrow of the system.

#### THE SEPARATION OF POWER IN THE REPUBLIC OF SOUTH AFRICA CONSTITUTION ACT OF 1984.

The constitution of 1984 despite all its flaws and shortcomings was an acknowledgement that force and power could not defend white South Africans from the 'total onslaught'. The government was 'vergligte' to accept this but was too conservative to draw up a constitution that met the requirements of all South Africans.<sup>127</sup> The process of glasnost in South Africa had thus begun. The unleashing of forces that neither the Nationalist party nor the white parliaments could control.

The separation of power in this constitution was not markedly different from the constitution of 1961. The difference was mainly symbolical. The President headed the executive.<sup>128</sup> Besides all the other paraphernalia in the 1961 constitution, the

---

<sup>125</sup> Kader, *Reconciliation through Truth*, p. 165 and News Hour, SABC I Sunday 12<sup>th</sup> September, 1999

<sup>126</sup> Supra. Wiechers uses the term "bantustans" in describing the parliamentary Houses that were created for the coloureds and Indians.

<sup>127</sup> Wiechers (et al) *Bridge or Barricade? The Constitution A first Appraisal*, (Johannesburg: Jonathan Paperbacks, 1984) p.127.

<sup>128</sup> Section 6 of the 1984 Act

President under this Act had an extension of his powers. Section 14 gave him powers to decide what was common and what was particular to the three chambers. He was elected by an Electoral College<sup>129</sup> that simply meant that the National Party had established a firm grip in power. The executive council was also given legislative authority. Where a house could not pass a bill and the president referred it to the council that decided it was worthy, the bill would then be passed as if the House had passed it.<sup>130</sup> The intention was here was to avoid a situation whereby refusal to adopt a bill by one house would not paralyse the apartheid institution as the council had authority to legislate.

Legislative authority in South Africa vested in three separate chambers (per Section 37). Which included the house of Assembly, the House of Representatives and the House of Delegates. Each of these Houses was entitled to its 'own' things that no other House could legislate on. This was a euphemism for the largely discredited philosophy of separate development now wrapped in new terms of 'own' and 'general' matters.<sup>131</sup> The mathematical representation of the Houses was 4:2:1 for the white/coloured and Indian respectively. This made it difficult for the white government to be removed from power by a coalition of any of the minorities, since they could not alter the composition of the house.

The judiciary experienced no significant changes. Section 36(2) and Section 20 expressly prohibited the courts from pronouncing upon the validity of a statute, while the other excluded the power of the court to perform judicial review. That is the power to test the validity of the president's decision on matters, which fall under the ambit of the 'own' and 'general' clauses. The judicial authority of the republic however, rested with the Supreme Court.<sup>132</sup> But this power was subject to the provisions of Section 18 and 34 and as was provided in the Supreme Court Act of 1959. Taken together this was a brilliant way to limit the Courts and thus prevent the resistance from serving further embarrassments on the regime. Although the

---

<sup>129</sup> Section 7(1)a

<sup>130</sup> Part iv

<sup>131</sup> Wiechers (et al), *Bridge or Barricade*, p. 56.

<sup>132</sup> Section 68 (2)

parliament could always make a different way, like it did with legislating retrospectively.

The greatest flaw in the constitution was that it made no significant provision for the blacks.<sup>133</sup> This increased the alienation of the white government in the eyes of the resistance. More so the constitution lost any shred to credibility it might have had and this prevented the external world from taking any stand against the offensives launched by the guerrillas. Even the moderate wing blacks of the government directed Inkatha were appalled by the fact that no provision was made for them. Instead the government had approached Chief Buthelezi and others to join the advisory council on Bantu affairs.<sup>134</sup> That the government ally in the black camp declined to accept such an offer was indicative of the fact that the government was alienating even further the blacks.

The next weakness was that the constitution did not touch any of the pillars of apartheid. In fact by the 'own' and 'general' clauses the Houses of the underprivileged communities could not change for example their educational system. The Group Areas Act that had sparked much heat was left untouched. Segregation remained entrenched and the Indians and coloured peoples were thus invited to serve as buffers between the blacks and the whites. Just as the Bantustans had been used in the defence against the guerrillas. The citizenship question was avoided. By avoiding the issue at stake the government was not solving the problem but was postponing it.<sup>135</sup>

This constitution alongside all its forbears simply added insult to injury in terms of building any South African nation. By bringing in the Indians and the Coloureds one should not make the mistake of misinterpreting this as a gesture of improving the lot of these people. Rather it was simply because the resistance had created a conflict whereby government had to react constitutionally. It did so but with half-heartedness and with the resultant spill out of Houses for both the Indians and Coloureds.

---

<sup>133</sup> The comments on the regional area councils were insignificant to the core issue of equal rights for all.

<sup>134</sup> Wiechers, *Bridge or Barricade*, p.122

<sup>135</sup> Marais D, *Constitutional Development of South Africa*, (Johannesburg: Macmillan, 1985) p. 65.

## MASS RESISTANCE

The armed struggle had underground and legal acolytes. By 1977, parliament had demonstrated its intention to delimit all forms of resistance particularly in the legal field<sup>136</sup>, semi-legal structures sprouted everywhere. This level of resistance was a face-off conflict with parliamentary manoeuvres. The community based organisation mobilised around specific aspects of the apartheid system affecting the lives of the majority of the population- high rents, transport costs, low wages and inferior education. Student organisations and non-racial trade unions multiplied. The United Democratic Front (UDF) was borne under this climate with a specific intention of resisting the new constitution.<sup>137</sup>

The process of interaction occasioned by mass political campaigns such as boycott of election to apartheid institutions like the Indian and coloured Houses of parliament provided the eventual unified umbrage of the UDF. The resistance and threat posed by the UDF was more organised, borne out of many years of suffering and repressive measures. With its incorporation of substantial proportion of trade unions, students, community and religious bodies at the national level, the state's response of a 'military defensible' system faced a major challenge. The unrest that started in 1984 and intensified after the election was in many ways similar to the 1976 uprising.

Faced with a possible collapse of the institutions created by the new constitution, and with an unprecedented anti apartheid mobilisation, the South African regime declared a state of emergency. The government was slow to read the writing on the wall that by violence the problem could not be resolved. The fear of a 'total onslaught' was real. But this time it was not from an external communist aggressor as presented in state

---

<sup>136</sup> Illegal Political Act (1977)

<sup>137</sup> Kader, *Reconciliation through Truth*, p.184

propaganda, but from the oppressed majority occasioned by the state itself. All this coincided with the changes in the international scene.<sup>138</sup>

## LEGAL APPARATUS OF REPRESSION: THE COURTS

The use of the courts as a weapon against political opposition has many historical precedents, from the ancient trial of Socrates to twentieth century trials of Nikolai Bukharin, Nelson Mandela amongst others. Political trials have played a central role in the political history of South Africa and have been significant as a tool to control opposition and dissent.

Within the background of rising resistance to apartheid, the Rabie Commission was created to review the security legislation. Its recommendations resulted in the streamlining and consolidation of existing repressive legislation as the Internal Security Act of 1983. What sustains our interest is the recommendation by the Commission on how to suppress opposition using the military and the courts. The commission recommended that

... Activities, which threaten the internal security of the Republic, should as far as circumstances permit, be combated as crimes. Such a line of action [is] ... preferable to a situation where subversive activities are combated by military measures.<sup>139</sup>

So far the state's policy towards the armed struggle has been to treat it

As crimes rather than acts warranting action by the defence force. In practice this means that acts ... committed by the ANC in ... [the] ... guerrilla war are combated as crimes that are tried by the courts of law.

The conclusion here was that as long as this was the line of action exceptional legal procedures were necessary. Detention without trial of suspects and interrogation of

---

<sup>138</sup> Ibid.

<sup>139</sup> Gavin, *Brute Force*, p.221

potential state weaknesses , refusal of bail, these powers were given to the judges.

Political trials constituted a key element in the repressive strategy of apartheid. From the 1960s, lots of people were arrested, jailed, charged and executed for a variety of offences. The Rabie Commission on the contrary presented the courts as champions of civil liberty. While to the Africans the courts were nothing more than other tools in the hands of the regime to achieve its separate development philosophy. The Courts were thus given a chance to play a key role in the defence of their place and in resisting apartheid. On the contrary, despite international legal opinion on the admissibility of certain evidence in court the courts more often played to the defence of apartheid than as opposition to it.

The ANC's human rights record,<sup>140</sup> its ratification of the General Protocol and the Convention on the Humanitarian Conduct of War,<sup>141</sup> did not make the government stop executing captured prisoners of war. The Pretoria regime however, refused to sign its protocol although it had acceded to the convention in 1952. The main issue was that this convention recognised 'armed conflicts in which people are fighting against colonial domination and alien occupation and against racist regimes in exercise of their right to self determination.'

In the Delmas Treason Trial<sup>142</sup> twenty-two persons were charged with high treason and alternatively with terrorism or subversion or furthering the aims of the ANC. The accused were mostly members of the United Democratic Front and The Vaal Civic Association. All had spent above nine months in detention. The court found them guilty of treason and or terrorism. In the judgement the court confirmed the view that the UDF was an internal wing of the ANC. Thus the policy of the state was continuous in eliminating opposition.

The apartheid government never at any point made it an either or situation between the military and the courts. In fact it used both and with the backing of the parliament it obtained the required results namely passing the legislation and having the military

---

<sup>140</sup> Kader, *Reconciliation through Truth*, p.186

<sup>141</sup> Gavin, *Brute Force*, p.222

kill or the courts convict. Despite all of these, the nation states it tried to foster were nipped in the bud.

### **ARMED FORCE: POLICE AND ARMY**

When the apartheid government employed the courts and the police to stem the rising tide of resistance, it did not expect to lose. However, as the situation got out of hand, it was bound to develop better strategies or follow the ultimate dictum full political rights. The state followed the former making the army and police one. In a defence white paper the relationship between the SAP and the SADF was aptly defined.

The responsibility for combating internal and especially urban unrest rests primarily with the SAP. Nevertheless, the SADF must at all times be ready, on a countrywide basis to quickly mobilise trained forces to render assistance.<sup>143</sup>

Thus in the repression that occurred in the townships the operating line between the two became thinner and thinner and subsequently indistinguishable. In other words, the suppression of strikes, protests, demonstrations and other anti-apartheid activities were legitimate concerns of the SADF entirely consistent with and integrated in its external tasks. Similarly the police were not limited only to maintaining law and order but also internal warfare.

The army and police became increasingly involved in the escalating confrontations between 1983-1984. With the boycotts to bus fare, rents and the new constitution alongside the elections. By 1984 when the tension was rife the Vaal Triangle was in a state of 'unwarranted military siege. Many people were arrested, jailed and fined. The government resolved not to leave any stone unturned in its attempt to maintain its grip was evident. Dubbed Operation Palmiet, the SADF described their joint operation as a good example of urban counter-insurgency. Despite the two-day stay-away staged by unions in the Vaal area for the removal of troops.

---

<sup>142</sup> Albertyn Catherine, "Political Trials In South Africa." P 394

<sup>143</sup> Gavin, *Brute Force*, p.223

Meanwhile along the border the Pretoria government hoped to create a cordon that would curtail the possibility of the guerrilla infiltrating South Africa. The sophisticated communication put in place and the use of the state of the art weapons from France and the US,<sup>144</sup> did not succeed in preventing the MK. Yet large telecommunication equipment worth billions were spent on a system that would make South Africa comparable to a fence around a house a technological adaptation of the wall of China defence system. Yet all these did not produce a nation divided and separate, all it could obtain was blood, arrests and jails.

The army was also actively involved in the suppression of urban resistance. In 1960 during the state of emergency the army was widely used in Cape Town Township of Langa. But in 1976 the situation had no equal. When the Soweto revolt began the police were stretched beyond their limits. The army came in and with a show of force, it succeeded in killing many and dispersing the crowds. Even in the subsequent anniversaries of the massacre, the presence of the SADF was a warning signal that nothing would be spared to achieve the goal of compliance.

The interchangeable role of the police and the army, which was classically very distinct and separate, made for an unhealthy relationship in the apartheid Republic. For it meant that every protest both non-violent and violent ended with bloodshed, arrests and jails. The state spent much in sustaining a system that would never succeed in obtaining the expected results. The solution to the problem was once more neither in the over militarisation of the police, or in the procurement of advanced digital electronics to fight the MK. The problem came from a white minority appropriating too much power. To solve it the root had to be attacked. But the government was unwilling and thus embarked on a different strategy.

## **RESISTANCE TO MILITARY RULE: POLITICS OF WAR RESISTANCE MOVEMENTS**

This section focuses on the conflicts and resistance within the white community. This opens up the argument and defeats the assumptions that there was a white nation.

---

<sup>144</sup> Ibid., p.233

Pursuant of its policy to leave no stone unturned the government extended conscription to all white males between 18-25.<sup>145</sup> The intention was to maintain a population of reserves that could be called up to defend the state when the need arose. This area however, marked the one phase in the struggle against apartheid where the White South African had an opportunity to declare his stance vis-à-vis the racist policies.

The objections to the conscription occurred among three main nuclei: the SACC (South African Council of Churches), End Conscription Campaign (ECC), Confederation of South African War Resisters (COSAWR) and the Jehovah's witnesses. The SACC was outspoken in its criticism of a system that was fundamentally unjust and discriminatory and that arming the population was to defend the unjust system. Pointing out that it was hypocrisy to 'deplore the violence of the terrorists or freedom fighters while we ourselves prepare to defend our society with its primary institutionalised violence by means of yet more violence.' The government's response was swift and with the usual parliamentary backing a legislation was passed 'making it an offence punishable by up to six years imprisonment to recommend, to encourage, aid, incite, instigate, suggest to or otherwise cause any person or any category of persons or persons in general to refuse or fail to render military service.'

146

The Act<sup>147</sup> placed restriction on reporting about military affairs. The media was forbidden to disclose to the South African public issues like the SADF invasion of Angola in 1975. The censorship hindered any organisational resistance to militarisation. Yet like all other laws it simply sparked conflicts, but it did not kill the opposition. It was illegal to quote many of the proscribed organisations including liberation movements or to report their activities. By 1985, the state of emergency tightened restriction even further and limited information the military and police deployment to put down protest. Yet publications came out like the 'Resister' that clandestinely circulated information about the government.<sup>148</sup> Thus limitation on

---

<sup>145</sup> Ibid., p.73

<sup>146</sup> Section 121 of the Defence Act of 1957 as amended

<sup>147</sup> Ibid.

<sup>148</sup> Gavin, *Brute Force*, p.15

access to information did not affect only the blacks it was extended to the whites when the regimes felt there was a threat to its position.

This legislation also handicapped resistance by the church and other opposition for quite a reasonable period. Yet it did not stop the conscientious objectors. Hundreds of whites left the city to seek asylum as far afield as Great Britain, USA, Netherlands and some in the front line states. Statistics show that more than 3000 conscripts failed to turn up for military duties annually. Many were imprisoned and a handful tried. The case of Ivan Toms and David Bruce,<sup>149</sup> were amongst the most politicised and showed that apartheid had exceeded its limits and was doing a disservice to its people. Refugees from the Nazis holocaust made apartheid a modern day adaptation of anti-Semitism but this time the wrath was upon the blacks.<sup>150</sup>

The question of conscripts also introduced the area of immigrants. The government had to look for a way to conscript the thousands of white immigrants enticed to 'Sunny South Africa' by the prospects of a high standard of living at the expense of the oppressed black majority. Yet it had to be careful not to jeopardise the immigration rate. The racist legislations exploited blacks and created lavish opportunities which whites from outside were attracted to enjoy. But by 1984, government responded by passing legislation that made it necessary for all immigrants between 15 and 25 to take SA citizenship after 5 years residence, thus becoming available for military call up. Here again the reaction was immediate, immigration declined (although it did not stop) and a widespread protest ensued in the immigrant community. Yet the SADF gained new membership that did not solve the problems.

The church, ECC, UDF, COSAWR organised greater resistance and although the government met their resistance with a double force law and repression, the effect was greater. By deliberately opting to fill the jails than serve in the SADF the resisters blunted the edges of the apartheid sword. It marked the most visible stance of white opposition to apartheid. It was the one time that every white South African had to say

---

<sup>149</sup> Abel, *Politics By other Means*, p.123

<sup>150</sup> Ibid.

‘ that if he had been a German soldier at the time he/she would have taken a stand against what was going on there.’<sup>151</sup>

The resistance also broadened the spectrum of the anti-apartheid movements. It created an alliance between the ANC and the non-racist tradition of opposition politics. It opened up a war on two fronts for the government. For a while the government had to suppress internal strife it also had to come to grips with the external threat. If the apartheid regime hoped that by legislation, imprisonment and increased conscription they would stem the tide of mounting criticism and resistance to apartheid, it was mistaken. It needed a better strategy which even the civic action to ‘win hearts and minds’ could not serve.

### STATE OF EMERGENCY

When the Botha regime had exhausted all its tools to maintain apartheid and suppress resistance, the writing became increasingly clear on the wall that the solution rested elsewhere. The apartheid parliament refused to read the message and invoked its traditional last resort weapon: a state of emergency. This meant the imposition of martial law, police and army administration of large areas, assassinations, arrests, press censorship, external aggression inter alia. Despite these extraordinary last minute measures intended to safeguard racist rule and reassure white minority, the reality eluded them.

Parliament with all its array of powers and flurry of laws decidedly aggravated the situation. As resistance to the apartheid pillars of education, land, employment, residence increased through boycotts, stayaways, attacks on police, the military came in. By March 1985, on the anniversary of the Sharpeville massacre police brutality in Langa outside Uitenhage left many killed.<sup>152</sup>

Undeterred the violence spread like wild fire through out the city. But in the Eastern Cape the situation was potentially very disastrous. Guerrilla activities escalated, with more acts of sabotage recorded. The government cried foul that the ANC and the UDF

---

<sup>151</sup> Abel, *Politics By Other Means*, p.67

<sup>152</sup> Gavin, *Brute Force*, p.247

were trying to make the country ungovernable and were establishing alternative forms of power in black areas.<sup>153</sup> The emergency was then extended to the Witwatersrand and the Eastern Cape, covering a third of the South African population. With the areas identified as a threat under martial law the government then went in to crack down on the resistance as the final step towards consolidating its hold. But this proved evasive.

All sorts of legislations, regulations, proclamations and particularly the Public Safety Act<sup>154</sup> were invoked. The police and the military personnel had far reaching powers, added to that wielded by the state president and the parliament there was a very despotic setting, enforced by the absence of any limitation or safeguards. Issues like arrests without warrant was extended outside the limits of the police. Detention orders could be renewed indefinitely. The troops were encouraged to invoke further any regulation falling within the ambit of the state of emergency. These included curfews, cordoning off areas, closure of public or private business, forcible removal of people from areas. This was clearly the absence of the rule of law.<sup>155</sup>

The next arsenal in this circle was the police-military liaison. However, with the network of censorship laws and regulations enforced under the state of emergency, information about their activities may not be exhaustive. Joint operational centres were established and while the police and army remained under their respective commands, the overall authority vested in the police exercised through the police divisional system.<sup>156</sup> In the township of Kwanobuhle in the eastern Cape for example, a military contingent of elements drawn from four and seven infantry battalion from the Transvaal, the school of armour in Bloemfontein, the state president's guard from Pretoria and an armoured car unit from Port Elizabeth and the members of the local commando.<sup>157</sup> This was nothing short of a military invasion. Terrorising the populace, instilling fear and a show of superior force are arguably the motives of such actions.

Adding insults to injury the parliament went ahead to legislate by granting indemnity to the forces from any criminal and civil litigations arising out of their actions. In fact

---

<sup>153</sup> *ibid.*, p.249

<sup>154</sup> Public Safety Act 53 of 1953

<sup>155</sup> Gavin, *Brute Force*, p.,249

<sup>156</sup> *ibid.*, p. 250

the only restriction was unrealistic. It demanded that the complainant has the onus of proof to establish that there was no 'good faith' involved. In 1985 this indemnity was extended to cover not only troops under the emergency areas but to the whole of South Africa.<sup>158</sup> With the nexus between the police and the army backed by indemnity the result was clear-cut disregard for human rights and property. Such may explain why heavy casualty was recorded in the confrontation in the townships.

The conduct of operation ranged from the use of dogs, specialised equipment, indiscriminate firing at people and property and deployment of units from the Koevoet fighting in Namibia.<sup>159</sup> This array of militarised warfare against a people whose fault was their numbers. According to a SAP journal<sup>160</sup> 'the application of the European anti-riot equipment and tactics had proved inadequate in South Africa.' This therefore was a justification why such inhumane methods had to be resorted to. Like in the civil rights struggle in the United States, this was a weak defence for the slaughter of women and children.

The argument here is that these restrictions, outlawing of organisations, detention, arrest and torture of anti-apartheid leaders (like Steve Biko who died in detention), troop deployment and military occupation of townships all failed to stifle anti apartheid resistance. According to PW Botha shortly before lifting the state of emergency, the battle in South Africa had reached a decisive phase. It was so decisive that it caused the nationalist party to kick him out of office and to initiate negotiations with the ANC whose onslaught from exile coupled with the internal resistance to form an uncomfortable element in the cushion of South Africa.

## RESISTANCE FROM THE INTERNATIONAL COMMUNITY

The resistance from the OAU, the Non-Aligned Movement and the UN progressed from step to step as the apartheid policy was developed and perfected by the parliament. The OAU and Non-Aligned members championed the cause in the UN.

---

<sup>157</sup> Ibid.

<sup>158</sup> Ibid.

<sup>159</sup> Ibid.

The struggle was thus waged from international law developments through, Security Council resolutions, embargo and boycott and in supporting armed rebellion to check the apartheid crime against humanity.

Security Council resolutions in all the areas of apartheid established paradigms through which apartheid was declared illegitimate. The UN progressed from general condemnation to specific pronouncements of the illegitimacy of apartheid. The UN recognised the liberation movement per resolution 2396 as the 'authentic representative of the people of South Africa.' The said resolution went ahead to enjoin the people to overthrow the system. In 1962 the UN had created a special commission against apartheid to oversee the best way of dealing with the system. In 1983 when the tri-cameral parliament was created the UN advised the people of South Africa to resist by all means the imposition of the constitution. The constitution was declared contrary to the principles of the UN Charter and consequently 'null and void' per Resolution 554.<sup>161</sup> The consequences this had on the resistance were immeasurable. But suffice it to say here that it supplemented and gave blessing to the resisters and made volunteering for the resistance a noble ideal.

Apartheid was established as another form of colonisation. The objective here is not to attempt an historical investigation of apartheid as a system of colonisation<sup>162</sup>, but to assess the impact this declaration had on the struggle and by extension on nation building in South Africa. At the wake of independence to the former colonies the UN condemned colonisation in all its forms including apartheid.<sup>163</sup> Apartheid was thus to the resisters some colonial jibe that had to be fought and like history had demonstrated in the continent would be won. In fact this gave them a drive and ability to establish a working relationship with the other liberation movements on the continent. Martial law and repression were thus incapable of stopping them but rekindled the desire to fight on.

---

<sup>160</sup> *Servamus*, September, 1985

<sup>161</sup> Resolution of 1984, in Kader, *Reconciliation through Truth*, p184.

<sup>162</sup> Mahmood, Kader, *Citizen and Subject*, p.185

<sup>163</sup> Kader, *Reconciliation through Truth*, p.182

In the international law scene, it is particularly ostentatious because international law recognises that people denied basic human rights and political participation have the right to 'alter, abolish or overthrow' such a regime. Through its practices the General Assembly had established *jus cogens* in international law of the right to self-determination which no country could ignore.<sup>164</sup> South Africans were thus entitled to their right to self-determination per Article 1(1) and Article 1(3).<sup>165</sup>

The people were also entitled to take up arms to overthrow the government and establish their right. Like the French Nationalist movement fought at the time when France was under the dominion of Nazi Germany.<sup>166</sup> Resolution 417 made that right specific to South Africa. The Protocol to the Geneva Convention of 1977 actively incorporated armed conflicts against colonial governments. This meant that captives from the liberation struggle were to be treated as prisoners of war and the humanitarian conduct of the war. Although apartheid governments did not ratify the convention and went ahead to slaughter the activists, this played to the advantage of the resistance and gave an image of a regime blinded by power and greed.

The other perceptions drew differences and similarities between apartheid and Nazism, apartheid as genocide, as a crime against humanity, peace and a war crime.<sup>167</sup> Particularly with respect to its policy to destabilise unfriendly regimes, the UN responded by Resolution 466 and 479 (of 1980) which declared the regime of South Africa as violating the sovereignty, airspace and territorial integrity of Zambia and Angola. In fact by Resolution 546-it referred to these actions as acts of aggression. Although the holocaust may be viewed differently by some observers, it falls under the same category with apartheid as a crime against humanity in international law.<sup>168</sup> The war crimes are gleaned from the apartheid contravention of Resolutions 34 and 39 (of 1974) which demanded that anti-apartheid victims be treated as prisoners as war. Genocide in the forced removals. What is notable here is that all such actions were given wider publicity and it galvanised the world beyond resolutions in the UN to the imposition of sanctions.

---

<sup>164</sup> *Namibian Opinion*, 1971 ICJ 54

<sup>165</sup> UN Charter

<sup>166</sup> Judge Ammoun, *Namibian Opinion*.

<sup>167</sup> Kader, *Reconciliation through Truth*, p.195

Here the field of arms is most relevant. Just like Mussolini had confessed in the invasion of Abyssinia (present day Ethiopia) in 1931 that had the embargo been extended to the vital elements of arms like iron and oil, Italy would have withdrawn, so too would the regime have possibly changed its policy if the arms embargo were rigidly imposed. While Vorster claimed that South Africa was prepared to defend itself, it later became clear that many western countries were contravening the embargo. British companies built arms industries, the French sold fighter planes and the state of Israel contributed to the building of a nuclear power. Nato and its allies flagrantly and discriminatory violated the arms embargo as they went ahead to do business with the regime. Thus while resolutions were passed they went behind and negotiated shady deals.<sup>169</sup>

The reaction of the international reaction to apartheid therefore varied from complicity to embargo and Security Council resolutions. Nevertheless the international community was a decisive player in the struggle against apartheid. In other words while the ANC and its allies were the infantry, the international community constituted the air force. Despite the double standards of the west, the OAU, Non-Aligned and the East played a decisive role to achieve the outcome of the collapse of the apartheid.

---

<sup>168</sup> Ibid., p.195

<sup>169</sup> Gavin, *Brute Force*, p. 236

### CHAPTER III

#### **THE CONSTITUTIONAL TRANSITION TO THE NEW DISPENSATION (1990-1993)**

The events of this period support the argument of this study: that the lack of a proper separation of powers generated conflict. The political negotiation was an acknowledgement that parliamentary sovereignty had failed and, a new order had to be defined. A constitutional state or *Rechtstaat* was born.

This phase in South African constitutional history is very important in that it marks the birth of a genuine constitutional compromise to settle political differences. It heralded a new order in which the Truth and Reconciliation Commission and not International Criminal Tribunal is used to negotiate with the past. Unfortunately the lessons drawn from this South African experience is still to be read by Cameroon and other African States. Whatever the case may be it is interesting to note here that the lessons from South Africa may be very fundamental to Cameroon and other African States that are still in quest of a basic constitutional solution to their diversities.

The Congress for a Democratic South Africa (hereafter referred to as CODESA) formed the nucleus around which the path to the new order would be traversed.<sup>170</sup> This path was plagued with problems that Codesa was ill equipped to resolve and ultimately led to its collapse. These problems included an unworkable and an unrealistic number of participants of about eighty members per five working groups. The absence of a deadlock breaking mechanism within its structures meant that conflicts could not be speedily resolved. Also the lack of a representative secretariat as the perceived one only had representatives from the ANC and the government.<sup>171</sup> The greatest contribution of Codesa it would appear lay in its foundational base for a negotiated settlement.

The establishment of a Multi Party Negotiation Process (MPNP) indicated willingness on both sides to resolve the crises. The process thus went a step further and the MPNP

---

<sup>170</sup> Hassen Ebrahim, *The Soul of a Nation*, (South Africa: Oxford University Press, 1998), p65

<sup>171</sup> *Ibid.*

corrected the errors of its predecessors by creating committees like the deadlock breaking sub-committee. A non-partisan consultative administration whose personnel was acceptable to the spectrum of political parties. However, the main organ of the MPNP was set up such that the negotiation process went through to ensure success. This organ was the Negotiation Council, which had two delegates and two advisers per participant.<sup>172</sup> It was opened to the public and entertained reports from different bodies and the planning committees. Which reports were thereupon debated and converted to the draft constitution.<sup>173</sup>

The technical and planning committees consisted of non-partisan political experts who were acceptable to the participants. They received mainly written and not oral submission from the political groups and thus circumvented grandstanding and the entrenching of positions a practice that crippled Codesa.<sup>174</sup>

This does not mean that the MPNP went without problems. On the contrary, it was characterised by many problems that tested the commitment of the parties involved. There were frequent mud slinging and deadlocks, withdrawal of some political parties from the talks like the Freedom Front, IFP, AZAPO, AWB (Afrikaner Resistance Movement).<sup>175</sup> The greatest of these problems could be the issue of a third force that saw an unprecedented upsurge in black on black violence. This violence rocked the bottom of the process and saw the assassination of the ANC/SACP activist Chris Hani. This it may be said represented the sacrificial blood that had to be shed for the transfer of power marking the dying kicks of the old order.<sup>176</sup>

Be that as it may it may be necessary to examine aspects of the negotiation process as a determinant of the outcome. The opening of the proceedings to the public made the process transparent and calmed fears of the government's good faith. Although the argument that the negotiation actually took place behind closed doors is valid. Looking at what obtained in the Cameroonian situation it may be observed that

---

<sup>172</sup> M. Nicol, *The Making of the Constitution: the Story of South Africa*, (Cape Town: Churchill Publishers, 1997), p. 34

<sup>173</sup> Ibid.

<sup>174</sup> Ibid.

<sup>175</sup> De Villiers, *Birth of a Constitution*, p.14

holding negotiation in private was more fruitful in South Africa and done with enough justification to avoid past errors. Whereas in Cameroon it was done to exclude the public from the gimmicks the government intended to play.<sup>177</sup> Through the media the public could thus participate and the resourcefulness of the academia appropriately harnessed to build up a solid constitution.<sup>178</sup>

The presence of one-woman delegate per participating organisation gave women the opportunity to 'rise to the occasion'. And often bringing their invaluable and moderating values to the chair. Although they argue that they played only a nominal role. A flexible interpretation of this would transcend the element of lobbying to the incorporation of the African Indigenous system of conflict resolution where a royal woman (the Queen mother, the king's first wife and eldest sister) always sat in council.<sup>179</sup> The development of a positive relationship within the delegates augured well for brokering deals and compromises.

#### **THE INTERIM CONSTITUTION OF SOUTH AFRICA ACT<sup>180</sup>**

The preamble guaranteed that this constitution was transitional<sup>181</sup> and provided for continued governance of South Africa while an elected Constitutional Assembly (CA) would draw up the final constitution.<sup>182</sup> The CA had five years to draw up that constitution as per section 38(I) and Section 80(I) a. This final constitution had to comply with 34 constitutional principles (CP) contained in schedule 4 of the interim constitution. The constitutional court was given the power to certify if the final constitution complied with those standards.

The interim constitution was the first and the most fundamental break with the past. It acknowledged the need for a new order based on equality between the races and the

---

<sup>176</sup> Oliver Tambo, ANC President, "Speeches in Exile", Grassy Park Hotel, Documentary, 1990. Nelson Mandela's "Slaughtering our people like flies speech", 1993.

<sup>177</sup> See the analyses in Chapter VI below.

<sup>178</sup> De Villiers, *Birth of a Constitution*, p.18

<sup>179</sup> Anta Diop, *Precolonial Black Africa*, (Wesport: Lawrence Hill & Co., 1987), p.46

<sup>180</sup> Act 209 of 1993

<sup>181</sup> per section 21

<sup>182</sup> Section 73

gender. It envisioned a Bill of Rights for all.<sup>183</sup> South Africa became a constitutional sovereign and democratic state. This signalled the death of the TBVC states as well as the *volkstaat*.<sup>184</sup>

## THE SEPARATION OF POWERS IN THE INTERIM CONSTITUTION

The manner in which the interim constitution dealt with the issue is unprecedented in South African constitutional history. This constitution did not only secure the independence of the three organs of the state but also went ahead to provide for checks and balances.<sup>185</sup> The objective was that by eliminating the power parliament formerly wielded the new society would be created and nation building enhanced as arbitrariness would be curbed.

The parliament was covered by chapter 4 and divided into two houses, the national assembly and the Senate. Legislative authority vested in the parliament.<sup>186</sup> Parliament enjoyed full powers to control, regulate and dispose of its internal affairs.<sup>187</sup> The members enjoyed immunity against civil or criminal proceedings 'by reason of anything said, produced or submitted in or before or to parliament per section 55(3). They enjoyed full freedom of speech in parliament and could thus not be impeached or questioned in any court of law.<sup>188</sup> Yet the laws they could make were to be tested.

Chapter 7 regulated judicial authority and the administration of justice. The Constitutional Court headed by the president (as per section 97(2)(a) and other ten judges had jurisdiction as court of final instance over all matters relating to interpretation, protection and enforcement of the provisions of the constitution.<sup>189</sup> The Supreme Court was precluded from having any jurisdiction on matters falling within the ambit of the Constitutional Court. The hierarchy of courts was thus established with the constitutional court at the apex and thus its decisions were binding on all the

---

<sup>183</sup> Section 7

<sup>184</sup> De Villiers, *Birth of a Constitution*, p3

<sup>185</sup> Ibid. p59

<sup>186</sup> Section 37 of the Interim Constitution.

<sup>187</sup> Section 43

<sup>188</sup> Section 55(2)

other organs. The judicial service commission was created with the responsibility to make recommendations regarding the appointment and removal of judges from office, term and tenure of judges and advising the government on matters of justice and of a judicial nature.<sup>190</sup>

The executive office like the other branches is adequately treated under the interim constitution in chapter 6. The President who is head of the executive was empowered to provide leadership in the interests of national unity in accordance with the constitution and the law of the republic Section 81. The president was also enjoined to uphold and to defend the constitution as the *suprema lex*. The president had all the normal prerogatives, but was subjected to the law. The office of the deputy presidents was created and regulated per section 84(1).

#### **DEMISE OF PARLIAMENTARY SOVEREIGNTY<sup>191</sup>**

One of the most fundamental and radical constitutional changes introduced by the interim constitution was based on the replacement of the constitutional order of parliamentary sovereignty (where parliamentary legislation is supreme) by the principle of constitutional supremacy.<sup>192</sup> This principle is clearly stated in section 4 of the constitution, which professes unequivocally that the constitution is the supreme law of the republic and shall bind all the organs of the state at all levels of government. Including it may be added here the legislative organ of the state.

Section 37 gave parliament full authority to legislate on the Republic, but not without limitation. Parliamentary legislation had to be in accordance and consistent with the constitution. Chapter 3 went further to state that all legislation or enactment by any legislative authority was subject to the Bill of Rights. The Human Rights commission covered by section 115 was entitled to vet all draft legislation before they could be promulgated. If the Human Rights Commission found that the proposed legislation

---

<sup>189</sup> Section 98

<sup>190</sup> Section 105(2)

<sup>191</sup> Dion Basson, *South Africa's interim Constitution: Text and Notes*, (Cape Town: Juta & Co, 1994) pp.16

The court would also advise the competent authority to correct the defect in the law within a specified duration for the interest of justice and good governance. The Constitutional Court and the division of the Supreme Court as per section 101(3) b were given the power to strike down an executive action that was contrary to the constitution. Section 98(7) added that in the event of such happening the Constitutional Court may order the organ of the state concerned 'to refrain from such act or conduct or may order it subject to such conditions to correct such act to conform with the constitution.

Another radical and complete break with the constitutional past was in the introduction of a democratic and a representative system of government in the Interim Constitution. The previous order gave the right to vote only to 'one population group' namely the whites and was thus undemocratic and unrepresentative.<sup>193</sup> The granting of the rights to vote to all also gave legitimacy to the process of change and to the government so elected.

The Interim Constitution also covered all the gaps that parliament filled under the parliamentary sovereignty. This means that the manner of election, composition, duration and removal from office of the various organs of the state was clearly defined.<sup>194</sup> By regulating all aspects pertaining to these offices the appropriation and abuse of power was thereby checked.

Parliamentary sovereignty that was thus at the base of the various crises plaguing the South African society was thus effectively checked and a new order put in its place. The problem to say the least was not with the concept but with the discriminatory nature of its application. The Interim Constitution opted for a constitutional state as a solution to the problem. This concept of *Rechtstaat* or Constitutionalism is a growing one amongst states in the wake of the new millennium.

---

<sup>192</sup> Ibid., p.59

<sup>193</sup> Ibid. p.61. Also see Section 7 of the 1996 Constitution

<sup>194</sup> Section 80(1), 85(1) for the executive, Section 38-65 for the parliament and section 96(2) for the judiciary.

## THE BILL OF RIGHTS<sup>195</sup>

The Bill of rights is the cornerstone of the South African democracy.<sup>196</sup> The concept of the Bill of rights begs one important normative question, which is whether an individual subject is adequately protected from abuse by the state power. Judging from the past of South Africa that was not the case. However, when this is adequately protected then the situation obtained is called the due process (in the United States) Constitutionalism or *Rechtsstaat* in European legal parlance.<sup>197</sup> The Bill of Rights has so far been accepted as the justifiable way of protecting the individual. And the courts are charged with the primary responsibility of guaranteeing this.

Technically these rights are divided into three. The first generation of human rights (otherwise known as blue rights) which included right to political participation, like the right to vote, freedom of speech, association, movement are adequately protected.<sup>198</sup> The second-generation rights or socio-economic rights (red lights) included the right to work, shelter, right to health and education associated with the welfare state. Lastly the third generation rights (environmental or green light) the right to clean air, healthy environment amongst others. The last two were not exhaustively covered like in the Namibian constitution where they were protected as state policy.<sup>199</sup>

The Bill of rights bounded all organs of the state.<sup>200</sup> Under the interim constitution the Bill of Rights followed its traditional duty *par excellence* to protect the individual from state abuse. A view that was confirmed by the Constitutional Court in *Du Plessis v De Klerk*<sup>201</sup> that the Bill did not apply horizontally. However, in the 1996 constitution section 8(1) and (2) now make it clear that the Bill of Rights apply both horizontally (in relation to private persons) and vertically (in relation to the state).

---

<sup>195</sup> Dealt with in chapter 3 of the Interim constitution, corresponding to chapter 2 of the 1996 Constitution.

<sup>196</sup> George Devenish, *A commentary on the South African Bill of Rights*, (Durban: Butterworths, 1999), p.5

<sup>197</sup> Dion Basson, *South Africa's Interim Constitution*, p18

<sup>198</sup> Ibid. p.19

<sup>199</sup> Ibid.

<sup>200</sup> Supra Section 4

<sup>201</sup> (1996) 5 BCLR 685 (55)

The Bill of rights bounded all organs of the state.<sup>200</sup> Under the interim constitution the Bill of Rights followed its traditional duty *par excellence* to protect the individual from state abuse. A view that was confirmed by the Constitutional Court in *Du Plessis v De Klerk*<sup>201</sup> that the Bill did not apply horizontally. However, in the 1996 constitution section 8(1) and (2) now make it clear that the Bill of Rights apply both horizontally (in relation to private persons) and vertically (in relation to the state). This is the new position of the law, which in terms of comparative jurisprudence is similar to the situation obtained under section 5 of the Namibian constitution.<sup>202</sup>

Mahomed DP submitted it in his dissenting judgement to the *De Klerk Case*<sup>203</sup> that all conduct in the modern society was subject to the law and thus the Bill of Rights was horizontally applicable. The point here is that if private issues are left outside the law then in the case of South Africa there would still be room for a wide possibility of unfair practices. In a situation where the wealth was still within the control of the minority, a landlord may refuse to sell his property or let a flat to someone because of their colour or gender and the law would be incapable to respond to that.<sup>204</sup> However, despite this the position of the law is clear that the application may depend to the extent that it is applicable, "taking into account the nature of the right and nature of the duty imposed by the right."<sup>205</sup> This issue was laid to rest in the final constitution.

#### AFFIRMATIVE ACTION<sup>206</sup>

The equality clause established equality of all persons before the law and equal protection of the law. Section 8 of the Interim Constitution corresponding to Section 9 of the 1996 constitution is no doubt the heart of justice and the very ethos upon which the constitution lies.<sup>207</sup> It should however be noted that the constitution did not outlaw differentiation between persons but only when such differentiation amounted to unfair discrimination. Unfair discrimination was thus outlawed.

---

<sup>200</sup> Supra Section 4

<sup>201</sup> (1996) 5 BCLR 685 (55)

<sup>202</sup> Devenish, *A Commentary on the Bill of Rights*, pp.24-27

<sup>203</sup> Supra

<sup>204</sup> *De Klerk*, par 135

<sup>205</sup> Section 8(2)

<sup>206</sup> Section 8(3) of the Interim Constitution and Section 9 (2) of the 1996 Constitution.

<sup>207</sup> Devenish, *A Commentary on the South Bill of Rights*, p.35

Section 9 (2) of the 1996 constitution<sup>208</sup> instituted affirmative action. This was intended to help redress the wrongs of the past. Thus although this amounted to unfair discrimination as per the equality clause, yet it is permissible for the reason mentioned above. This perspective to factual equality underlined the affirmative action clause as part of the second generation rights, meanwhile 'the concept of mere formal' equality as per the equality clause was part of the first generation human rights. Clearly this approach to formal equality was reasonably found to be inadequate as a redress of the inequalities of the past. Affirmative action was thus very necessary to rebuilding the new nation.<sup>209</sup>

### ASPECTS IN THE MAKING OF THE 1996 CONSTITUTION<sup>210</sup>

The process through which this constitution came to operate is equally as relevant as the content. By examining the most important aspects of that process we also discuss how nation building was enhanced and the various methods of checking the three spheres of government guaranteed and accepted across the spectrum of political parties. This vividly contrasts with the Cameroonian experience where consensus was not a priority as giving the impression that a new constitution has been borne.

The Interim constitution had set up thirty-four principles that bounded the final constitution<sup>211</sup> and thus by extension the constitutional Assembly. However, the dynamics that influenced the new constitution included time constraints, public/political party interests, the policy of inclusively and the Constitutional Court.

The Aristotlean concept of participatory democracy was widely followed in the process of drawing up the constitution. The Constitutional Assembly voted in 1994 made every effort to get the public participate in the final constitutional making process. Thus the draft was published for public commentary. This was very important since the public had been shut out of the process to avoid the errors of the

---

<sup>208</sup> Section 8 (2) of the Interim Constitution

<sup>209</sup> Although there are growing arguments that it is reversed discrimination.

<sup>210</sup> RSA Act 108 of 1996

<sup>211</sup> Hassen Ebrahim, *The Soul of a Nation*, p34

MPNP.<sup>212</sup> About R 31 million was spent on the various public participating programmes.<sup>213</sup> These ranged from translating the constitution to the various African languages for the greater part of the population to understand. Printing leaflets and distributing them to the areas not accessible to the modern information superhighway. Public debates and seminars were held to educate the people. The media became a very important partner in the dissemination of this information. The University of Cape Town created and maintained a web site for these issues.<sup>214</sup> These provided greater public access and participation and engendered a feeling of public participation, although the extent to which their recommendations influenced the final draft is debatable.

The language of the constitution was also made simple for the public to understand. Civic action became another medium for the political participation. Various pressure groups sent their comments to issue relevant to them like COSATU on the lock out clause of the interim constitution, traditional leaders on the status of customary law, property owners and chamber of mines on the property clause. By comment this process of inclusively gave the public a sense of participation and therefore relation to the institutions that they had been estranged from for so long. Although about 68 outstanding issues were identified from the public contribution the recent tendency has been to ask to what extent these actually affected the final constitution. Be that as it may it should be noted that by the mere fact that the public was given a chance to say what they thought on the issues affecting them and the final constitution was drawn up by a parliament representative of its people gave the final constitution legitimacy.

The time factor is particularly relevant when the African constitutional history is brought into focus. The common practice has often been to rush up with the constitutional drafting process since from independence (with special relevance to the former British Colonies).<sup>215</sup> Section 73 (1) of the interim constitution set down May 8, 1996 as the deadline for the constitutional assembly to complete and adopt a new

---

<sup>212</sup> Discussed in greater detail in the paragraphs below.

<sup>213</sup> Nicol M., *Making of the Constitution*, p. 41

<sup>214</sup> [www.uct.ac.za/](http://www.uct.ac.za/)

<sup>215</sup> Boule, *Constitutional Analysis*, p 104

constitution. This deadline was not arbitrarily chosen and required amendment to have changed. The formation of committees in charged of specific issues worked particularly well for the completion and for an efficient document to be produced at the end. The six theme committees that dealt with the most important issues like the Bill of Rights, the Judiciary and other branches of government. They received public submissions and also worked towards the time limit.

To prevent the issue of constituency betrayal and the media subjectivity<sup>216</sup> there was closed door bilateral and multilateral meetings. Where there was deadlock this method proved very effective. As per section 72 of the interim constitution an independent panel of constitutional experts was created with the primary objective to resolve conflicts and avoid deadlocks.<sup>217</sup> With the regular boycotts by the IFP, FF, PAC the ANC and NP were left as the two most important players. This often meant that they could easily reach strike a compromise with their limited numbers. However, despite its majority the ANC demonstrated good faith and compromise to engineer a sense of belonging and inclusively. This is very evident in the final constitution on the issue of federalism. Where the stance of the FF and the IFP was often rigid. The final constitution it can be said by virtue of the concurrent and exclusive jurisdiction relating to national and provincial legislature demonstrates the compromise of the majority to enhance nation building.

## THE SEPARATION OF POWERS IN THE 1996 CONSTITUTION

Amongst the thirty-four principles that the constitutional court had to certify the issue of the separation of powers came up. This was dealt in *Re Certification of the Constitution*.<sup>218</sup> The objectors based their principal arguments on provisions within the New Text (which was adopted by parliament) and provided for the members of the executive government also serving alongside members of the legislature at all three levels of government was a failure to give full effect to the separation of powers. It was further submitted that this system enhanced the power of the president and the

---

<sup>216</sup> Compare with the Jury system in the US.

<sup>217</sup> Gloppen S., *Battle over the Constitution*, (Dartmouth: Aldershot, 1997), p.79

provincial premiers, 'thereby undercutting the representative basis of the democratic order'.<sup>219</sup>

The objector acknowledged that there was a certain amount of separation of powers between the three spheres of government. Like the parliament having the exclusive jurisdiction to legislate and the courts' power to review. But in their view this was inadequate. And because members of the cabinet continued to be members of the legislature, by virtue of their positions, could exercise a powerful influence over the decisions of the legislature. This it was contended was inconsistent with the institutional provision VI. The example of the United States, France, Germany was cited to buttress the point.

In its judgement the court found out that there is no universally accepted model for the separation of powers. Any system of checks and balances leads to restraint by one branch of government upon another. Thus the separation of power cannot be absolute. The court gave as examples that while in the United States, France and Holland members of the executive may not continue to be members of the legislature, this was not a 'requirement' of the German system of separation of power. The court recognised therefore the 'unavoidable intrusion of one branch on the terrain of another to enhance checks and balances'.

The Legislative competence of government in the National sphere rested with the parliament as per section 43.<sup>220</sup> In the provincial sphere to provincial legislatures. Although there are areas of concurrent jurisdiction. Section 85 and 125 respectively vested executive power of the Republic in the President and in the provinces with the premiers. Judicial authority was with the courts (Section 165). A system of balances was covered by the provision 92 (2) which made members of the executive directly answerable to the legislature 'both collectively and individually for the performance of their functions.' Per Section 92 (3) b the cabinet was required to provide full and

---

<sup>218</sup> 1996 (10) BCLR 1253 (CC)

<sup>219</sup> Ibid. p 1299

<sup>220</sup> New Text (Final version) of the constitution of 1996.

regular reports to parliament concerning matters under their control. The legislature could also remove the President.<sup>221</sup>

In its concluding judgement the court submitted that the Constitutional provision VI required a separation of power between the executive, legislature and judiciary but did not prescribe what form that separation should take. The separation was so construed taking into account the country's constitutional history. Provision VI the court advised should not be read with technical rigidity. It was sufficiently wide to cover the type of separation envisioned by the New Text; the objection that the constitutional provision VI had not been complied with was thus accordingly rejected.

On other issues like the Bill of rights the complaint was that it did not enjoy full protection and entrenchment required by constitutional provision ii. The court held that the provision of the Bill of Rights were not satisfactory of the 'entrenchment clause' of the constitutional provision and thus non-compliance succeeded. The drafters were thus to rewrite the Bill of Rights in a manner that was not unamendable but required greater mechanism to be amended.<sup>222</sup>

On the question of constitutional amendment, two separate objections were raised. The first related to the procedures for the amendment of the New Text and the second the entrenchment of the Bill of Rights.<sup>223</sup> The court made a distinction between procedures and majorities involved in amendments to ordinary legislation on the one hand and to constitutional provision on the other. The reason for this is found in the manipulation of the former constitutions. It was to prevent this from recurring and thus make the foundational provisions less vulnerable to amendment as was the case in the past. The court found non-compliance.

## THE COUNTER-MAJORITARIAN DILEMMA

The power of the court to set aside legislation inconsistent with the constitution and executive action emerged from the judicial review of the United States in the *Marbury*

---

<sup>221</sup> Section 89

<sup>222</sup> Supra

<sup>223</sup> Supra

*v Madison Case*<sup>224</sup>. Where Marshall CJ reasoned that the constitution of the United States was the supreme law, congressional legislation in conflict with it must be declared invalid. The Supreme Court had implied jurisdiction to do that.

The counter-majoritarian dilemma is based on the premise that since the members of the judiciary are appointed not elected, their power to test and set aside legislation of a democratically elected legislature is politically highly contentious. The judiciary is not to usurp the powers of the legislature as this would amount to a violation of the separation of powers. There are limits in every system and clearly defined parameters where a non-elected judicial law making is applicable.<sup>225</sup>

In the two cases analysed below the concepts discussed above are situated and applied in the South African context. In *S v Makwanyane*<sup>226</sup> where the question of death penalty was rife and the public opinion was arguably in favour of the sentence. The Constitutional Court in its 'first politically significant and contentious judgement wrote

The reason for...vesting the power of judicial review of all legislation in the courts was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process.... It is only if there is willingness to protect the worst and weakest amongst us that all of us can be secured that our rights will be protected.<sup>227</sup>

The courts did not therefore 'substitute public opinion for the duty vested in them to interpret the constitution and uphold its provisions without fear or favour.'<sup>228</sup> It declared the death sentence unconstitutional.

Judicial review was the main subject in the Case of *Executive Council of the Western Cape Legislature v President of the Republic of South Africa*.<sup>229</sup> Here President Nelson Mandela acting on the powers granted him per Section 16(a)<sup>230</sup> amended the

---

<sup>224</sup> Devenish, *A Commentary on the South African Bill of Rights*, p5, 5 US (Cranch) 137 (1803)

<sup>225</sup> *Geelong Harbour Trust Commissioners v Gibbs Bright & Co* 1974(2) ALR 362 at 369

<sup>226</sup> 1995 3 SA 391 (CC), (1995) 6 BCLR 665

<sup>227</sup> *Ibid.* par 88

<sup>228</sup> *Ibid.*

<sup>229</sup> Devenish, *A Commentary on the South African Bill of Rights*, pp5-7

<sup>230</sup> Local Government Transition Act 209 of 1993

provisions of the principal Act by transferring the powers of the demarcation committees from provincial committees to provincial governments and limiting the power of local administrators. In the first hearing at the Cape High Court the claims that the amendment was unconstitutional was rejected.

In its carefully worded and judiciously reasoned judgement the Constitutional Court rejected the decision of the lower court and invalidated the President's proclamation and parliament's amendment of the said Act. The court declared that the amendments were unconstitutional and thus invalid. The President's reaction to this judgement was as landmark as the case itself when he declared "this is not the first time, nor the last, in which the Constitutional Court assists both the government and the society to ensure constitutionality and effective governance."<sup>231</sup>

These cases are the more significant because they are concerned with the Interim constitution. The mere fact that the Constitutional Court could act independently and take judgements based on the constitution indicated that South Africa had come a long way. This contrasted sharply with the attitude of the D. F. Malan to *Harris v Minister of Interior*.<sup>232</sup> The court had invalidated legislation by parliament that purported to amend the entrenched provisions. On the day the judgement in that case was delivered, Malan's government said the decision created a constitutional position that could not be accepted.

## CONCLUSION

In this first part of the work we have examined how a failure to provide for the separation of power helped to cripple nation building in South Africa. From Union to the 1990s, the concept of parliamentary sovereignty was used to support the notion that parliament could do as it wished. This made it possible for apartheid to emerge.

Parliament used its powers to exploit Blacks and enrich the Whites. This sowed racial hatred and division and led to conflict. It galvanised the century's most moving global

---

<sup>231</sup> Devenish, *A Commentary on the South African Bill of Rights* p 7

<sup>232</sup> 1952 2 SA 428(A)

and collective campaign for a better world.<sup>233</sup> Thus by its act parliament initiated the resistance and the nature of it. When law proved incapable more direct means were employed. Yet in the words of the African-American civil rights leader Martin Luther King Jr., “truth however, pressed to the earth shall rise again.”

The Interim constitution and eventually the constitution of 1996 were an acknowledgement of the wrongs of the past and defined the steps to help redress them through affirmative action<sup>234</sup> and the Bill of rights.<sup>235</sup> The Bill of rights guaranteed a new order in which the courts can protect the minorities. Now the separation of powers has laid the basis for nation building in the new South Africa.

University of Cape Town

---

<sup>233</sup> Kader, *Reconciliation through Truth*, p. 202

<sup>234</sup> Section 9(2) 1996 Constitution

## PART II

### CHAPTER IV

THE SEPRATION OF POWERS WITH REFERNCES TO NATION BUILDING IN CAMEROON.

#### HISTORICAL BACKGROUND

This section has been divided into four parts;

- A) Indigenous Cameroonian Framework
- B) German Administration of Kamerun
- C) Cameroon from Mandate to Trusteeship
- D) Cameroons under British Rule
- E) Cameroun under French authorities
- F) Independence and reunification

The maxim that “geography is the mother of history”<sup>236</sup> can be exemplified by the Cameroonian experience. Geographically Cameroon is neither in West nor in Central Africa, but wedged between the two regions. This strategic location has often been translated into the role it played in the two sub regions long before Western contact. From the dry shores of the lake Chad and the Sahara desert in the North through the dense equatorial forest and the Atlantic Ocean in the South, this diversity is reflected in the various peoples of Cameroon and has earned the country the appendix “*L’Afrique en Miniature*”.<sup>237</sup>

The question that concerns us here however, centres on constitutional law in the pre-western Cameroon. However, as demonstrated in the previous chapter on South Africa, the separation of power under the uncoded and unwritten African Indigenous law was premised on a different basis. A view confirmed by the judgement in *Bangindawo v Head of the Nyanda Regional Authority; Hlantlalala v Head of the*

---

<sup>235</sup> Chapter 2

<sup>236</sup> Ali Mazrui, “*Triple African Heritage*”. BBC, 1990

<sup>237</sup> Kofele Kale (ed.) *An African Experiment in Nation Building: The Bilingual Cameroon*, ( New York:

*Tembuland Regional Authority*<sup>238</sup>. The applicants in this case had contended that the constitutional requirement of impartiality and independence could not be guaranteed in the Regional courts. They argued that since the Chiefs sat or appointed their delegates to adjudicate on disputes and also sat in the regional councils making laws they could not be impartial and such courts could not be independent. The court held that the western view of the separation of power did not apply under the African order. There was a trust and reliance on the impartiality of the kings in the exercise of their judicial functions.<sup>239</sup> However, the court did not go further to explain how the African approach prevented arbitrary decisions through compromise and revolt.

The African approach was one of consensual decision-making, compromise and secession as last resort.<sup>240</sup> The different polities in Cameroon like the centralised Fondoms of the Grassfields and the acephalous forest peoples along the coast had this fundamental approach.<sup>241</sup> Thus the Nso', Bamoun, Bamileke and Bali Fondoms like the Zulus in South Africa with their centralised governments had the same principles for the limitation of arbitrary powers. In the same way the Bakweri of the coast, Douala and others of the forest like the stateless societies of Southern Africa (Xhosa) were much or less the same on these constitutional principles.<sup>242</sup>

In the Northern region of Cameroon, however, with the advent of Islam a new dynamic was thus added to the existing order.<sup>243</sup> Islamic law combined the administration of the state and religion. The religious leader was also the head of the state and his power was deemed to flow from Allah.<sup>244</sup> Thus the legislature, executive and judiciary could not pass any laws, commit any acts or give judgements on any issues that were contrary to the Qur'an and the Sunna. Any such was *ipso facto ultra vires*. Under Islamic law therefore although there was a distinction between the three spheres of government (*Ahl al Hal*-legislature, *Qada*-judiciary and executive '*Ulul 'Amr*) the tendency is that of co-ordination and not separation. The role of the courts

---

<sup>238</sup> (1998) 3 BCLR 314 (Tk)

<sup>239</sup> At 327D- F.

<sup>240</sup> George Ngwane, *Conflict Resolution*, p. 47

<sup>241</sup> Eyongetah and Brian, *A History of Cameroon*, (London: Longman 1990) p. 13

<sup>242</sup> It may be possible for there to have been variations on the application of these principles

<sup>243</sup> Mention may perhaps be made here of the differences in the Islamisation process of sub-Saharan Africa as opposed to the Maghreb. See Ali A. Mazrui, *Triple African Heritage*.

<sup>244</sup> Nicholas Heer, *Islamic law and Jurisprudence*, (London: Washington Press, 1999), p. 46

was primarily to enforce Divine law and conduct inconsistent with it from anyone including the government negated allegiance.<sup>245</sup> Islamic law is treated as part of Indigenous law today applicable in mostly the northern part of Cameroon that is predominantly Muslim.

### C) SEPARATION OF POWERS UNDER GERMAN COLONIAL ADMINISTRATION.

The colonial constitution that regulated Germany's possessions (including Kamerun) like the others by Britain and France had a concentration of powers in the Governor.<sup>246</sup> The Governor was the head of the colonial administration, but the Kaiser and the chancellor delegated his powers.<sup>247</sup> He could rule by decrees and for a large part like the English orders-in-council in South Africa had ultimate legislative powers. This system has prevailed to the present day president of the Republic. The decrees touched on the administration of justice and all other sectors. The governor commanded the *schutztruppe* and *polizeitruppe*, colonial troops and police respectively, whose duty was to quell revolt or rebellion against the colonial structure.<sup>248</sup>

The power to legislate rested on the governor although there was provision for the advisory council. It remained advisory to the governor (therefore its opinion was not binding) and was composed only of the colonialists. Its membership included the traders and missionaries within the colony.<sup>249</sup> The frequent appearance and disappearance of the advisory council showed just how unimportant it was considered by the German authorities. However, as the territory became greatly settled, the settlers agitated for more representation and power in decisions affecting them. A similar experience occurred under the move from responsible to representative government in South Africa.

---

<sup>245</sup> Syed Habibul, *Islamic legal Philosophy And the Qur'anic Origins of the Islamic law*, (Durban: University of Durbanville 1989), pp.141-188.

<sup>246</sup> Rubin Harry, *Germans in the Cameroons 1884-1944*, (Oxford: Alden Press, 1939) p. 178 ff.

<sup>247</sup> Ibid.

<sup>248</sup> Ibid. p 193

<sup>249</sup> Ibid. p187

The Reichstag was very reserved towards this trend and identified in it a threat towards self-government. In 1904 however, legislation was passed creating mandatory councils with official and non-official members.<sup>250</sup> But as in South Africa the membership was all white. Despite growing agitation for more powers in decision-making by the councils, the Reichstag was adamant and instead recommended that those representatives from Kamerun be allowed in the Reichstag. While the Africans who paid taxes were not represented or were their opinion taken into consideration.

The courts that operated in Cameroon posed some very interesting questions that permeate the present judicial system. The earliest court established in the territory was the court of equity by the British.<sup>251</sup> It regulated disputes between the Africans and the settlers. English and German traders sat as members of the court. The German traders looked towards this court with antagonism, as they feared that it threatened their security and interests in the territory. The Germans abolished this court in 1885 during the insurrection by the Doualas, which they interpreted as a British incitement to rouse anti-German sentiments.

The Germans operated a different system of courts. The court created by the German Governor Soden had two lay assistants and the governor himself. Membership was for a year only.<sup>252</sup> It settled disputes between Europeans and was a court of Appeal for cases arising between Africans and Europeans. A chancellor was appointed by the governor to assist in the discharge of his judicial function. A court of second instance for whites (*Obergericht*) was created with appellate jurisdiction for disputes from Togo.<sup>253</sup> It was the court of final appeal in the colony although subsequently there was a demand for the final appeal court to be established in Germany with a trained staff. This highlights the fact once again that the colonialist in Africa saw the separation of power as vital in regulating relationships between them but not worthy of the Africans.

---

<sup>250</sup> Ibid. p 189

<sup>251</sup> Ibid., p198

<sup>252</sup> Ibid. P.199.

<sup>253</sup> Which was also a German colony

The next issue concerned the applicable law. There was by this time a great hostility towards the policies of the colonialists. It was later decided that the colonial constitution provided for German law in criminal and civil cases. However, as far as possible African law was used to regulate the disputes *inter se*. But on matters pertaining to misdemeanours, incitement to rebel and insurgency German law applied. Under this law a handful of Kamerunians who challenged the system were hanged and some chiefs de-stooled.<sup>254</sup>

The observation from the German separation of power in colonial Kamerun inadvertently points to human rights abuses and violations. During the thirty years of their rule there were six governors amongst whom Leist was tried and dismissed by the Chamber of Potsdam.<sup>255</sup> Leist was dismissed because of the human rights atrocities he propagated. The number of insurrections against the Germans increased all over Kamerun despite the increases in budget for policing it did not help. Just like the increased use of force and legislative back up did not suppress the resistance to apartheid. The rebellion against the Germans went alongside the appeal by the Doualas to the Reischtag against the expropriation of their lands. Although the constitution did not allow it. There was even a plan to appeal to the Queen of England!<sup>256</sup>

#### D) SEPARATION OF POWERS UNDER THE MANDATE AND TRUSTEESHIP RULE

Article 9<sup>257</sup> required the Germans to forfeit all her colonial possessions. Kamerun being amongst them was thus forfeited and partitioned according to the Milner-Simon agreement between the English and the French. Although she was in no way responsible for the war and by partitioning the territory they ignored the role-played by the indigenous soldiers to liberate the territory. The French took three quarter of the territory while the British took the rest. Kamerun therefore became a mandate of

<sup>254</sup> Chief Douala Manga Bell, Rudolph and others.

<sup>255</sup> Eyongetah, *A History of Cameroon*, p 90

<sup>256</sup> *Ibid.*, p. 206.

<sup>257</sup> Treaty of Versailles 1919.

and balances, the country was subject to arbitrary rule. Much of which Cameroon experienced as her pleas were often disregarded.

#### D (I) THE UN CHARTER

The importance of World War II to the colonised peoples came to Cameroon through clause III<sup>261</sup> that assured “the right of all people to choose the form of government under which they live.” The territory further experienced a change of status from a mandate to a UN trusteeship. This meant that there would be an international supervision of the territory in accordance with the Charter to promote political, economic, social and educational advancement of the people of the territory. It also enjoined the administering authority to prepare the inhabitants of the territory towards self-government and/or independence. A provision that would be critically analysed under the French administration.

The effectiveness of the UN supervisory role of the UN to curb arbitrariness by the administering power in the colonies is today highly debatable. While it certainly did impose pressures on the British and French in Cameroon towards providing annual reports and on the spot investigations. In fact from 1949-1958 the Cameroons had four visiting missions to find out if the British and French (trustees) were performing their responsibilities. This at least provided the British Cameroons that was in a disadvantaged position in Nigerian politics to receive some attention for the first time and to say things that they could not say in the Nigerian parliament in Lagos. Some of such issues raised by the Cameroons was the expropriation of land problem by the Bakweri<sup>262</sup>, the restriction of freedom of movement to the French Cameroon, the creation of a separate house of Assembly for British Cameroons and compulsory instruction in schools of English and French.<sup>263</sup> The UN supervised the plebiscite that was held in British Cameroons.

---

<sup>261</sup> UN Charter (1947)Chapter III

<sup>262</sup> This dates as far back to the German era.

## D (ii) THE RICHARDS CONSTITUTION

World War II played no small role in the granting of the new constitution in 1947. The constitution widened the membership of the legislative council from thirty to forty-four, with four elected members and the rest nominated. The most important contribution by this constitution was the creation of regional councils.<sup>264</sup> These regional houses were later to play advisory roles and serve as the nexus between the Native Authorities and the legislative Councils. The provisions of the order in council was applicable here in governing the advice by resolution on any matters referred to them by the governor or introduced by a member. For Nigeria the inclusion of the northern region was its most enduring legacy in fostering unity.<sup>265</sup>

However, since the Cameroon had no regional government but a resident its two delegates were represented in the eastern House. Wherein there was a president (chief commissioner), thirteen official members, fifteen unofficial members from the provinces with about ten nominated by the Native Authorities and five by the Governor from interest groups.<sup>266</sup> These nominated officials were in office according to the whims and pleasures of the governor. The legislative council also incorporated these changes by taking chiefs from each of the houses. The greatest contribution of this constitution to the Cameroons and Nigeria was the incorporation of the British indirect rule system into the constitutional structure of both countries.

For the Cameroons its demerits exceeded its merits. It was not representative of the territory and took Cameroons one step backward as the country lost its representative at the centre. It also fell short of creating a responsible assembly as the nominated officials were directly answerable to the governor and not to the people. The public was not consulted and thus felt estranged. At the bottom line the Executive council remained wholly European. These shortcomings besides the absence of a separation of power led the National Council of Cameroons and Nigeria (NCNC) to embark on an itinerary to London with their bags full of protests.

---

<sup>263</sup> Eyongetah, *A History of the Cameroons*, p.121

<sup>264</sup> *Ibid.*, p. 123

<sup>265</sup> Nwabuzue B., *Constitutionalism in the Emergent States*, (London: Hurst & co., 1973) pp. 81-128.

<sup>266</sup> *Ibid.*, p. 85

The Kale memorandum contained grievances from Cameroon. Those that concern the thesis statement included the excess powers of the governor. Being the sole judge of what was 'native' law and custom and in the event of any dispute the governor had power to depose chiefs, which was an interference with the traditional laws and custom of the people."<sup>267</sup> A similar provision existed under the governor in South Africa, and it becomes difficult to understand how someone who had little or no understanding of the language and lore of the other would be a sole judge. The excessive power of the governor to restrict press freedom, right of workers to strike, usurped judicial power by imposing fines and imprisonment. The powers to restrict freedom of movement within and outside Nigeria and to prohibit freedom of worship if he solely considered it a breach of peace.<sup>268</sup>

#### **D (iii) THE MACPHERSON CONSTITUTION**

The Macpherson constitution introduced two most significant developments in the constitutional history of British Cameroons. Firstly the process of consultation involved in the making of the constitution and secondly the impact of the constitutional crises that resulted therefrom. The Macpherson constitution did not come up after the completion of the nine-year term of the Richards constitution due to the protests and the impact of British internal affairs on the colonies.<sup>269</sup>

The pre-constitution consultation initiated by the newly appointed labour governor was in a bid to redress one of the principal defects of the Richards constitution. Discussions and debates on constitutional issues were organised from village council levels through divisional to provincial and regional and finally to the constitutional conference at Ibadan. After going through all the stages applicable to it the Cameroons had their highest meeting in Mamfe in 1948.

Two observations are discernible from their submissions. One was the desire for separate regional status for the trusteeship. This was a very popular view in the

---

<sup>267</sup> Eyongetah, *A History of the Cameroons*, p.126

<sup>268</sup> Nwabuzue, *Constitutionalism in Emergent States*, p. 61

<sup>269</sup> The labour party had just won the elections in Britain.

Cameroons and various steps were taken to realise it. Amongst which was the resolution adopted by the Cameroons provincial council.<sup>270</sup> While within Nigeria itself various Cameroon groups and organisations combined in 1949 to petition the Governor general for a separate house answerable to the commissioner who would then be responsible to the trusteeship council. They also requested above all for a separate region to be administered separately from Nigeria.

This raises the question why the constant quests for separation from Nigeria. From a constitutional perspective, the British Cameroons was always in an ambivalent position. Under international law they were not a colony *per se* but a trusteeship. However, Britain treated and administered her as a colony. This contrast between the *de facto* nature of administration of the country and her *de jure* status placed her in a backward position *vis à vis* development in Nigeria.<sup>271</sup> A situation confirmed and aggravated by the Richards' constitution elimination of Cameroon's representation at the centre. Thus the Cameroons being described as a "colony within a colony."

The other reason centred in the huge Nigerian presence in Cameroon. Nigerians filled most of the top civil positions in the country. This was more so because of the absence of a post-primary institute of learning for Cameroonians right up to 1939. The shortage of Cameroonian labour and trained personnel was partly also due to the dragged leg policy of the Nigerian authorities towards opening a college in Cameroon to redress this imbalance. Which in Nigeria was economically advantageous, but politically and constitutionally expensive to Cameroon.<sup>272</sup> This poor treatment of Cameroonians by Nigerians and the backward development of the territory are well expunged by S.A. George<sup>273</sup>:

The territory was not looked after and essential administrative services were maintained on a skeletal basis for twenty-eight years. The Cameroons was subject to merciless exploitation while its inhabitants lived merely as plantation slaves.... Provision of social services were unknown and unheard of

---

<sup>270</sup> Eyongetah, *A History of the Cameroons*, p. 128, This council had twenty-seven chiefs, six administrative officers and thirty combined

<sup>271</sup> A.H. Asa'na, "The Contribution of Religion to Educational development in Africa: The case of Cameroon" Unpublished Honours dissertation in the University of Buea, Cameroon, p. 12

<sup>272</sup> Ibid.

<sup>273</sup> Cameroons representative in Lagos to the house

in the Cameroons. There was no link with Nigeria, for fear that Germans might ultimately take back full political control of the territory.

In British Northern Cameroons the constitutional conference advocated for the termination of the trusteeship for the territory and for complete administration as part of Nigeria. However, because Northern Cameroons had just two delegates the Nigerian majority swallowed their view. It must be noted here that they had expressed the desire in favour of the continuation of the trusteeship.<sup>274</sup> Unfortunately they were effectively ousted from future constitutional conferences.

This policy by the Nigerians to defeat legitimate Cameroonian concerns also repeated itself finally in the General constitutional conference at Ibadan in 1950. Despite the eloquent and vivid declaration by the Cameroon delegates that they wanted a separate region their views were rejected. Instead the Nigerians argued that since British Northern and Southern Cameroons could not be administered collectively and the two entities were not economically viable (an unfounded view)<sup>275</sup> to stand on their own, they should be administered alongside Nigeria. So rather than granting the demand of the people they went ahead to provide what they judged was best – more representation.

In the Eastern House, British Cameroons would have thirteen out of the eighty members with a senior regional officer who had no vote. In the House of representatives two members were chosen from the eastern region who were delegates from the province of Cameroons. Then one of the ministerial positions accorded to the east would go to Cameroons.

Comparatively speaking this constitution was more liberal than its predecessors were. It provided a crisis situation that was more beneficial to Cameroon than any of the consultations had been. The crisis in the eastern house centred on two opposing camps, one calling for the outright rejection of the constitution and the other for giving it a fair trial. Although the Cameroonian delegates had opted for a 'benevolent neutrality' in the affairs of Nigeria, they were nevertheless affected. A motion for the

---

<sup>274</sup> Eyongetah, *A History of the Cameroons*, p.129

<sup>275</sup> See the Phillipson Report

reinstatement of one of her delegates into the eastern cabinet was rejected by a vote of 45 to 32.<sup>276</sup> This again highlighted the frequent despair and disadvantageous position of British Cameroons as a minority within Nigeria.

The Cameroons delegate exploited the situation and decided to boycott future elections to the Eastern House. They thus pressed and drove home their demand for a separate region and a separate house. This recurrent but dreadful reminder of their minority status in Nigeria played an important role in her constitutional politics. Just as it drove her away from integration with Nigeria, so too it influenced her negotiation of reunification with French Cameroun. This fear of being in a disadvantageous minority position *ad infinitum* became real.

#### D (iv) THE LYTTTELTON CONSTITUTION

After the constitutional crises created by the Macpherson constitution subsequent constitutional conferences held in London and Lagos added momentum for a separate region for Cameroons. However, the Lyttelton constitution rested on the multi-party bases for British Cameroons and the establishment of a quasi-federal status for the South while the North made a *volte face* decision to stay as part of Nigeria.<sup>277</sup>

The consolidation of a multi-party election as the base of the Southern Cameroons separate status was seen in the general election on the issue. There were basically two political parties, the kamerun Peoples Party (KPP) and the Kamerun National Congress (KNC). The KNC campaigned for secession from Nigeria and ultimate reunification with French Cameroon. The KPP on the other hand capitalised that independence for Southern Cameroons would not be an economically viable idea and so the best option would be for integration with Nigeria. To confirm that Cameroonians were really dissatisfied with the treatment they received from Nigeria, the KNC won twelve of the thirteen seats in the eastern regional House.<sup>278</sup> The option for secession from Nigeria had thus been successfully tested and Southern Cameroons

---

<sup>276</sup> Ibid., p.134

<sup>277</sup> Ibid.

<sup>278</sup> Ngoh, *A Hundred years*, p. 250

was thus declared separated from the eastern region, but remained a federal part of Nigeria.

The quasi-federal status relied on the fact that the federal legislature and executive maintained their jurisdiction on certain issues like finance and foreign affairs.<sup>279</sup> Legislation still required assent by the governor to be valid.<sup>280</sup> However, provision was made for a separate house of assembly, three ex-officio members, and two nominees to represent special interests, six Native Authority representatives, thirteen elected members and a commissioner who acted as president.<sup>281</sup>

The legislature had concurrent jurisdiction on certain issues with the federal authorities while for the residual matters she had complete authority to legislate. The executive council consisted of four official and four unofficial members and the commissioner. It elected six members to the Nigerian federal legislature.<sup>282</sup>

The weaknesses of this constitution centred on the absence of certain pillars of a federal government and much dependence on the central authorities. This included; for a legislation to become law; it needed the assent of the governor-general. There was also the absence of the federal nomenclature. The constitution talked of a leader of the government business, instead of a premier. The public service for Cameroons operated from Lagos.<sup>283</sup>

However, the 1957 resolution granted full regional status to Cameroon. A bi-cameral legislature was created. The commissioner was removed as a member of the executive council, which experienced a majority. Thus as the independence of Nigeria drew nigh Cameroons it was agreed was under no obligation to remain as part of Nigeria. However, the federal government also made certain constitutional grants to subsidise the Cameroons government. However, the UN was to fulfil its obligation for the British Northern and Southern Cameroons to decide in a plebiscite whether to stay as part of Nigeria or reunify with French Cameroun.

---

<sup>279</sup> Nwabuzue, *Constitutionalism In Emergent States*, p. 60

<sup>280</sup> Lyttelton Constitution

<sup>281</sup> Ibid.

<sup>282</sup> Ibid.

## F) SEPARATION OF POWER UNDER THE FRENCH ADMINISTRATION.

Article 22<sup>284</sup>, which placed Cameroon as “inhabited by peoples not yet able to stand by themselves under the strenuous condition of modern world”, failed to provide expressly a set goal of self-government for Cameroon. This meant that the French were under no obligation or commitment to prepare Cameroon for self-rule. Thus French administration during the mandate can be better understood through the Old French policies of assimilation and paternalism rather than association. This policy of creating ‘black Frenchmen’ (*evolue*) seems to be the most far-reaching legacy.

Cameroon was ruled by the constitution applicable to Senegal.<sup>285</sup> Under which the head of the territory was a commissioner with the status of a governor, responsible to the minister of colonies in Paris. He was assisted by *chefs de circonscription* or heads of administrative units into which the territory had been divided. Below this level was the chef de sub division a system that still prevails today in the administrative set up of Cameroon. In some areas chiefs were used as intermediaries not because of regard for the African institution nor a desire to preserve it, but for the French to use it for their own purposes thus making them unpopular amongst their own people.<sup>286</sup>

The legislative framework created a council of notables whose membership reflected tribal and economic interests. However, their responsibility was more to inform the French administration of the African opinion than to explain administrative policies and decisions to these Africans. In the governor’s *conseil d’administration* (administrative cabinet) which had four notables after 1927, the Africans occupied subordinate positions that it is obvious it was not African reflective at all. In actual fact the governor was above the council and could not be brought to book.

---

<sup>283</sup> Ibid.

<sup>284</sup> Covenant of the League of Nations

<sup>285</sup> Gardinier David, *Cameroons: UN Challenge to French policy*, (London: Oxford Press, 1963) p. 57

<sup>286</sup> Ibid., p.48

Thus the French policy of paternalism as practised in Cameroon gave Cameroonians neither the right nor the protection of the French code.<sup>287</sup> Like elsewhere in France *d'outre mer*, the Africans were subjected to the 'customary law' as administered by the French *chefs de sub division*. This clearly changed the law to something else and thus provoking the current conflict between the written version and the original version of African law.<sup>288</sup>

Two key approaches defined the French administration. The *indigenat* and *prestation*. Under the former Africans were deprived of all basic rights like freedom of movement, association, free speech. And like in South Africans the governor reserved the right to inflict penalties on a wide range of 'minor offences'. This was an arbitrary system that led to abuses and was the basis for the Brazzaville conference that took the struggle a step ahead.

*Prestation* translated the above concept into the economic sphere.<sup>289</sup> It was a system of forced labour whereby all males were required to supply government with a ten-day free labour.<sup>290</sup> Afterwards they might be paid a minimal wage. This was similar to the German labour tax policy.<sup>291</sup> Many sources have admitted that despite its human rights weaknesses the French government achieved more in Cameroon than the British.<sup>292</sup> Yet the two colonial powers were both hesitant to engage in developments for the territory both constitutionally and economically.

The relevance of these policies to the current constitutional order lies in the inability of today's leaders to adopt the borrowed concepts to the realities of their countries.<sup>293</sup> The policy of paternalism for example created Africans who saw the French system as the best. Today French laws are borrowed indiscriminately.<sup>294</sup> The economic and social policies are heavily depended on France with the absence of the African. So

---

<sup>287</sup> Ibid., p.16

<sup>288</sup> Butterworths, *Bill of Rights Compendium*, (Durban: Butterworths Publishers, 1999) par 6A1-6A2

<sup>289</sup> Mann Kristin, Roberts R.,(eds.), *Law In Colonial Africa*, (London: James Currey, 1990) p. 31

<sup>290</sup> Ngoh, *A Hundred Years of Cameroon*, p.189

<sup>291</sup> Eyongetah, *A History of the Cameroons*, p. 117

<sup>292</sup> Gardinier and Eyongetah amongst others.

<sup>293</sup> Kahn Freund, O., "On Uses And Misuses of Comparative Law", (1974) 37 *Modern law Review* p.1

<sup>294</sup> Watson A., "Legal Transplant and Law Reform", (1976) *Law Quarterly Review* p. 79,

"Comparative Law and Legal Change", (1978) *Cambridge Law*, p.38

part of the current constitutional crises in the continent is visibly from the mindset that was created by the colonial policies.

### **E (I) POWER SEPARATION IN THE TRUSTEESHIP UNDER FRENCH ADMINISTRATION**

The purport and object of the Trusteeship was stated in vague and ambiguous terms.<sup>295</sup> Article 76<sup>296</sup> stated the purposes thus:

To promote the political, economical (*sic*), social and educational advancement of the inhabitants of the trust territories and their progressive development towards self government or independence as may be appropriate to the circumstances of each territory and its people and the freely expressed wishes of the people concerned, and as may be provided by the terms of each trusteeship agreement.

However, the Charter failed to establish a criterion for determining which of the objectives self government or independence would be most appropriate for the territory. The Charter also failed to specify whether 'the particular circumstances or the freely expressed wishes of the people concerned' took precedence.<sup>297</sup> This had a particular bearing on Cameroon.

To further complicate the ambiguity the French text did not reflect the same thing like the English. In the French text the phrase 'towards self-government or independence' read '*vers la capacite a s'administrer eux-memes ou l'indépendance*'. Self-administration and self-government are not one and the same concepts. While the former is latent with experiences of the French, self-government on the other hand reflects the Anglo-Saxon experience<sup>298</sup>, which implies a status of something less than complete independence. The former suggests the power of a local administrative unit within a centralised unitary state, which merely implement policies defined by the central institution.<sup>299</sup>

---

<sup>295</sup> Gardinier, *UN Challenge to French Policy*, p.6

<sup>296</sup> Official English Text of the UN Charter

<sup>297</sup> Gardinier, *UN Challenge to French policy*, pp 6-10

<sup>298</sup> *Ibid.*, p7

<sup>299</sup> *Ibid.*

Since the two versions of the charter had equal legal validity the question of interpretation became problematic. Particularly when the administering authority did not select independence as the most appropriate goal for a territory. This is where the question of the third option for Southern Cameroons comes in. Following the above argument it may be difficult to put the British in the dock for not asking British Cameroons if they wanted independence. France too exploited the situation firstly by ruling out the possibility of eventual self-government or independence for French overseas. Thus self-administration and not self-government was the goal towards which France decided to direct its African territories. Cameroon fell under this category despite being a trusteeship.

However, international pressures on the French to place Cameroons and Togo on the trust status did help out. In its final draft of the French Constitution<sup>300</sup> the government refrained from expressly making the mandates juridically part of the French republic.<sup>301</sup> Yet it left a leeway that was subsequently exploited for a *de facto* incorporation of the Trusts into the Republic by decrees and laws. Cameroon thus had the status of an associated territory of the Union under French domestic law.

Taken altogether, the various measures amounted to a *de facto* incorporation of Cameroon into the Republic. The consequence being France ruled out the possibilities of administering her towards self-government or independence. Metropolitan France remained dominant. A dominance that survives today. The subsequent policies of preparing for independence it could be said came a little too late for an adjustment that would create self-reliance as opposed to reliance on France. The Brazzaville conferences of 1944-1946 confirmed that and hold the answer for the current aversion towards the concept of federalism in Francophone African with particular reference to Cameroon.<sup>302</sup>

Perhaps it may be relevant here to highlight developments on the way to independence as a confirmation of the inadequacies of the later policy shift by the

---

<sup>300</sup> Fourth Republic constitution

<sup>301</sup> Gardinier, *UN Challenge to French Policy*, p. 9

<sup>302</sup> Federalism is considered heretic (as in the years of the French revolution with the Girondins)

French. The Lamine Gueye law<sup>303</sup> made the inhabitants of French overseas territories citizens of France and granted them many of the same rights as French men. However, the formalities involved in qualifying for these made very few Africans to apply.<sup>304</sup> The fundamental right of franchise was never fully realised by the majority.<sup>305</sup> A latter law made French criminal law applicable to all Africans.<sup>306</sup>

The national Assembly had over 600 deputies from all overseas territories with *Afrique noire* together with associated territories sending only 26 deputies. One third of the seats were reserved for French residents. Under the double Electoral College the Europeans and the few *evolues* sat in the first house, while the masses sat in the second. In Cameroon, 4000 French chose 16 representatives while 3 million Africans chose twenty-four. The power of the Assembly was advisory.<sup>307</sup>

Evidence from here is the fact that the Africans were not given enough exposure and opportunity to do it for themselves. Dependence was always at the bottom line.<sup>308</sup> The UN executed its responsibilities with characteristic half-heartedness thus supporting the view of the colonialists. However, there was a counter influence that came from the nationalists in their struggle for independence.

## G) THE QUESTION OF REUNIFICATION

The importance of this section is from the thesis statement that inadequate separation of power gave rise to arbitrariness. The drive towards reunification can be examined through this perspective. Which reveals that the lack of checks and balances in the colonial administration created conflicts in Cameroon that tended to bring the respective spheres together to kick out the colonialists. A similar finding under the bantustan policies which instead of separating south Africans brought the people from a broad spectrum to fight out apartheid.

---

<sup>303</sup> Of 7<sup>th</sup> May 1946

<sup>304</sup> Gardinier, *UN Challenge to French Policy*, p 19

<sup>305</sup> *Ibid.*, p20

<sup>306</sup> *Ibid.*

<sup>307</sup> *Ibid.*, p 31

<sup>308</sup> C. Ogwurike, *Concept of law In English Speaking Africa*, (Lagos: NOK, N.D.) p.181

It was thus by no coincidence that one of the earliest voices of reunification that came from British Cameroon were raised by people from French Cameroon who had fled the system of prestation to seek refuge in the South. Their call for reunification was made through the Cameroons Welfare Union.<sup>309</sup> Just like the British Cameroons felt sidelined by the ambivalent status the British gave her in Nigeria. A status that saw her as a minority in constant abuse. These collectively brought them together under reunification.

On the other hand resistance to these French policies created a lot of tension and violence. Just like Jeucafra (Jeunese Camerounaises Francaise) was created by the French to combat the rising call of the Germans for a return of her former colonies, the pressure group later on turned on the French themselves. They asked for the transfer of the administration of justice to the magistrates, the Africanisation of the administration, election of regional councils and the creation of territorial assemblies endowed with legislative powers. Rassemblement Camerounais (Racam) went a step further to call for the independence of Cameroon conforming to the UN Charter. Which objectively speaking Article 4 did not seem to make allowance for. The French reaction was 'simply judged undesirable the same year by the administration, it was purely and simply banned without other form of action'.<sup>310</sup>

*Union des Populations du Cameroun* (UPC) that was the successor of Racam and major player in opposing French policies got registered before it elaborated on its programme. A manifesto that contained amongst others, the suppression of artificial boundaries created in 1916 between the two Cameroons, abandonment by France of its policy of assimilation (that is the negation of article 4) and the fixing of a time limit for trusteeship after which independence.<sup>311</sup> The UPC had its strength amongst a wide populace especially amongst workers. With such an agenda it was bound to come to come into conflict with the French.

The UPC worked alongside the various African traditional institutions to oust the French in Cameroon. They operated with the help of the "Ngondo" or traditional

---

<sup>309</sup> Ibid., p. 59

<sup>310</sup> Gardinier, *UN Challenge to French Policy*, p. 44

Assembly of the Douala people who had been formed to defend and safeguard their interest. The “Kumsze” of the Bamileke was another traditional institution that worked with the UPC. The Kumsze supported the notion of reunification and played to the achievement.

The French reaction ranged from calling the UPC communists to the transfer of key UPC members to remote areas where their impact to the local population would be negligible (a strategy currently used by the government towards the opposition). The French also created political parties to rival and discredit the UPC. One of such parties was the *Evolution Sociale Camerounaise* (Esocam).<sup>312</sup> This policy was similar to the one adopted by the apartheid regime to support the IFP and use her to create violence amongst the blacks especially the supporters of ANC.

The greatest set back the French employed against the UPC was electoral manipulation and fraud. Fear of its rising popularity and the prospects that the UPC would win the majority seats in the territorial assembly the French resorted to stuffing the ballot boxes and other unlawful electoral practices.<sup>313</sup> This and the subsequent outlawing of the party made them to take to the bush and embark on guerrilla warfare.

As the fight for independence gained momentum the French passed the Loi Cadre<sup>314</sup> for overseas territory. Developments in Indo-China and North Africa had broken the myth of France overseas. Loi Cadre was an Enabling Act that authorised government to assume legislative tasks ordinarily undertaken by the by the committees of the Assembly.<sup>315</sup> The law sped up administrative reforms for independence and economic processes, as well as the extension of the universal suffrage, establishment of a single electoral roll. By increased agitation the national assembly added article 9 for Cameroon which empowered the government to draft separate decrees for the trust territories – similar to the quasi-federal status in Southern Cameroons. The UPC

---

<sup>311</sup> Ibid.

<sup>312</sup> Ibid.

<sup>313</sup> Ibid.

<sup>314</sup> Loi Cadre 23 of June 1956

<sup>315</sup> Gardinier, *UN Challenge to French Policy*, p.77

challenged the Loi Cadre on the basis that the reforms were inadequate and demanded for an amnesty for the revolts and for fresh elections.<sup>316</sup>

As independence drew nigh the French transferred power<sup>317</sup> to the new premier of Cameroun Ahmadou Ahidjo while the international tension was growing. Kwame Nkrumah and Sekou Toure issued a joint declaration offering their aid in 'the national reconciliation of the population of Cameroon and the establishment of a truly representative and democratic government before the accession of the country' to independence.<sup>318</sup> They called for the abrogation of the decree dissolving the UPC; the unconditional amnesty for condemned politicians. When Ahidjo failed to be influenced by these appeals they decided to allow the use of their territories as bases for smuggling soviet-bloc weapons and supplies to the maquisards in Cameroon. With the intent to undermine the Ahidjo regime. An attempt that made Ahidjo to call in the French to suppress it, as it put a cloud on the Independence Day celebration of French Cameroon January 1<sup>st</sup> 1960.

While in British Cameroons the UN conducted a plebiscite on February 11<sup>th</sup> 1961. Two questions were put before the population, whether they would like to gain independence by integration with Nigeria or by reunification with La Republique (as the French part called itself). Although the League had given the territory to Britain as a single entity the results were counted separately in the two portions of the Cameroons which raises the undemocratic role the British played in influencing the outcome.<sup>319</sup> Thus British Northern Cameroons voted in favour of integration while Southern Cameroons voted for reunification.

## CONCLUSION

This background has exposed the tensions that were borne out of the imposition of these foreign concepts. How the absence of a deliberate balance or separation of power led to abuses by the various colonial administrations. The position of the UN as

---

<sup>316</sup> Ngoh, *A Hundred Years*, p. 367

<sup>317</sup> By Statute no 45 of January 1, 1959

<sup>318</sup> Gardinier, *UN Challenge to French Policy*, p. 91

<sup>319</sup> Ngoh, *A Hundred Years*, p. 391

a major player and the status of the territory as a trust under international law did not at all times operate to the benefit of the people. In fact it rarely did. As a result the subjugated people under the English and French came together to send away their colonisers.

But as has been investigated the policies implemented by these powers have far reaching consequences. One of which has been the borrowing of concepts from the West<sup>320</sup>. After having been a minority under Nigeria and the birth of a new culture with the British would the Southern Cameroons have her identity guaranteed under the Union? Is the question the next chapters seek to answer under the constitutional paradigm. What methods were employed by French Cameroun by virtue of their majority status within the Union to guarantee the birth of a Cameroonian identity without neglecting the minority as has been the experience in Nigeria.

---

<sup>320</sup> Mann, Kristin, Roberts Richards, *Law In Colonial Africa*, (London: James Currey 1990) p134

## CHAPTER V

### THE FEDERAL CONSTITUTION OF 1961<sup>321</sup> AND THE SEPARATION OF POWERS.

#### BACKGROUND TO THE MAKING OF THE CONSTITUTION

The current Anglophone problem in Cameroon makes an investigation into the making of the 1961 constitution imperative. This is more so because, the making and violation of this constitution occupies a central place in this crisis.<sup>322</sup>

The constitution that *La Republique* (French Cameroon) had when it gained independence 1961 was drafted by a consultative Committee<sup>323</sup>. Ideally the membership of such a committee charged with the drawing up of the first draft constitution of the nation should reflect the character of the society to be governed. But just like in South Africa, where the Blacks were excluded from all constitutional making before 1994, so too was the UPC denied political participation in the constitutional deliberation.<sup>324</sup> By thus denying political participation to the UPC 'a very large part of national political opinion was eliminated from the constitutional process.' This refusal was based on the manifesto of the UPC that stated in clear terms that they would take an independent Cameroon polity out of the 'French Community and make sure that the French business and entrepreneurial interests did not dominate political economy in the post independent society.'<sup>325</sup>

The French ban on the UPC gave them the leeway to dominate the constitutional process and thus manipulate the transition to insure its domination of the postcolonial political economy in Cameroon.<sup>326</sup> This legacy of excluding relevant public opinion from constitutional making survives in present day Cameroon.

---

<sup>321</sup> Promulgated September 1<sup>st</sup>, 1961.

<sup>322</sup> Piet Konnings & Francis Nyamnjoh, "The Anglophone Problem in Cameroon." Pp.201-221. In *Journal of Modern African Studies*, 1997.

<sup>323</sup> Created by Decree No 59-56 of October 31, 1959.

<sup>324</sup> Mukum John, "Effective Constitutional Discourse." in Udo Okeke (Ed), *Democracy and Democratisation In Africa*, (Leiden: J. Brill, 1997). Pp. 38-50.

<sup>325</sup> Ibid., p. 43

<sup>326</sup> Ibid.

The constitution that was thus drawn up was modelled closely to that of the Fifth French Republic.<sup>327</sup> This constitution was therefore far from being a social contract between the representatives of the country and the relevant groups. As a result up to ten of the twenty-one designated political jurisdictions in the new country rejected the constitution.<sup>328</sup> That is 531,000 votes against ratification as opposed to 797,489 in favour of adoption.<sup>329</sup> This document established a unitary state with a strong central government and despite disparities between Cameroon and France its institutional provisions were remarkably similar to those of the fifth Republic. Despite all the amendments and new constitutions its worth noting how similar the centralisation of power has penetrated to the present day constitution of the country.

There is a view that the French Cameroon simply adopted the aforesaid constitution primarily because they were interested in gaining independence from the French.<sup>330</sup> The high per cent of votes cast against this constitution raised serious doubts on its legitimacy and its subsequent use as a basis for the negotiation of reunification. The people had hoped that after independence the Ahidjo regime would settle down for a constitution that had all the relevant checks and balances. This was an underestimation of Ahidjo and too much good faith on the part of the people as Ahidjo stood to benefit from the centralised and domineering executive powers.<sup>331</sup> Just like the French had favoured the BDC over the UPC in the elections so too would Ahidjo favour French interests over those of his people. Ahidjo made no attempt to start a constitutional debate and with French aid he continued efforts to totally eliminate the UPC from the political scene.<sup>332</sup>

---

<sup>327</sup> Richard Joseph (Ed), *Gaullist Africa: Cameroon Under Ahmadou Ahidjo* (Malta: Fourth Dimension Publishers, 1978).

<sup>328</sup> Mukum John, "Effective Constitutional Discourse," p. 44

<sup>329</sup> Ibid.

<sup>330</sup> Ibid., p.44, Enonchong A., *Cameroon Constitutional law: Federalism in a mixed Common law and Civil law System* (Yaounde: CEPMAL, 1967), p. 80

<sup>331</sup> Mukum, "Effective Constitutional Discourse," p. 44. This was also visible in his leadership style of the country from independence.

<sup>332</sup> Ibid., p45

This constitution occupies the same place like the 1909 constitution of South Africa. It was simply given different dress codes over the years. This confirms the theory later in this research, that the Federal structure constituted an unwelcome interference with the centralised power, Ahidjo had always favoured. And that is why he engaged in all sort of manoeuvres to accentuate the demise of federalism. However, just like the Ahidjo regime (as first government of Cameroon) lacked popular legitimacy because of the exclusion of the most popular nationalist party, the UPC, in the elections so too was this constitution. This may be comparable to excluding the ANC from the constitution drafting committee in South Africa at the collapse of apartheid or any other Nationalist party at Independence.

#### THE FOUMBAN CONFERENCE AND THE OUTCOME OF THE FEDERAL CONSTITUTION.

The British Cameroons decision in 1961 to reunify with *la Republique*, provided Cameroonians with a second chance to redraft a consensual constitution. Reunification thus provided them with an opportunity to engage in the kind of political constitutional discourse that had eluded them earlier. However, the view of the two territories on the nature of the union was different.<sup>333</sup> Southern Cameroons believed that the federation would be a loose voluntary association between political equals with each retaining significant level of both political and economic autonomy.<sup>334</sup> Unfortunately several constraints were to make the formation of such an arrangement virtually impossible.

The Fouban conference that was to draft a federal constitution for the union had many conflicting agendas.<sup>335</sup> There was little short of a conference for the representatives of the two groups as the meeting lasted only one hour and thirty-five minutes.<sup>336</sup> The Southern Cameroons delegates were also unaware of the detailed

---

<sup>333</sup> Kofele, *An African Experiment in Nation Building*, pp. 105-111. Some writers like Awasum Nicodemus argue that the autonomist policies of the British in Southern Cameroons made the Anglophones to favour federalism as opposed to the self-governing policies of the French that supported centralisation. This is thus considered to be the beginning of the Anglophone problem.

<sup>334</sup> Mukum, "Effective Constitutional Discourse," p.45.

<sup>335</sup> Kofele, *An African Experiment in Nation Building*, p112

<sup>336</sup> Ibid.

proposals of *La Republique* until a few hours before the conference.<sup>337</sup> The proposals of the Southern Cameroonians for the Foumban conference that had been drawn up in Bamenda included inter alia: (i) a separate government, (ii) a bicameral federal legislature, (iii) a ceremonial not executive head of state.<sup>338</sup> The fact that Ahidjo simply ignored this and presented his document (the constitution of *la Republique*) as the basis of the negotiations, confirms the argument that several factors militated against an effective constitutional framework for Southern Cameroons<sup>339</sup> to the relative advantage of *La Republique*.

The Southern Cameroons delegates led by John Ngu Foncha were inexperienced and not adequately advised.<sup>340</sup> While the other partner was already an independent Country admitted into the UN<sup>341</sup> with its institutional arrangements and more resources to draw from backed by the advice of French experts<sup>342</sup>. Another area which gave the French Cameroon a relative advantage was the population and size of the territory as opposed to Southern Cameroons which comprised only nine per cent of the total area and about a quarter of the population.<sup>343</sup> The decision by the UN to provide only two options for the Southern Cameroons namely integration or reunification imposed constraints and limited its leaders' ability to negotiate.<sup>344</sup>

Another important dynamic to the equilibrium that should not be underestimated is the influence of the French. The French had been actively involved in French Cameroon and were responsible for Ahidjo's position as president. They had also taken special measure to come out with the constitution of 1959 and were thus disinclined to accept changes that may upset, weaken and distort the strong central

---

<sup>337</sup> *Journal of African Studies*, vol. 7 (1997) Piet Konnings & Francis Nyamnjoh, "The Anglophone Problem In Cameroon" p. 211.

<sup>338</sup> Ibid.

<sup>339</sup> Thus the views by some scholars like, Joseph Ebune, *Growth of Political Parties in Southern Cameroons, 1916-1961* (Yaounde; CEPER, 1992) and George Ngwane "Anglophone File," (Victoria: Presbook, 1994). That Foncha met with Ahidjo privately before the Foumban Conference to negotiate private arrangements and that Anglophones failed to agree on what form of government they really wanted respectively all these confirm the relative advantage of *la Republique*.

<sup>340</sup> Stark FM, "Federalism in Cameroon," *Canadian Journal of African Studies*, vol. 10, No. 3 (1976)

<sup>341</sup> 20<sup>th</sup> September, 1960 www.un.org

<sup>342</sup> Mukum, "Effective Constitutional Discourse," p. 45

<sup>343</sup> Konnings & Nyamnjoh, "The Anglophone Problem In Cameroon." p. 209

<sup>344</sup> Mukum, "Effective Constitutional Discourse," p. 45

government that they had established, and thus reduce French influence in the country.<sup>345</sup>

However, all these taken together and the role of Ahidjo as 'the ultimate arbiter of what may be accepted or rejected'<sup>346</sup> made the new constitution to lack any relevant checks and balances on his powers.

## SEPARATION OF POWERS IN THE FEDERAL CONSTITUTION

To better understand the separation of powers under this constitution may necessitate a look into the federal structure of the constitution. Foncha had expressed his views for a loose federation with *la République*.<sup>347</sup> Ahidjo on the other hand wanted '*une federation fondamentalement provisoire, transitoire et...le plus tot possible vers un etat unitaire*',<sup>348</sup> -that is a provisional and transitional federation before a unitary state.

Articles V and VI<sup>349</sup> enumerated subjects falling within the jurisdiction of the federal authorities and the respective states. Article V included nationality, status of aliens, conflict of laws, foreign affairs, emigration, monetary systems, taxes and revenues, higher education and scientific research, judiciary, boundaries of federal states. While Article VI included inter alia, judicial organisation, criminal law, labour legislation, secondary and technical education. By 1965 all these powers fell within the jurisdiction of the president.<sup>350</sup> In fact Articles V and VI were so broad that they might include virtually state power under section 38(1)

Any subject not listed under Article V and VI and whose regulation is not specifically entrusted by this constitution to a federal law shall be of the

---

<sup>345</sup> The arguments by V.J. Ngoh, *Weekly Post* (Yaounde; July 1995) that Foncha's 'relegation to the back seat' of the British authorities, who 'were expected to guide and give expert counsel to the KNDP during negotiations with Ahmadou Ahidjo' was the real reason why the Southern Cameroons emerged as the loser is therefore an underplaying and a failure to accord appropriate importance and relevance to the other constitutional dynamics in the equation. The British had never seriously taken active interests in the affairs of Cameroons (Konings & Nyamnjoh, p. 208) thus with their advice or not the forces against the Southern Cameroons were more than those for their favour.

<sup>346</sup> Kofele, *An African Experiment in Nation-Building*, p. 112

<sup>347</sup> *ibid.*, pp. 108-111

<sup>348</sup> *ibid.*

<sup>349</sup> Federal Constitution of 1961, Title III

<sup>350</sup> Kofele, *An African Experiment in Nation-Building*, p.128

exclusive jurisdiction of the federal states, which within these limits may adopt their own constitution.

No specific powers were thus listed for the federated states. Some scholars<sup>351</sup> have argued that federal arrangement albeit imperfect 'unquestionably operated to limit presidential power and that is why federalism proved such an effective cornerstone although of a relatively short interval of the federal constitution.' The separation of power went beyond the executive, judiciary and legislature to a division that was both functional and territorial.<sup>352</sup> It was thus Ahidjo's quest for a centralised power that made him push for the unitary constitution of 1972.

Title III dealt with executive authority. The office of the President and the vice were instituted per section 9. Like the constitution of the Fifth French Republic the president wielded a lot of authority.<sup>353</sup> In this sense the balance of power weighed more to the executive and a dominant president characterised Cameroon's constitutional history. Thus unlike in South Africa where the Legislature had much authority in Cameroon the executive under the president enjoyed that status. The similarity here lies in the fact that one branch had unlimited powers and abused it which provoked conflicts. The president had an indefinite eligibility to run as the "president of the federal republic shall be elected for a term of five years [and] and shall be eligible for re-election."<sup>354</sup> The president also exercised legislative powers.<sup>355</sup> The office of the president and the vice were incompatible with other positions.<sup>356</sup>

The legislature was covered in Title IV. Article 16 declared that the members are voted by universal suffrage for five years. Federal laws 'shall be adopted by a simple majority of deputies' provided that the majority of deputies of each federal house voted.<sup>357</sup> The legislature met twice yearly of durations not more than thirty days each. Since the bills introduced by the executive had priority over those introduced by parliament, the executive tactfully spent the legislative sessions so that it would legislate by decrees for the other periods of the month. Thus Article 23 divided the

---

<sup>351</sup> Ibid., p. 144

<sup>352</sup> Ibid.

<sup>353</sup> Ibid., 135

<sup>354</sup> Section 10

<sup>355</sup> Article 12, par 7, 8, 9

<sup>356</sup> Article 9

This may be interpreted liberally to include the judicial review. However, two clauses seriously undermined the power of the courts. Article 32 par II stated that the president of the federal republic shall be guardian of the independence of the judiciary. It raises the fundamental question of how the judiciary that is supposed to be the watchdog of the executive be protected by that same government. This same clause is present in the 1996 constitution.<sup>362</sup> A second impediment to judicial independence was that the president may enlarge the composition of a bench for certain disputes.<sup>363</sup> This was always used to get judges on the bench who would reflect the decision of the president.

### **EXECUTIVE POWER AND THE ANGLOPHONE PROBLEM.**

The investigation here seeks to establish that the current anglophone problem in Cameroon is largely due to the absence of a separation of powers from the federal constitution to the present day 1996 constitution. The Anglophone problem can be described as the consciousness of the people of former Southern Cameroons of being 'marginalised', 'exploited,' 'annexed' and 'assimilated' by the Francophone-dominated state, and even by the Francophone population as a whole.<sup>364</sup> It includes the issue of nation building; central in the resolution is attempts by the Anglophones to secede or the call for a return to federalism and the government response.<sup>365</sup>

As has been demonstrated above the making of the 1961 constitution revealed that the Anglophones were not at par with the Francophones on the negotiation table. This lack of equality was due to some dynamics and translated itself to the unequal status accorded to the two parties in the constitution. But the problem was aggravated by the lack of any rigid system of checks and balances on the organs of the state. The president thus emerged as the most powerful figure who 'was the father of all.' It is precisely because of such overwhelming powers that he subjugated the other branches

<sup>362</sup> Enonchong M., "The Separation of Powers in the 1996 Constitution of Cameroon" in *African Journal of International Comparative law*, Vol. 9, 1999 p. 211

<sup>363</sup> Article 34, also present in the South African Constitution of 1961.

<sup>364</sup> Supra Konnings & Nyamnjoh, "The Anglophone Problem"

issue of nation building; central in the resolution is attempts by the Anglophones to secede or the call for a return to federalism and the government response.<sup>365</sup>

As has been demonstrated above the making of the 1961 constitution revealed that the Anglophones were not at par with the Francophones on the negotiation table. This lack of equality was due to some dynamics and translated itself to the unequal status accorded to the two parties in the constitution. But the problem was aggravated by the lack of any rigid system of checks and balances on the organs of the state. The president thus emerged as the most powerful figure who 'was the father of all.' It is precisely because of such overwhelming powers that he subjugated the other branches of government and through centralisation, repression and coalition building consolidated his power and plundered the Union with the anglophone.<sup>366</sup> Below is an analysis of how the president subjugated the legislature and the judiciary before capitalising on the anglophone.

Article 50<sup>367</sup> gave the president plenary powers to establish and organise all institutions of the new federal state by issuing decrees for a period of six months. This was similar to the power given to the French colonial administration to deal with the UPC. In South Africa it was used during the state of emergency. In Cameroon it meant that government by a state of emergency *ad infinitum*. The president thus had legislative powers that superseded that of parliament.

A distinguishable case in point has to deal with freedom of association. The law<sup>368</sup> affirmed that freedom of association is recognised in the territory of the federal republic. Article 14 of this same law modifies the above position by stating a mandatory authorisation for any association to be formed alongside other requirements that may be added by a presidential decree.<sup>369</sup> Thus almost every provision of the constitution was counterbalanced by the power of the president to

---

<sup>365</sup> Ibid. It should be understood here that the call for a return to federalism is not synonymous to a call for the same structures of 1961. The EMA constitution is the framework of the call for a federal structure.

<sup>366</sup> Delancey, Cameroon, p. 52

<sup>367</sup> Federal Constitution of 1961

<sup>368</sup> Law 67/LF/19

<sup>369</sup> Richard Joseph, *Gaullist Africa: Cameroon Under Ahmadou Ahidjo*; (Malta: IBS, 1979) p. 16

issue decrees. Thus effectively making the president more equal to the parliament, in an area that is traditionally reserved for the parliament.

The power to appoint people into all offices of the state including the cabinet and judiciary was absolute. These people were appointed and there was no corresponding clause to check the president from filling such high offices with his cronies. The president could thus appoint and dismiss the judges at his will. This made all the officers so appointed to be depended on him. The position of the executive is better demonstrated in the case of the *Dissident Deputies* where four moderate politicians who expressed reservations on the methods employed by Ahidjo and Foncha to form a united party.<sup>370</sup> They expressed their fears based on the possible absorption of the smaller parties by the two largest parties in both federated States of East (*la Republique*) and West Cameroon (Southern Cameroon).

The government responded by bringing charges against them on the violation of Ordinance 62/OF/18 of march 1962 on 'repression of subversion.' The court found them guilty and sentenced them to thirty months imprisonment with a fine of 250,000-franc CFA.<sup>371</sup> Although it was clear that this law was intended for the UPC, the government revealed that it could use it to silence its opponents. On appeal, the Court of Appeal in Yaounde acceding to government demands increased the sentences imposed on the four to three years each.<sup>372</sup> However, when the issue reached the Supreme Court, the judge appeared ready to quash the lower courts' decision because of the irregularities in the law and proceedings. Informed of the position of the Supreme Court to the matter, Ahidjo had the whole file of the case removed from the court and brought to his palace. The appeal was thus short circuited and the men were made to serve the sentences of the lower court.

With such a 'threat' by the judiciary to the president, Ahidjo proceeded to make it plain in subsequent laws and decrees that judgement pronounced by his tribunals in

---

<sup>370</sup> The absence of a law report in Cameroon makes it difficult to cite cases and even for a development of a corpus of case law. See *African Journal of International Comparative Law*, vol. 9, 1999, Ajonoh Sone, "The Administration of Criminal Justice In Cameroon: Realities of the Application of the Uniform Penal Code." pp. 309-334.

<sup>371</sup> *Commission Internationale de Juristes*, in Richard Joseph, *Gaullist Africa*, p. 103.

<sup>372</sup> *Ibid.*

cases dealing with repression of subversion were not subjected to appeal by those condemned.<sup>373</sup> This case occupies the same position in Cameroon like the *Harris v Minister of Interior* case in South Africa.<sup>374</sup>

## CENTRALISATION

Centralisation like the Bantustan policies involved many aspects. These included the development of a single political party, concentration of administrative decision making, the dissolution of the federation and the birth of a unitary state, use of the constitution to funnel authority to the president amongst others.

The formation of one party rule in Cameroon was carried out by forging unity of all the political parties in the East state and then in the West. All parties in the East were to obey the orders issued by the president that they should join with his party the Union Camerounais (UC). In West Cameroon Ahidjo played one political party against the other. He threatened to ally with the CPNC (Cameroon People National Congress) which was a minority party in the opposition if the KNDP did not heed to his call for a single party. This made the politicians to hastily enter into the Cameroon national Union (CNU) formed in 1966.<sup>375</sup> While it is accepted that the coming of the Anglophones brought some openness into the discussions within the leading organs of the state and party, the striking consequence of this political marriage was unmistakably the extending of the field of action for the president. The birth of the CNU thus marked an important stage in the maximisation of power. The last area of self government from challenges could be made to abuse of power by the federal and state governments was thus eliminated.<sup>376</sup>

The centralisation of decision making in Yaounde and in the hands of the president was the next step. All autonomous organisations and independent bodies had to be controlled and supervised by the political bureau of the party. This system affected mostly the Anglophones whose system of administration had a number of autonomous associations like co-operatives, Trade unions, marketing board. All these

---

<sup>373</sup> *ibid.*

<sup>374</sup> 1952 SA, 4 546.

<sup>375</sup> Konnings & Nyamnjoh, "The Anglophone Problem in Cameroon," p. 210

associations crumbled years after the centralisation of control.<sup>377</sup> Even within the trade unions, the right of workers to strike was limited as the state used the police force and the troops to repress such. This paternalistic attitude that the one party rule represented all the various interests was based on the president and his powers to decree wage increases and public holidays.<sup>378</sup> Yet a vital element of the Anglo-Saxon heritage was suppressed and replaced by the bureaucracy of the French. This provoked a lot of resentment from the Anglophones.

The process of election and holding offices by appointment confirms the major policy in sidelining the Anglophones. Although the law permitted the creation of a political party it was practically impossible to win any seats in the Assembly. As elections were based on a single list system and the entire country serving as a single electoral district and the party winning the majority votes taking all the seats.<sup>379</sup> Thus any new party that never had 51% of the votes could not therefore have any seats in parliament. This made the president to approve the list of those who supported his plans. Finally the nomination list was definitely the list that won. Through this method the major Anglophones were given positions of prestige while the majority were deprived.

The president was superior to his cabinet and usually convoked it twice annually. During which he merely laid down directives. It is debatable whether he sat down with the ministers to discuss these issues.<sup>380</sup> Just like the colonial councils did not bind the president, so too there was no binding effect with the presidential cabinet. A feat that survives today under the administration of Biya.<sup>381</sup>

At the height of this centralisation was the change from a federal to a unitary state in 1972. Ahidjo took the Assembly by storm when he announced that he wanted to change the nature of the union by a referendum. This act was unconstitutional as it violated Article 47(1) which read “any proposal for the revision of the present

---

<sup>376</sup> Delancey, *Cameroon*, p. 88

<sup>377</sup> In this list could be included Powercam, the West Cameroon power supply, Marketing board etc.

<sup>378</sup> Delancey, *Cameroon*, p. 54

<sup>379</sup> Ibid.

<sup>380</sup> *ibid.*

<sup>381</sup> *Ibid.*

constitution, which impairs the unity and integrity of the federation shall be inadmissible.” It is clear that a constitutional amendment was not also permissible by referendum as stated by Article 47 (3) “that proposals for revision shall be adopted by simple majority vote of the members of the federal assembly, provided that such majority included a majority of representatives...of each of the Federated States.”<sup>382</sup> Ahidjo therefore acted *ultra vires* by unilaterally deciding to change the nature of the union. However, this was as a direct conclusion to the powers he already had and a logical end of the process of centralisation that he had initiated through a single party.

## COALITION BUILDING

The question that arises here is how did Ahidjo establish such a powerful structure for an autocratic rule? How did he succeed to keep the Anglophones at bay while dominating the state? And how did he manage with his attempts to ‘Frenchify’ them? Two basic approaches have been identified that the president used; control of the country’s economic base and the policy of divide and rule.<sup>383</sup>

For a country like Cameroon just emerging from the shackles of colonial rule, the state was the major employer and source of revenue. Indigenous private entrepreneurial interests were relatively few and small.<sup>384</sup> Government was thus the major source of funding of schools, roads, industry and hospitals. With the centralisation policy the president’s office was the key factor in the distribution of scarce resources to individuals, communities and regions.<sup>385</sup> Added to this was the president’s ability to gain or deny passage of legislation that may favour the interests of individuals or groups. This gave the president support of the ruling class as long as they wanted to keep their office.

---

<sup>382</sup> A.W. Mukong (ed.), *The Case for the Southern Cameroons* (Yaounde: Cameroon Federalist Committee, 1990), p. 18 in Konnings & Nyamnjoh

<sup>383</sup> Kofele, p. 101-127 and Konnings & Nyamnjoh p. 211. For an elaborate list of anglophone problems see All Anglophone Conference (AAC), *The Buea Declaration* (Limbe, Nooremac Press, 1993), Francis Nyamnjoh (ed.), *The Cameroon GCE Crisis: A test of Anglophone solidarity* (Limbe: Nooremac, 1996), Southern Cameroons National Council (SCNC), ‘The Buea Peace Initiative’, in *Cameroon Post* (Yaounde) 20-27 April 1994, *Nouvelle Expression* (Douala) ‘Ce que veulent les Anglophones.’

<sup>384</sup> Delancey, *Cameroon*, p. 59

<sup>385</sup> *Ibid.*

All these culminated into a client-patron network. Ministers were appointed for example as a major reward to those who the president had served his wishes.<sup>386</sup> And because there were not enough ministerial portfolios to satisfy all groups, Ahidjo sought to move the ministers from one post to another. The frequency with which this was done made the president and not the ministers' head of the ministries. The current president pursues this same policy, and ministerial appointments in Cameroon today are considered a favour by the president to the individual, his ethnic group and his region.<sup>387</sup>

## GOVERNMENT BY STATE OF EMERGENCY

Despite the methods enumerated above, Ahidjo ultimately depended on the use of force for his rule. The concentration of so much power had to be maintained by other means. The use of force like in South Africa proved a short-term solution.

The French imposed the first case of emergency rule in Cameroon in the 1950s to combat the UPC. The law<sup>388</sup> stated that, "the maintenance of public order in the state of Cameroon will be enforced, in cases of emergency, by implementation of the two following measures: a state of *mise en garde* and a state of alert." The notion of public order in Cameroon does not have the same meaning as elsewhere, even in the French administrative set-up (from which Cameroonian Administrative law is drawn). In French public law public order refers to the minimum condition necessary for the maintenance of a normal social life, like the security of persons, property, peace and tranquillity.<sup>389</sup>

In Cameroon 'public order' has been transformed and now comprises two fundamental principles; the maintenance of the political status quo that is the retention of power by Ahidjo and his friends.<sup>390</sup> Next all acts, proposals, omissions capable of being interpreted by the regime as bringing into question one of these principles were treated as constituting grave threats to public order and consequently as instances of

---

<sup>386</sup> *ibid.*

<sup>387</sup> Konnongs & Nyamnjoh, "The Anglophone Problem in Cameroon," p. 218

<sup>388</sup> Law of 27 may 1959

<sup>389</sup> Richard Joseph, *Gaullist Africa*, p. 101.

<sup>390</sup> *Ibid.*

subversion subjected to prosecution. These laws existed in the country for a long time and it is still debatable if they are not frequently invoked.<sup>391</sup> Under the Federal Republic, they were applicable throughout the entire country and renewable every six months instead of four.<sup>392</sup>

This imposed restrictions in the area of personal freedom, which according to Article 24 of the Federal constitution was reserved for the federal law. Cameroon was thus under a quasi-military rule that served as a 'smokescreen for the dispossession of the people of their political and civil rights.' Some of the most notorious of such decrees included Articles 1, 2 and 3 of March 1962.<sup>393</sup> Article I stated that whosoever incites any person to resist in any manner whatsoever, the application the laws; decrees, regulations or orders of any public administrative authority shall be guilty of misdemeanour. Article 3 went further to include any person who publishes, reproduces any false statement, rumour or report, tendentious comment on any statement or report which is likely to bring into hatred contempt or ridicule any public authority shall be guilty of a misdemeanour.

The potential range of activities covered by this decree is so large that practically any expression of disapproval for any act of the public authorities, whether at the national or local level, could lead to the infliction of severe penalties. Constructive criticism of public officials was thus a threat and could be interpreted as abuse by the local authorities and the person would be in breach of article 3. Such crimes were tried only in tribunals set up by the president and appeals were forbidden.<sup>394</sup> Thus upon the violation of his rights the Cameroonian was legally powerless like his South African counterpart.

Another repressive feature of the system was introduced in the correctional services called "Centres d'internement administratif."<sup>395</sup> This was the power of the state authorities to send any person considered 'dangerous to public security' to detention

---

<sup>391</sup> See the experiences of the Ghost Towns and Oben Peter Ahu's "Fifteen Days Renewable", Konnings & Nyamnjoh, "The Anglophone Problem in Cameroon," p. 211.

<sup>392</sup> Ibid., Decree No. 52 of 7 May 1960.

<sup>393</sup> Decree No., 62/ OF/18

<sup>394</sup> Op cit.

<sup>395</sup> Established by decree of October 4<sup>th</sup> 1961

camps for up to two months renewable indefinitely.<sup>396</sup> It soon became clear that such dangerous persons were those seen as threat by the regime. Thus the preventive detentions were simply a guise to dispose of political opponents. Most dissenters were thus sent to such prisons in Tchollire and Tignere. This same method of detention is still in use and recently in the Moucheipou Affair where ministers alleged to be corrupt were arbitrarily locked up indefinitely without trial.<sup>397</sup>

Thus like in South Africa the government believed that the best way to consolidate its rule was by force. It tried to make this legitimate by usurping judicial and legislative powers. The president could issue decrees making an act a crime and exclude the courts from having any jurisdiction.

### THE UNITARY CONSTITUTION OF 1972<sup>398</sup>

It has been established that the change from a federation to a unitary state was a forgone conclusion of the centralisation of power. Like the 1983 constitution of South Africa it was another step in the wrong direction. Cameroon became a unitary state less than two weeks of the president declaring his intention to make the change.<sup>399</sup>

### THE SEPARATION OF POWERS

Under Article 5(2) the president was treated as the sole repository of executive power. Even with amendment creating the office of the vice president<sup>400</sup> stated 'the prime minister shall...receive a delegation of powers to direct, co-ordinate and control the activities of the government in such spheres' as determined by the president. Note that the post of the Prime Minister or vice president has often been used in Cameroon to placate political opponents.<sup>401</sup>

---

<sup>396</sup> *ibid.*

<sup>397</sup> [www.iccnet.cm](http://www.iccnet.cm)

<sup>398</sup> Decree No. 72. 270 of June 2, 1972

<sup>399</sup> Kofele, *An African Experiment in Nation Building*, p. 144

<sup>400</sup> Article 5 of the Amended version

<sup>401</sup> Nwabueze, *Constitutionalism*, p. 26 and this may constitute an interesting and fertile area of research on Cameroon.

The Prime Minister like the other ministers has no independent authority. Their authority is merely delegated. The prime for example is not a co-beneficiary with the president and his appointment in charge of any department does not imply an abdication.<sup>402</sup> In fact there was (and still is) no obligation on the president to accept or act on the advice of the cabinet. Article 8 has thus been rightly considered a formality. Thus there is no doubt that in any such regime an obligation to consult with a cabinet operates to fetter any advance to assume dictatorial powers.

The parliament in Cameroon has been characterised as a 'passive and decorative organ'.<sup>403</sup> This is because under the new constitution it was effectively subjugated to the executive. The legislative houses of the two federated states were formally abolished and their authority entrusted unto the state president and the national assembly. Article 2(1) provided that National sovereignty shall be vested in the people of Cameroon who shall exercise it either through the president of the republic and the members of the assembly. The general rule is that the legislative organ shall possess the law-making sphere and no other branch can legislate except by its authority and consent.<sup>404</sup> Under this constitution the president shares the law-making power and thus legislative power is joint and equal and the absence of any contrary provision in the constitution, the concurrence of both is indispensable to its exercise.<sup>405</sup> As much as it is difficult to justify this qualification on legislative autonomy, it suffices to state that it is a relic of the colonial era which should have no place in a democratic set up.

This is not to downplay the president's legislative role that is common in other jurisdictions like South Africa, United States, France and Germany. In fact the power to participate was intended to protect the executive, ensuring that it was not left at the mercy of the legislative department as occurred in South Africa.<sup>406</sup> But this fact alone does not make the president a co-beneficiary of the legislative power. In Cameroon the president possessed inherent law-making power.<sup>407</sup> The power to promulgate rules which have the force of law (*force de droit*). And because the constitution always

---

<sup>402</sup> Kofele, *An African Experiment in Nation Building*, p. 147

<sup>403</sup> *ibid.*

<sup>404</sup> This does not exclude the power of the president to legislate especially on foreign affairs, see the US experience in Kofele, p. 144.

<sup>405</sup> *Ibid.*, p. 147

<sup>406</sup> See Kofele, *An African Experiment in Nation Building*, p. 148

makes provision for issues to be decided by law, the president actually wields a lot of legislative power.<sup>408</sup>

Another dimension of the subjugation of parliament is in the question of the transitional legislation after the adoption of the new constitution. A change of constitution created the necessity of adopting the existing laws to the new constitution. Such adoption is an exercise of legislative power by way of amendment of existing laws. Under the 1972 constitution it was considered both expedient and desirable to give this power to the president. The nature of the necessary adoption is often extensive, involving the whole body of existing legislation.<sup>409</sup>

The judiciary under part V of the constitution in Article 2(1) expressly stated that sovereignty in Cameroon shall be exercised by the president and the national assembly. It failed to acknowledge the judiciary as an independent branch of the state sovereignty. This position was confirmed by Article 31(2), which stated that the president of the republic shall guarantee the independence of the judiciary. This means that the executive can use the courts as an instrument to maintain itself in power. This perception of the role of the judiciary tended to destroy the notion of the separation of powers and the role of the courts as an impartial institution.<sup>410</sup>

Article 31(2)(3) gave the president the power to appoint judges with the assistance of the judicial council. This does not mean that the appointments were censured or confirmed by the council. The tenure of office of the judges was not guaranteed. The primary function of the judiciary to render justice as the guardian of the constitution and to do so with impartiality, neutrality and independence could not be achieved in Cameroon. The judiciary lacked the guarantees to do so and was therefore merely an instrument of repression in the hands of the executive.<sup>411</sup>

---

<sup>407</sup> Article 9(a)

<sup>408</sup> *ibid.*

<sup>409</sup> Kofele, *An African Experiment in Nation Building*, p. 149

<sup>410</sup> Ketchemin Eric Pythagors, "The Separation of Powers in Cameroon Great Britain and the US: A Comparative Study", (Unpublished Dissertation: University of Buea, 1996) p. 6

<sup>411</sup> *Ibid.*

The judiciary was thus the weakest of the three organs of the state. It had no influence over either the sword or the purse and in many instances, the executive ordered or directed its agencies not to execute or obey its judgements. Thus the Cameroonian judiciary is merely a branch of government service such as health; education and judges were often used for other non-judicial functions.<sup>412</sup>

The Preamble of the unitary constitution of 1972 affirmed the Declaration of the rights of man and the UN Charter. In fact according to the preamble no one could be constrained to do what was not prescribed by the law. However, the military was in constant use. Although the armed in Cameroon seldom occupied the front pages of the news on Africa, that did not mean that they have been away from the dirty games in the continent. By 1975 Cameroon had the largest military establishment in Francophone Africa.<sup>413</sup> The military were always used in maintaining 'public order.' They have been the auxiliary forces whose internal function far exceeded its responsibility of maintaining and safeguarding the nation against external attack. Another role of the military has been for the punishment of offenders under the wide-ranging state of emergency legislation, which fell within the ambit of the military tribunals.

The laissez-passers requirement for travelling in Cameroon is comparable to the pass laws of South Africa. Cameroonians were expected to carry identification cards everywhere as a justification for suppressing crime. But in actual fact the police used this to harass the population, tight controls and weaken the political opponents. In fact today the requirement of an identity card is seen in every traffic control. Those found without one could be liable for any of the standing laws. All these together with the restraint on issuing passports for travelling outside the country gave the police greater control and violated the freedom of movement without impunity. This is another instance where a colonial relic is maintained to guarantee the status quo.

Presidentialism in Cameroon tended to act towards dictatorship and tyranny, not much because of its great power but for the insufficient constitutional restraint upon that

---

<sup>412</sup> *ibid.*, p. 19

<sup>413</sup> Richard Joseph, *Gaullist Africa*, p. 182.

power. With the judiciary considered as an arm of the executive and the executive being an embodiment of the president plus the equality to legislate between the executive and the president, the condition was thus favourable for the growth of a dictatorship.

The consequence of this subordination of the other organs led to abuses in Cameroon. However, this research focuses on the impact this had on the anglophone minority and thus nation building in Cameroon.

### **THE ANGLOPHONE PROBLEM**

There is no attempt here to exhaust the anglophone problem in Cameroon today. However, the following analysis seeks to investigate the role of the lack of a separation of powers in this malaise.

As has been established the federal constitution had sufficient lacunae that gave the president the arbitrary power to intervene in the politics of West Cameroon. The office of the vice president is a vivid example of this manipulation. By 1965 the constitution required that the post of the vice president was not to be held alongside any other elective office. This meant that Foncha had to choose between the vice president of the republic and the Prime Minister of west Cameroon. He opted for the former. In the ensuing election to choose his successor, Jua won under the mandate of the KNDP. Muna who was a centrist was defeated. An indication that the people wanted and preferred federalism.

By 1968 when the unified party was gaining momentum Ahidjo acted outside the parameters of his office by appointing Muna and not Jua as the Prime Minister of West Cameroon.<sup>414</sup> Besides the unconstitutionality of this act it also marked the collapse of a parliamentary system of government that had triumphed in West Cameroon. In 1970 Ahidjo repeated the same gimmick by appointing Muna and not

---

<sup>414</sup> See Delancey, *Cameroon*, p. 200. Also note the conflicts between Jua and the federal inspector to highlight his position on the status of the federated state of west Cameroon.

Foncha as the vice president of the federal republic.<sup>415</sup> Foncha like Jua was an obstacle to his plans for a centralised state as was before the advent of the Anglophones. The act was in itself unconstitutional, since the constitution prohibited the vice president from holding any other post. Although this provision was later on amended by the president. He had demonstrated that he could do what ever he liked and could manipulate the constitution with ease to achieve that.

Territorial administration was another major area where the president went about the federal structure. A decree<sup>416</sup> by the president had divided up the country into administrative regions under federal inspectors. This decree disregarded the jurisdiction of the federated states and violated the powers of the Prime Minister of West Cameroon, as there was often conflict between them. The inspectors were directly responsible to Ahidjo and were to be the representatives of the federal government in 'all acts of civil life and in judicial matters.' They were also 'to supervise the enforcement of federal laws and regulations, to maintain order according to the laws and regulations in force and having at their disposal the police, gendarmerie and federal service.'<sup>417</sup> Under this system West Cameroon was designated as only one of the six regions. The present day position of provincial governors is a progression from the federal inspectors. This approach of appointing officials over elected representatives is used today by the ruling party to control councils won by the opposition.

In the social sphere, language, education and culture were within article six of the areas that fell within the federal government. Secondary and technical education was to be taken over. A cultural delegate was appointed<sup>418</sup> who was a federal representative and thus split education responsibility with the West Cameroon Minister of education. West Cameroon insisted on paying half of its workers salaries to retain control of its services. The threat of abandoning the English system of education, language, culture became real as French was made mandatory, while English was not. By 1983 government signed a decree restructuring the General

---

<sup>415</sup> Delancey, *Cameroon*, p. 119

<sup>416</sup> Decree No. 61-DF-15 December 20, 1961

<sup>417</sup> *ibid.*

<sup>418</sup> Decree 62-DF-84 March, 1962

Certificate of Education (GCE) to suit the standards of the French Baccalaureate.<sup>419</sup> This was a culmination of a long-term process of assimilating the Anglophones.

In the economic field reunification and centralisation pulled the carpet from below West Cameroon. The two territories were at different economic levels, producing a variety of different products.<sup>420</sup> West Cameroon produced mainly for the markets in Nigeria and Britain especially in rough timber, oil, bananas. Due to centralisation she lost her preferential trading position with Britain.<sup>421</sup> The ports of Victoria and Tiko, which used to be the territory's connection to the outside markets, were crippled. All these were in line with the policy of centralising the trade in the country from the French region, and thus rendering an economically viable people dependent.

The loss of the currency of West Cameroon (sterling pound) connected to the West African Board.<sup>422</sup> A presidential decree imposed the franc CFA (*Communauté Financière Africaine*) on West Cameroon. Traders and buyers were particularly affected. West Cameroon officials protested on many levels.<sup>423</sup> The franc zone was protected by a system of exchange controls and import export licenses. The franc was pegged to the French franc at a fixed parity. By extending the franc to West Cameroon it created problems since she was used to the trade policies of Nigeria and the United Kingdom.

The absence of a source of revenue for the state of West Cameroon was the ultimate method that crumbled the minority. Under Article 5 custom taxes- the most important source of government revenue went directly and entirely into the federal government coffers. The constitution was silent about the means of recourse for the federated states, although it did not prevent them from levying taxes; it deprived them of their main source of revenue. The basic question is how was the state expected to develop when it could not be sure of how much it possessed. In fact the prime minister expressed the fear that West Cameroon would not be able to act much longer as the

---

<sup>419</sup> For a detailed analyses of the GCE Crisis see Nyamnjoh Francis, *The GCE Board Crisis*, (Limbe: Nooremac, 1996) pp. 19-68

<sup>420</sup> Kofele, *An African Experiment in Nation Building*, p. 191

<sup>421</sup> *ibid.*, p. 193

<sup>422</sup> *ibid.*, p. 200

<sup>423</sup> *ibid.*

true government which makes decision in domains where it 'has sovereignty.'<sup>424</sup> The federal government reacted to this by reducing the jurisdiction of the state on issues and thereby the minority's right to its identity.

The use of divide and rule politics by the Francophone regimes operated to hamper effective resistance by the minority to their policies. Ahidjo divided the erstwhile state of West Cameroon into two provinces, the Northwest and South West provinces. There was already some amount of tension within the region, due to political, economic and social factors.<sup>425</sup> By thus dividing the people into two the President was wedging a fissure in the cracks. This operated on two counts; firstly it created resentment between the Anglophones and hampered their unity as a nation, secondly it gave the government the chance to manipulate each camp against the other to achieve its goals.

#### RESISTANCE AND OPPOSITION BY THE MINORITY

The resistance here would be studied under two paradigms. Firstly we shall examine the non-violent approach adopted by the Anglophones and the reaction of the Francophone majority, then the violent approach and its outcome.

The resistance by the Anglophones to the defacing of their rights and identity started long under the federal structure. The late prime minister Jua Augustine and intellectuals like Bernard Fonlon<sup>426</sup> who had dared to raise their voices against the policies of *la Republique* were effectively silenced. The policy of Ahidjo was to bypass those who opposed his policies and appoint those that supported them. This policy was used in kicking out Jua and appointing Muna and later bypassing Foncha for Muna. Thus it became clear that those who opposed his assimilation of the minority were to be left out in the cold.

---

<sup>424</sup> *ibid.*, p. 199

<sup>425</sup> The South West/ Coastal/ forest people resented the North West people/ Grassfields because they dominated the politics of Anglophone Cameroon, acquired the best jobs in the province and exerted a lot of influence in the other sectors of the economy. The Elites of the Southwest formed the SWELA to fight against this domination. But they have often played in the hands of the policy of divide and rule. See Konnings & Nyamnjoh, pp. 210-213, Ndiva Kofele, *Tribesmen and Patriots: Political Culture in a poly-ethnic African State* (Washington, DC, 1981)

<sup>426</sup> Richard Joseph, *Gaullist Africa*, p. 180. This policy was also made effective because of the state of emergency laws.

Under the Unitary order, the opposition gained momentum, but due to serious repression and his divide and rule tactics, the voices could not be adequately heard.<sup>427</sup> However, in 1982 when Ahidjo resigned<sup>428</sup> and hand picked Paul Biya as his successor, things changed. Biya's policy of liberalisation brought some air and protests that had been silenced resurfaced. However, Biya adopted and continued with the policies of his predecessor. In 1983 he promulgated the decree to change the GCE, in 1984 he re-enacted the constitution changing name of the country and quashing the office of the vice president.<sup>429</sup>

There were boycotts and demonstrations in urban centres and particularly in the anglophone provinces. School children stayed away from classes and teachers boycotted classrooms. Anglophones made it clear that their system of education was their last genuine heritage. The Church too played a role in mobilising their schools and workers to obey the boycotts. The police reacted with tear gas and extreme brutality. But this time there was no return. The Anglophones asked for an autonomous board to manage the affairs of the GCE, and thus take away from the hands of the Francophone dominated ministry of education.<sup>430</sup>

On the constitutional change, the major complaint by the Anglophones was that by changing the name of the country from 'United Republic of Cameroon' to simply 'Republic of Cameroon' the president was taking on the name of what French Cameroon used to be called before the union. Thus suggesting either a completion of the process of 'franchification' of the anglophone and/or denying the fact that there was an English minority in the country. This re-enactment of the 1972 does not deserve a separate study here since all the Articles that are relevant to this study remained unchanged.<sup>431</sup>

---

<sup>427</sup> Ibid.

<sup>428</sup> Ahidjo joined Leopold S. Senghor, Julius Nyerere as the first few African presidents to deliberately step down from office. Although some sources say the French deceived Ahidjo, the point remains that he stepped down of his own accord. Konnings & Nyamnjoh, p. 215

<sup>429</sup> Ibid.

<sup>430</sup> Detailed material on this would be obtained from Nyamnjoh (ed.) *The GCE Board Crisis*, op. Cit.

<sup>431</sup> The decree was law No. 84 - 1 of February 4, 1984. Biya had organised and won the election after his appointment by Ahidjo. This meant that he was ruling in his own capacity. He thus went ahead to abolish the post of the Prime Minister, that brought him to office and to re-enact the constitution, all this was to erase the personality that Ahidjo had imposed on the state.

It was at this time that the Anglophones became vociferous about the issue of secession.<sup>432</sup> The Gorji Dinka issue where this prominent Anglophone lawyer, was arrested after declaring the Biya government unconstitutional and calling for the independence of Southern Cameroons under the name Republic of Ambazonia.<sup>433</sup>

By the late 1980s the question of tribalism and the monopolisation of key offices by the Francophones became a bone of contention with the minority. An independent study showed that 37 of the 47 administrative officers (*prefets*) were from the same tribe as the president, as were the 22 of the 38 high offices in state corporation and parastatals.<sup>434</sup> All these coupled with the excruciating economic crisis made Anglophones to attribute their problems to the corruption and mismanagement of the Francophone dominated state.<sup>435</sup>

Following the above abuses, it was 'not surprising' that the first opposition party in Cameroon was born in the anglophone province of the Northwest.<sup>436</sup> In 1990 the Social Democratic Front (SDF) was born amidst the death of six Anglophones in the hands of the state police.<sup>437</sup> As the protest increased, the government introduced a greater measure of political liberalisation. Several other associations and pressure groups were formed to represent and defend the interests on the English-speaking minority. There was the Free West Cameroon (FWCM), the Ambazonia Movement (CAM), which championed the return to the federal state. Professional associations included the Teachers' Association (TAC), Cameroon Anglophone Students' Association (CANSA) these helped in the ten-year struggle for the GCE board<sup>438</sup> and the All Anglophone Conference (AAC).<sup>439</sup>

---

<sup>432</sup> The issue of secession it should be noted started long in the days of the Trusteeship. However, over the years the call was muted and became alive again after Biya came to office.

<sup>433</sup> Konnings & Nyamnjoh, "The Anglophone Problem in Cameroon," p. 213.

<sup>434</sup> Joseph Takougang, 'The Demise of Biya's New Deal 1991-1992,' in *Africa Insight* (Pretoria), pp. 91-101, in Konnings & Nyamnjoh, "The Anglophone Problem in Cameroon,"

<sup>435</sup> For more recent information on corruption in Cameroon, see Transparency International Report where Cameroon has featured as the most corrupt nation in the World consecutively for the last two years. See [www.boh.org](http://www.boh.org), [www.iccnet.cm](http://www.iccnet.cm) et al.

<sup>436</sup> Konnings & Nyamnjoh, "The Anglophone Problem in Cameroon," p. 214.

<sup>437</sup> Although the state tried to deny its responsibility in the issues.

<sup>438</sup> *Ibid.* p. 217.

<sup>439</sup> *Ibid.*

The role of the AAC would be very eloquent in the making of the 1996 constitution. However, the AAC was the forerunner of the Southern Cameroon National Council (SCNC) and met 'for the purpose of adopting a common anglophone stand on constitutional reform and of examining several other matters related to the welfare of ourselves, our prosperity, our territory and the entire Cameroon nation.'<sup>440</sup> All these associations had the positive effect of making the minority aware of the gravity of the problem. In other words no section of the Country or of the anglophone minority was informed of the nature of the problem.

However, due the persistent and deliberate policy by the government and some Francophone media to downplay the problem some pressure groups decided to adopt a stand for 'total independence of the Southern Cameroons.' Thus it was when the government either persisted in its refusal to engage in meaningful constitutional talks or failed to engage in such talks within a reasonable time', that the Anglophone council then decided to 'proclaim the revival of the independence and sovereignty of the anglophone territory of Southern Cameroons, and to take all measures necessary to secure, defend and persevere the independence and integrity of the said territory.'<sup>441</sup>

This was the last stage before the embarking of some these pressure groups on the violent method. There was an attack in the Northwest province of the country that was alleged to have been launched by the SCNC.<sup>442</sup> There was damage to property and life. The attempt although small definitely marked the extent to which the Anglophones are ready to go to get their problem resolved. The state reaction to this attempt falls outside the scope of this work. Yet it suffices to state that those apprehended were locked up and tried by a military tribunal. This relates to the treatment political dissenters received in the seventies.

The Australian Affair was also another episode that threw light on the armed struggle that was in the pipeline. Some arms shipment into the country had been discovered and the some dealers caught in Australia. The Australia government tried them and

---

<sup>440</sup> Ibid.

<sup>441</sup> *ibid.*

they were sentenced in Australia. A sentence that made many to believe that the government faked the incident to forestall future anglophone attacks.<sup>443</sup>

This clearly shows that the argument of too much power without the relevant checks would lead to abuses. Ahidjo like Biya were all involved in the process of assuming too much power and violating the integrity of the nation

### INTERNATIONAL CHARACTER OF THE PROBLEM.

The international implications of the struggle will be examined in the relations and diplomatic offensives taken by the various pressure groups of the Southern Cameroons towards the United Nations, the Commonwealth, the United Kingdom and the French government.<sup>444</sup>

The delegation sent to the UN in 1995 by the SCNC was to protest against 'the annexation of its ex-Trust Territory, the Southern Cameroons' by *La Republique*. This was in line with the actions previously taken by Albert Mukong and Gorji Dinka in the 1980s and 90s to petition the UN to intervene on behalf of the anglophone minority. However, the SCNC delegation to New York, had some very distinguished personalities like Foncha and Muna who were regarded as the leaders of the Southern Cameroons to the union. Although the result from the UN may not be visible in the short term, but it did give publicity to the anglophone cause and helped to discredit the Biya regime.<sup>445</sup>

Cameroons application to the membership of the commonwealth was made in 1989. However, through effective lobbying and pressure it was only in 1993 that the secretary general Chief Emeka Anyaoku, visited the country to assess if Cameroon met the standards for admission. This offered an effective bargaining position to the Anglophones who used it to their fullest in drawing the attention of the commonwealth to their plight as a minority. In 1993 at the summit in Nicosia, Cyprus,

---

<sup>442</sup> [www.jeuneafrique.com](http://www.jeuneafrique.com), "les Anglophones qui nous menacent."

<sup>443</sup> [www.boh.org](http://www.boh.org), [www.iccnet.cm](http://www.iccnet.cm)

<sup>444</sup> Konnings & Nyamnjoh, "The Anglophone Problem in Cameroon," p. 220.

<sup>445</sup> Ibid.

Cameroon's admission was again delayed because it failed to meet the criteria of the Harare Declaration namely, the establishment of a democratic system, good governance and the respect of human rights. The role of the SCNC two man delegation in lobbying against this admission cannot be underestimated.<sup>446</sup>

Although Cameroon was later on admitted in 1995, this was alleged to have been due to a 'deal' between Biya and Sani Abacha of Nigeria to defend each other against international criticisms of their regimes.<sup>447</sup> But the SCNC has argued that Cameroon was admitted because no Commonwealth members opposed its admission, and not because they voted in support.<sup>448</sup> The UK and other commonwealth countries that are sympathetic to the plight of the Anglophones joined Nigeria in accepting Cameroon. The SCNC later on appealed for a Quebec style referendum in Auckland and filed an application for a separate membership. But the commonwealth has often dragged its leg when it comes to admission 'of separatist movements of minority groups.'<sup>449</sup>

The relationship between Cameroon and France suffered a setback as result of the diplomatic offensive taken by the SCNC. It is common knowledge that the French government has been a regular supporter of the government of Cameroon. This has earned them the resentment of many Cameroonians especially those of the minority. Thus the SDF in its campaign against the regime called for the boycott of French goods. This was aggravated during the 'ghost towns' when the SDF was protesting its stolen victory in the 1992 presidential elections.<sup>450</sup> The French government realised this and the new French ambassador for the first time in 1993 visited Buea and Bamenda and conferred with anglophone leaders. France went ahead to sponsor projects in the Northwest province. The French president even went ahead to 'recognise the anglophone problem' and to 'propose dialogue and a constitutional approach as solutions.'<sup>451</sup>

---

<sup>446</sup> *ibid.*

<sup>447</sup> *ibid.*

<sup>448</sup> Ekontang Elad, Chairman of the SCNC in Konnings & Nyamnjoh, "The Anglophone Problem in Cameroon," p. 222.

<sup>449</sup> *Ibid.*

<sup>450</sup> *ibid.*, This happened to have been the first time an anglophone ran for the highest office of the state. The disruptions that came as a result of the alleged rigging of the election made the state to impose a state of emergency in the Northwest province and put the SDF leader Ni John Fru Ndi under house arrest.

<sup>451</sup> *Cameroon Post*, 16-22 April 1996, in Konnings & Nyamnjoh.

The reaction of the government has been to increase its use of repression and the policy of divide and rule. SWELA and other prominent anglophone elites who are willing to get posts in return of favours for special position have been on the side of *La Republique*. The use of chiefs, the appointment to prestigious positions like that of Peter Mafany Musonge in 1996, by the CPDM (Cameroon People Democratic Movement) to the office of the prime minister, has not succeeded in swaying the Anglophones from the realities of their misery and the policy of the oppressor.<sup>452</sup>

The SCNC went ahead to set the 1<sup>st</sup> of October 1996 as the Independence Day of Southern Cameroons. Although nothing serious happened on that day, the SCNC called it 'a day of prayers' and asked 'God to save us from political bondage.' However, they reiterated their appeal that independence for the Southern Cameroons was 'irreversible and non-negotiable.'<sup>453</sup> The independence of the territory may be far fetched but the willingness of the people to 'fight back' cannot be underestimated. That is why the SCNC has admitted the possibility of a long drawn out war' and the building of a defence wall in the Southern Cameroons to prevent 'the brutal forces of *la Republique* with their incessant provocations will not deter us.'<sup>454</sup>

---

<sup>452</sup> The appointment of Musonge as Prime Minister (from the South West) replaced Achidi Achu of the Northwest and caused in some circles the joy of acknowledging the favour the president has shown to them. The politics of one good turn deserves another, 'scratch my back I scratch your own.' In Konnings & Nyamnjoh, "The Anglophone Problem in Cameroon," p. 214

<sup>453</sup> Ibid.

<sup>454</sup> *Cameroon Post*, 7-13 January, 1997 in Konnings & Nyamnjoh.

## CHAPTER VI

### COMPARATIVE ANALYSIS

*[This] work does not equate 'apartheid and the anglophone marginalisation'. The idea of equating historical atrocities is not only unseemingly but in practice impossible...equations are for algebra, not [law], not history, not politics. We compare and contrast rather than seeking to equate.<sup>455</sup>*

The comparative analysis undertaken below brings out the similarities in the Cameroonian and the South African experience from 1961 to 1996. Such similarities are investigated from the making of the constitutions, the influence of the common law system to both jurisdictions, the contribution of the Dutch/ French legal systems, to the conflicts arising from them.

#### 1) CONSTITUTIONAL MAKING PROCESS.

Under the indigenous framework there was more effective check of power abuse as it was more difficult for the dictatorial or tyrannical regime to emerge. This is not to say however, that there were no such leaders, but comparatively speaking it was easier for that to arise under the colonial and postcolonial set-ups.

In South Africa the entire constitutional making processes up to 1993 excluded the black section of the population.<sup>456</sup> However, they were expected to comply with its provisions. In Cameroon the making of the colonial constitutions ignored the indigenous people. But from independence a tactical and manipulative design excluded the most popular voices (the UPC in *la Republique* and Anglophones later in the Union<sup>457</sup>) of the country.

---

<sup>455</sup> Kader Asmal, p. viii

<sup>456</sup> Black as used here excludes the Indians and Coloureds.

<sup>457</sup> By ignoring the EMA constitution and the resignation of credible anglophone personalities from the constitutional process, the Francophone dominated government decided to promulgate its own constitution.

The 1993 constitution of South Africa marked a radical shift and break with the past. An inclusive process of participatory democracy gave birth to a *Reichstaat*. The 1993 constitution contained thirty-six principles that laid the foundation for the 1996 constitution. The separation of powers was one of these principles and constituted the basis for the case *Re: Certification of the Constitution 1996*<sup>458</sup> in which the New Constitution was challenged for not sufficiently meeting with the separation of powers requirement as set down in the Interim Constitution. Unfortunately the 1996 constitution of Cameroon failed rise to meet this challenge of adequately providing for checks and balances.

## 11) THE INFLUENCE OF THE COMMON LAW/FRENCH/ROMAN-DUTCH SYSTEMS

The foreign legal systems have the most enduring impact on the current judicial framework of both countries. The Roman-Dutch law today forms part of the South African legal system. In *Ex Parte De Winaar*<sup>459</sup> Holmes J described the relationship between English and the Roman-Dutch law in South Africa thus:

Our country has reached a stage in its national development when its existing law can better be described as South African than Roman Dutch....No doubts its roots are Roman Dutch, and splendid roots they are. But continuous development has come through the adaptation to modern conditions, through case law, through statutes, and through the adoption of certain features of English law, such as procedure, and the law of evidence.

Hahlo & Kahn<sup>460</sup> argue that “like a jewel in a brooch, the Roman Dutch law in South Africa today glitters in a setting that was made in England.” Nonetheless, there exists in South Africa a special statutory provision allowing all courts to take special notice of ‘customary law’. Sections 1(1) of the law of evidence Amendment Act.<sup>461</sup> This Act constituted a radical deviation from former reluctance to treat Indigenous law on a par with the foreign laws.<sup>462</sup> Over and above all Section 31(2) makes the constitution and

---

<sup>458</sup> Supra

<sup>459</sup> (1959) 1 SA 837 (N) 837 at 839

<sup>460</sup> The South African Legal System and its Background (1968) p. 584

<sup>461</sup> Act 45 of 1988.

<sup>462</sup> See Bennett on the Application of Customary law (Supra).

not either the foreign or indigenous systems<sup>463</sup> supreme, by prohibiting any exercise inconsistent with the bill of Rights.

The Cameroon judicial system is not easily defined. While Cameroon is a bi-jurial entity, with the Anglophone provinces following the Common law (as applicable in Nigeria and Britain), Francophone Cameroon pursues Civil law (as received from Senegal and France).<sup>464</sup> Ajanoh explicitly pointed out in his article the absence of a uniform practice in Cameroon. There has been harmonisation in certain areas like the labour code, the Penal code, however, these have been in substantive law, and the procedures applicable in the two jurisdictions are very different. Added to this is the conflict between the jurists trained in the different legal traditions with each wanting to cling to their separate procedures.<sup>465</sup>

The result in the current state of affairs in Cameroon makes the applicability of law very uncertain. For example in Criminal cases courts in Anglophone Cameroon would apply the accusatorial approach that assumes one innocent until proven guilty, while their counterpart in Francophone Cameroon would apply the inquisitorial approach (guilty until proven innocent).<sup>466</sup> This is further complicated technically because the Cameroonian Supreme Court is not a court of ultimate appeal.<sup>467</sup> Its sole function is to ensure that judgements of the lower courts are in accordance with the law (Cours de cassation). Although the objective of this was to ensure uniformity of case law, Ajanoh asked the question how unity of case law could be achieved when Supreme Court decisions are not binding on lower courts.<sup>468</sup>

The problem of uniformity of case law is further compounded by the absence of appeals from the Appeal courts of the Anglophone provinces. Litigants from this part of the country view the Supreme Court in Yaounde as in a foreign country from which

---

<sup>463</sup> Although Section 211 enjoins that the Courts must take into consideration African customary law.

<sup>464</sup> Supra, Ajanoh Sone Zachary, "The Administration of Criminal Justice in Cameroon: Realities of the Application of the Uniform Penal Code." *African Journal of International Comparative law*. p. 297-299.

<sup>465</sup> Ibid.

<sup>466</sup> Ibid., p. 299

<sup>467</sup> Ibid. p. 295

<sup>468</sup> Except in the Anglophone provinces where the binding precedent is applicable.

they are estranged by rules of practice and procedure obtaining before it.<sup>469</sup> The German legal system is visible in Cameroon today mainly in land law. Indigenous law has not seen more than was obtained under the repugnance proviso. In Cameroon therefore differences between the procedural and evidential laws operating in the two different systems of law are remarkable and are in many respects antithesis of each other.<sup>470</sup> Although the legal systems in Cameroon and South Africa can be described as a hybrid of the different colonial laws with the indigenous. The lack of certainty or unpredictability of the law in Cameroon coupled with the accumulation of power in the executive organ of the state has given rise to abuses. Arbitrary court rulings are thus easily obtained in Cameroon as in South Africa under apartheid.

#### 111) SEPARATION OF POWER PROVISIONS

The South African Act of 1961 and 1983 like the Union Act all lacked an adequate system of separation of powers and the relevant checks and balances. Parliamentary sovereignty as applied in South Africa lacked the most relevant checks to prevent abuse. Judicial review as in the *Harris case*<sup>471</sup> was forbidden and the executive executed the will of parliament, besides the absence of popular democracy. Apartheid was made possible not as much as a result of parliamentary sovereignty, than as a lack of the separation of powers and the relevant checks and balances. The case of *President of the Republic v Western Cape* (1993) was a *locus classicus* as it reinstated the judiciary as a watch dog of the executive and confirmed that the constitution and not parliament was supreme.

In Cameroon unlike in South Africa, the executive was supreme. More so the executive in Cameroon meant the president. So by extension the president was supreme and above the law courts and the parliament. The federal constitution that imposed some limitation on his power was violated. The president unconstitutionally abrogated the federal nature of the Union and replaced it with a unitary state. Under the Unitary constitution the president used the parliament to stamp his decisions and

---

<sup>469</sup> Ajanoh, *African International law Journal*, p. 295

<sup>470</sup> For details on the Cameroon Legal system, see Ajanoh's article supra.

<sup>471</sup> Supra DF Malan's government said the ruling by the court was unacceptable.

the courts as a department to accord recognition. The Case of the *Dissident deputies*<sup>472</sup> bears testimony to this. As a result of this excess power the Anglophones who had fled from Nigeria to avert the disadvantaged position of a minority, were again in an uncompromising position. A situation far less than what they had initially bargained for.

The change from a federal to a unitary state also demonstrates accurately the inability of the courts to check the excesses of the president. This act was unconstitutional as it violated Article 47(1) which read "any proposal for the revision of the present constitution, which impairs the unity and integrity of the federation shall be inadmissible." It is clear that a constitutional amendment was not also permissible by referendum as stated by Article 47 (3) "that proposals for revision shall be adopted by simple majority vote of the members of the federal assembly, provided that such majority included a majority of representatives...of each of the Federated States."<sup>473</sup> Ahidjo therefore acted *ultra vires* by unilaterally deciding to change the nature of the union.

The similarities here lie in the fact that in both countries there was no substantive separation of powers with the relevant checks and balances. Power weighed absolutely to one organ of the state usurped from the others. Making the people liable to violations.

#### IV) USE OF THE LAW

The emergency regulations of both countries permitted the president to declare a state of emergency. However, there were no corresponding limitations on this duty. The courts could not for example challenge the infringement on civil liberties.<sup>474</sup> Under such emergency laws with the president as head of the armed forces, this made them very despotic. The president could thus call in the army in civil unrest and this was a frequent occurrence. Under the emergency regulations what constituted a crime was

---

<sup>472</sup> Absence of Law Report makes providing references very difficult.

<sup>473</sup> A. W. Mukong (ed.), *The Case for the Southern Cameroons* (Yaounde: Cameroon Federalist Committee, 1990), p. 18 in Konnings & Nyamnjoh

<sup>474</sup> This situation happened in the periods when the state of emergency was declared in South Africa (1960s and 1985) and Cameroon (from 1959 and in 1992).

defined subjectively and anyone could be detained and abused with no recourse to the courts.<sup>475</sup>

The law<sup>476</sup> stated that, "the maintenance of public order in the state of Cameroon will be enforced, in cases of emergency, by implementation of the two following measures: a state of *mise en garde* and a state of alert." The notion of public order in Cameroon does not have the same meaning as elsewhere, even in the French administrative set-up (from which Cameroonian Administrative law is drawn). In French public law, public order refers to the minimum condition necessary for the maintenance of a normal social life, like the security of persons, property, peace and tranquillity.<sup>477</sup>

In Cameroon 'public order' has been transformed and now comprises two fundamental principles the maintenance of the political status quo that is the retention of power by president and his friends.<sup>478</sup> Next all acts, proposals, omissions capable of being interpreted by the regime as bringing into question one of these principles were treated as constituting grave threats to public order and consequently as instances of subversion subjected to prosecution. These laws existed in the country for a long time and it is still debatable if they are not frequently invoked.<sup>479</sup> Under the Federal Republic, they were applicable throughout the entire country and renewable every six months instead of four.<sup>480</sup>

It is thus accurate to state that the security laws operated to maintain the status quo. It confirmed the extent to which the South African parliament and the Cameroon president manipulated their people and manoeuvred their interests, in constitutional amendments. When the law proved insufficient to guarantee their interest force was used.

---

<sup>475</sup> The Anti- Communism Act for example gave the president power to declare any act illegal or as constituting a threat to peace. With the absence of judicial review, the courts could not challenge the acts of the executive.

<sup>476</sup> Law of 27<sup>th</sup> May 1959 in Cameroon.

<sup>477</sup> Richard Joseph, *Gaullist Africa*, p. 101.

<sup>478</sup> *Ibid.*

<sup>479</sup> See the experiences of the Ghost Towns and Oben Peter Ahu's "Fifteen Days Renewable", Konnings & Nyamnjoh, p. 211.

<sup>480</sup> *Ibid.*, Decree No. 52 of 7 May 1960.

## V) USE OF FORCE

This is very related to the above but the focus is on the government side of it. In South Africa like in Cameroon the governments used the police and the military to suppress its own people. Ideally the function of the police is to maintain internal peace, while the army is for national defence. However, the two roles became so interchangeable that the result could be predicted. The White Paper<sup>481</sup> accurately summed up the relationship that existed between the police and the army in South Africa thus

The responsibility for combating internal and especially urban unrest rests primarily with the SAP. Nevertheless, the SADF must at all times be ready, on a countrywide basis to quickly mobilise trained forces to render assistance.<sup>482</sup>

The Sharpeville and Soweto massacres are the two most glaring examples of such police operations. The army was always on standby and sometimes called in to assist in maintaining stability after police brutality. In Cameroon the casualties in the Northwest province during the state of emergency and the shooting of the some youths during the launching of the SDF, like the massacre of innocent civilians under the guise of eliminating the UPC are instances of excess force against unarmed people.

## VI) RESISTANCE

History in both countries show that where there is any such absence of the separation of powers there is a violation of fundamental rights and freedoms. And where there are any such violations there is conflict born out of resistance.

---

<sup>481</sup> Although this paper was issued in the 1980s it reflected a trend of military interference in civilian unrest as far back as in the 1950s.

<sup>482</sup> Gavin, *Apartheid War Machine*, p.223

The non-violent approach as practised in South Africa and Cameroon was conducted through boycotts, sits-in, stay-aways, ghost towns, and peaceful demonstrations inter alia. But each time the people expressed their protest in these forms they were met with more force and excessive brutality. The governments proceeded to outlaw basically all forms of protest admissible in a democratic set-up.

It was under such circumstances that the people resorted to violence. The resistance in South Africa developed alongside International Criminal law, which gave a people, denied their basic rights to alter, abolish and overthrow any such regimes.<sup>483</sup> In Cameroon the resistance seems to be at the last stages of non-violence and the early stages of violence.<sup>484</sup> Taken collectively it is submitted that there comes a time when an oppressed people would fight back for their rights.

#### VII) INTERNATIONAL ELEMENT

In both Cameroon and South Africa, the international community has played a significant role. In South Africa, the international community operated in dual capacities. It aided and abetted the regime. In Cameroon the situation is much less the same.

The battlefields of apartheid went far afield as to all the corners of Southern Africa. The nature of the government crackdown on the liberation movements pushed them to seek alternative safe havens in other countries. The resistance movements organised and launched their attacks from bases in the frontline states. The regime retaliated by invading these territories. Pressure by foreign powers were neutralised by their trading contacts with the apartheid regimes.

Cameroon resistance movements are still mining the international waters for favourable opinions whilst pressing on with their struggle. But just like some Western countries violated the UN sanctions on South Africa, the French have been the most ardent supporters of the Cameroon regimes and have provided troops and equipment

---

<sup>483</sup> Kader Asmal, *Reconciliation through Truth*, p.184. UN Resolution 2396 of 1984.

for the 'maintenance of law and order and to foster technical corporations.'<sup>485</sup> It would be wrong however, to assume that simply because the Southern Cameroons struggle for secession has not engaged in a total military campaign it means the struggle is relatively unimportant. The fight for minority protection in this case can be compared to the quest for equality by the blacks in South Africa. When the resistance movements started in South Africa it was similarly not well known. But with the increasing use of force by the government and segregationist laws the situation exploded. The case of Cameroon may not be very different from the South African experience.

University of Cape Town

---

<sup>484</sup> The declaration of the restoration of the independence of Southern Cameroons on December 30, 1999 was done within a non-violent framework. See [www.southerncameroons.org](http://www.southerncameroons.org)

## CONCLUSION

In this research there has been an attempt to examine parliamentary sovereignty as it operated in South Africa from 1961-1993 and presidential executive in Cameroon. It was established that both concepts are not in themselves wrong but their transplant and applicability without the corresponding limitation created a crisis situation. In other words, the applicability of these concepts led to the concentration of powers in one organ. Herein lies the root of the conflicts that plagued the two countries. As a recommendation therefore, conflicts can be prevented and resolved when constitutions avoid the accumulation of powers in one organ by providing for a system of checks and balances.

Although there is no universally accepted form of a separation of powers, there is consensus that there should be limitation on the powers of each organ of the state. This limitation is usually in the form of checks and balances by each branch on the other. In Cameroon as in South Africa (up to 1993) despite the recognition of the importance of the principle, there was inadequate attempt to apply it.

Under parliamentary sovereignty, the parliament's power to make and unmake led to abuses such as apartheid. The lack of power separation led the marginalisation of the Anglophones in Cameroon.

The violation of basic rights and fundamental freedoms was done under the guise of Acts and Decrees and constitutional manoeuvres. When this proved ineffective other methods had to be used to preserve their control like the use of force. The combine influence of force and laws necessitated a high disregard for persons and rights. A situation that today is criminally liable in many jurisdictions, but South Africa opted for reconciliation through truth and granted amnesty to some of the perpetrators. Whether Cameroon may follow this path or that of the International Tribunal for offences against humanity is still uncertain and too early to predict. But if the country seeks lasting peace it may be necessary to pursue the former approach.

---

<sup>485</sup> [www.boh.org](http://www.boh.org)

On the other hand the 1996 constitution of Cameroon failed to harness the forces of the time and establish a new order like in South Africa. The South African constitution of 1996 marks a paradigmatic shift with its predecessors. It goes further to create a country based on equality, human rights and democracy. These concepts of Affirmative Action, Bill of rights, Counter- majoritarianism are treated here to show just how significant the new constitution seeks to mend the wounds of the past. The constitution goes even further to reintroduce some indigenous concepts like 'ubuntu' which suggests humanness.<sup>486</sup>

The importance of the separation of powers need not be over emphasised. South Africa poses a beacon of hope in line with African Renaissance in the millennium. Cameroon may not avert its conflicts because the 1996 constitution simply differed from the previous ones in form and not substance.<sup>487</sup> It left the Cameroonian people at the mercy of an executive president who maintained excessive powers, when the history of the previous century is replete with information on what consequences such have had.

It is submitted therefore that Cameroon may not learn the South African experience because maybe "history cannot simply be learned, it may have to be lived."<sup>488</sup>

---

<sup>486</sup> *S v Makanyane*, supra

<sup>487</sup> Enonchong, "Old Wine in New Wineskin: Cameroon Constitution of 1996" supra.

<sup>488</sup> Greenberg, Katz et al, *Constitutionalism and Democracy: Transitions in the contemporary World*, (New York: Oxford University Press, 1993). p 645

## SELECTED BIBLIOGRAPHY

### Part I

#### General Texts

- Ali Mazrui, *Triple African Heritage*, London: BBC, 1990.
- Anta Diop, *Precolonial Black Africa*, Wesport: Lawrence Hill & Co., 1987.
- Davidson B., *The Black Man's Burden: Africa and the Curse of the nation State*, Oxford: James Curry, 1992.
- Gerhard C., *Separation of Powers*, Oxford: Oxford University Press, 1997.
- Greenberg Douglas, Stanley Katz, Melanie Oliviero, Steven Wheatley Eds., *Constitutionalism and Democracy: Transitions in the contemporary World*
- Heer Nicholas, *Islamic Law and Jurisprudence*, London; Washington Press, 1990.
- Kahn Freud, "Uses and Misuses of Comparative Law," *Modern law Review*, Vol. 37, 1974.
- Korn Jessica, *The Power of Separation: American Constitutionalism and the Myth of the Legislative Veto*, New Jersey: Princeton University Press, 1996.
- Mamdani M., *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism*, London: James Curry, 1996.
- Mann Kristin, Roberts R., (Eds.) *Law in Colonial Africa*, London: James Curry, 1990.
- Montesquieu, Baron De, *De L'Esprit Des Lois*, Oxford; Clarendon Press, (10<sup>th</sup> Edition), 1989.
- Nwabuzue C., *Constitutionalism in Emergent States*, London: Oxford Press, 1963.
- Ogwurike C., *Concept of Law in English Speaking Africa*, Lagos: NOK, N.D.
- Syed Habibbal, *Islamic Legal Philosophy and the Qu'ranic Origins of Islamic Law*, Durban: University of, 1989.
- Watson A., "Comparative Law and legal Change," *Cambridge Law Vol. II*, 1978.
- Watson A., "Legal Transplant and Law Reform," *Law Quaterly Review Vol. IV*, 1976.
- Wesseling G., *Divide and Rule*, Oxford, Oxford University press, 1995.

## Part II: Cameroon

### PRIMARY SOURCES

#### Journals on Cameroon

Ajanoh Sone, "The Administration of Criminal Justice in Cameroon: Realities of the application of the Uniform Penal Code," in *African Journal of International Comparative Law*, Vol. 9, 1999.

Enonchong N., "The Cameroon Constitution; Old wine in New Bottle," in *African Journal of International Comparative Law*, vol.5, 1998.

Konnings Piet & Nyamnjoh Francis, "The Anglophone Problem in Cameroon." *Journal of Modern African Studies*, vol. 12, 1997.

Mukum John, "Effective Constitutional Discourse" in *Democracy And Democratisation in Africa*, Leiden: J. Brill, vol. 3, 1997.

Takougang Joseph, "The Demise of Biya's New Deal 1991-1992" in *African Insight*, Pretoria 1997.

Stark FM, "Federalism In Cameroon," in *Canadian Journal of African Studies*, Vol. 10, No. 3, 1976.

#### Unpublished Dissertations

Akoh Harry Asa'na, "The Contribution of the Roman Catholic Mission to Educational Development In Africa: The Case of St. Joseph's College, Sasse In Cameroon. Unpublished BA Dissertation, University of Buea, Cameroon.

Albertyn Catherine Hester, "A Critical Analysis of Political Trials in South Africa 1948 – 1988." Unpublished PhD Thesis, University of Cambridge.

Kechemin Pythagors, "The Separation of Powers in Cameroon, Great Britain and the USA: A Comparative study", Unpublished LLB Dissertation: University of Buea, 1996

### SECONDARY SOURCES ON CAMEROON

Delancey Mark, *Cameroon: Dependence And Independence*, Westview Press: London, 1994.

Ebune Joseph, *Growth of Political parties in Southern Cameroons, 1916-1961*, Yaounde, CEPER, 1992 in Konnings & Nyamnjoh, "The Anglophone Problem In Cameroon," in *Journal of Modern African Studies*, 1997.

Enonchong A., *Cameroon Constitutional Law: Federalism in a Mixed Common law and Civil law System*, Yaounde: CEPMAL, 1967.

Kofele Kale (ed.) *An African Experiment in Nation Building; The Bilingual Cameroon Republic Since Reunification*, Colorado; Westview, 1980.

Ngoh Victor Julius, 1884-1985: *A Hundred Years of Cameroon History*, Yaounde: Navi Publishers, 1989.

Ngwane George, *Conflict Resolution In Africa*, Limbe: Nooremac Publishers, 1996.

Richard Joseph, (ed.), *Gaullist Africa: Cameroon Under Ahmadou Ahidjo*, Malta: Fourth Dimension Publishers, 1978.

Rubin Harry, *Germans in the Cameroons 1884-1914*, Oxford: Alden Press, 1939.

### Part III: South Africa

#### **PRIMARY SOURCES**

##### **Journals & Documentaries SA**

Chakaskalson A., "The Legal System in South Africa 1960-1994", *South African Law Journal*, Vol. 115, 1996.

*Comparative Labour law Journal*, Vol., 3, 1979.

Human Rights Report, *Crises In the Crossroads*, New York: Lawyers Committee, 1988.

Report of the UN Expert Group on South Africa, April 1964.

SABC Program, News Hour Sunday 12<sup>th</sup> September 1999.

*South African Yearbook*, Pretoria, Department of Information, 1976.

Steenkamp, *Security Branch Reports*, Pretoria, 1985.

*Survey of Race Relations*, Cape Town, Juta 1976.

Tambo Oliver, "Speeches in Exile", Grassy Park Video Documentaries, 1996

Vorster P., "Speech And Policies" Video Documentary, Grassy Park Library, 1994.

#### **SECONDARY SOURCES ON SOUTH AFRICA**

Abel Richards, *Politics by Other Means: Law in the Struggle Against Apartheid 1980-1994*, New York: Routledge, 1995.

Asmal Kader, *Reconciliation Through Truth: A Reckoning of Apartheid's Criminal Governance*, Cape Town: David Phillip, 1996.

Barrell Howard, *MK*, London: Oxford University Press, 1994.

- Basson Dion, *South Africa's Interim Constitution; Text and Notes*, Cape Town; Juta & Co., 1994.
- Bennett TW, *African Customary law and the Bill of Rights*, Cape Town, Juta, 1996.
- Bennett TW, *African Customary law*, Cape Town, Juta, 1994.
- Benyon John (ed.) *Constitutional Change in South Africa*, Pietermaritzburg; University of Natal Press, 1978
- Butterworths, *Bill of Rights Compendium*, Durban: Butterworths, 1999.
- Cawthra Gavin, Cheryl Walker, Platzy C., *The Surplus people And Forced Removals in South Africa*, Braamfontein: Ravan Press, 1985
- Cawthra Gavin, *The Apartheid War Machine: Brute Force*, London, Showsean Ltd., 1986.
- De Villiers Bertus, *Birth of a Constitution*, Cape Town: Rustica Press, 1994.
- Devenish G., *A Commentary on the South African Bill of Rights*, Durban: Butterworths, 1999.
- Gloppen S., *Battle Over the Constitution*, Dartmouth: Aldershot, 1997.
- Hassan Ebrahim, *The Soul of a Nation*, Cape Town; Oxford University Press, 1998.
- Kennedy T., *Law and Custom of the South African Constitution*, London: Oxford University Press, 1939.
- Marais D., *Constitutional Development of South Africa*, Johannesburg: Macmillan, Butterworths, 1985.
- Marshall Geoffrey M., *Constitutional Theory*, Oxford; Clarendon Press, 1971.
- Murray Christian, O'Regan Catherine, Eds. *No Place to Rest: Forced Removals And the Law In South Africa*, Cape Town: Oxford University Press: 1990.
- Nicol M., *The Making of the Constitution; The Story of South Africa*, Cape Town; Churchill Publishers, 1997.
- Vorster MP, Wiechers M., Van Vuuren DJ, *Constitution of Transkei, Bophuthatswana, Venda & Ciskei*, Durban: 1985.
- Walker Cheryl, *Women and the Resistance in South Africa*, London: Onyx Press, 1982.
- Wiechers M., *Bridge or Barricade? The Constitution a First Appraisal*, Johannesburg: Jonathan Paperbacks, 1984.

#### WEBSITES

[www.boh.org](http://www.boh.org)

[www.cameroon.net](http://www.cameroon.net)

[www.camnet.cm](http://www.camnet.cm)

[www.gcis.co.za](http://www.gcis.co.za)

[www.southerncameroons.org](http://www.southerncameroons.org)

[www.uct.ac.za](http://www.uct.ac.za)

[www.un.org](http://www.un.org)