

When the rule of law and constitutionalism become a mirage: an analysis of constitutionalism and the rule of law in post-independent Cameroon against post-apartheid South Africa

BY

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DECLARATION

I declare that this thesis is my original work. It has never been presented to any other University or institution. Where other people's works have been used, references have been provided, and in some cases, quotations made. It is in this regard that I declare this work as originally mine. It is hereby presented in partial fulfillment of the requirements for the award of the LL.D Degree.

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DEDICATION

This thesis is dedicated to my Almighty God who put this desire in my heart and accomplished it for me, and to my unmarried wife and unborn children, whom I sacrificed in order to achieve this goal first.

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ACRONYMS

ANC	African National Congress
ARCAM	Assemblée Representative du Cameroun
ATCAM	Assemblée Territorial du Cameroun
AZAPO	Azania's Peoples Organisation
BCM	Black Consciousness Movement
CA	Constitutional Assembly
CC	Constitutional Court
CGT	Confédération Générale du Travail
CODESA	Conventions for a Democratic South Africa
COPE	Congress of the People
COSATU	Congress of South African Trade Unions
CPDM	Cameroon's People Democratic Union
CWA	Cameroons Welfare Association
CYL	Congress Youth League
DA	Democratic Alliance
DPP	Director of Public Prosecutions
ECC	End Conscription Campaign
ELECAM	Elections Cameroon
IFP	Inkatha Freedom Party
JSC	Judicial Service Commission
KNC	Kamerun National Congress
KNDP	Kamerun's National Democratic Party
KPP	Kamerun's People's Party
MDR	Mouvement pour la Défense de la République
NCHRF	National Commission for Human Rights and Freedoms
NEO	National Elections Observatory
NP	National Party
NPA	National Prosecuting Authority
PAC	Pan Africanist Congress

Racam	Rassemblement Camerounais
SACP	South African Communist Party
SADF	South African Defense Forces
SAP	South African Police
SIU	Special Investment Unit
UN	United Nations
UNDP/NUDP	National Union for Democracy and Progress
UNICAFRA	Union Camerounaise Française
UPC	Union des Populations du Cameroun
USCC	Union des Syndicats Confédérés du Cameroon

SUMMARY

The thesis examines the colonial era in Cameroon with the view to determining whether or not there has been a shift from colonial ideologies or jurisprudential transformation in the new democratic dispensation. Constitutional transformation in South Africa is used as a desirable transformative paradigm against which constitutional transformation is measured in post-independence Cameroon. I contend that participation and empowerment of the South African citizenry through the constitution-making process which endowed the citizenry with the power to constrain and restrain government action through the constitution provides a desirable paradigm for constitutional transformation. Cameroon's constitution-making process was elite-driven, participation reduced to the colonial government and Cameroonian citizenry side-lined, thereby facilitating the continuity of the colonial ideology to be captured in the independence and post-independence Cameroonian constitutions. Since independence there has been no substantive change in the content of the constitution of 1960 which was then replicated in the 1961, and 1972 constitutions. Conclusively, the legacy of colonialism is still apparent in the present 1996 constitution. This colonial ideology continuity into the current democratic dispensation has inspired disregard for the rule of law and constitutionalism.

The thesis concedes that South Africa has not been transformed fully as yet. Violations such as those in Marikana, Nkandlagate and refusal by President Zuma's lawyers to hand over the 'spy tapes' to the court can only suggest that South Africa is still undergoing transformation. However, I have pointed out that in just twenty one years SA has made significant constitutional transformation Cameroon has not made despite its fifty five years as a democracy.

The thesis ends by making recommendations for constitutional transformation in post-independence Cameroon relying on the SA model to provide for the entrenchment of a bill of rights in the Cameroonian constitution, the Constitutional Council be empowered with the power of judicial review and constitutionalization of specialised institutions amongst others.

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CHAPTER ONE

INTRODUCTION

1 RESEARCH PROBLEM, ASSUMPTIONS, AND RESEARCH QUESTIONS

We spent the time adapting the laws received from our colonial master. The new dispensation, a new mentality was buried in the old ways of doing things. Meanwhile, our society was changing but the change was not being reflected in our laws.¹

The main research problem this thesis addresses is premised on the fact that there was no substantive change in the law when Africa gained independence, but more specifically when Cameroon gained independence on 1 January 1960 and the sovereignty of the people was restored.² Hence, objective transformation³ did not take place. Cameroon's shift from a colonial past to a new dispensation, in terms of which sovereignty was invested in the people, did not result in a true transition to democracy.⁴ Thus, it must be understood, parenthetically, that even though the 1959 statute of Cameroon called Cameroon a state, this statute did not truly make it so, since the reserved powers retained by France could only suggest that sovereignty ultimately lies in Paris and not in Yaounde, the capital of Cameroon.⁵ Juridical irregularities and judicial submissiveness to the executive under the present constitutional dispensation in Cameroon are informed by colonial regime continuity in state rule under the new dispensation.⁶

The theory of a revolutionary war known as "*doctrine de la guerre révolutionnaire*", which the French applied in both Indochina and Algeria, without success, was subsequently applied in

¹N Wakai *Under the broken scale of justice: The law and my times* (2009) 91.

²Above

³Objective transformation and transformative constitutionalism refer to meaningful change in a constitutional dispensation. (Practical change in terms of progressive realization of democracy and rights on the ground and not mere theorization). In other words, objective transformation occurs when rules written in the constitution are translated into actual events happening on the ground. Transformative constitutionalism shows a change which increases protection of citizens as seen in the Preamble to the Constitution of the Republic of South Africa, 1996. The inclusion of socio-economic rights in the South Africa constitution is a good example of transformative constitutionalism and objective transformation: K Klare "Legal culture and transformative constitutionalism" (1998) *South African Journal of Human Rights* 146-188 at 150.

⁴J Takougang "Cameroon: Biya and incremental reforms" in J Clark & D Gardinier (eds) *Political reforms in Francophone Africa* (1997) 166.

⁵Le Vine V Le Vine *The Cameroons: From mandate to independence* (1964) 217.

⁶C Anyangwe *The magistracy and the bar in Cameroon* (1989) 34 n 34.

Cameroun.⁷ This theory aimed at eradicating any opposition to the French colonial ideology by psychologically manipulating, in their favour, the population supporting the largest and best organised indigenous political party in the territory, *Union des Populations du Cameroun* (UPC).⁸ Unable to dislodge the opposing ideology held by the Camerounians under the UPC banner, which sought immediate independence and the establishment of a sovereign state, the colonial administrators considered that democratic measures to win over UPC were likely to fail and thus resorted to an anti-subversion campaign that Roland Pre, the French colonial administrator in the territory at the time, proposed.⁹

Charles de Gaulle, as the *L'homme providentiel* for France, finally resorted to the consolidation of state monopoly of internal capitalism in black Africa and Cameroun, in particular by adopting a perfectly reliable sleight-of-hand by which France granted independence to black Africa while at the same time reinforcing a structure of dependence.¹⁰ The French vigorously destroyed the nationalist movement spawned in Cameroun and left a Legislative Assembly in place, which on the date of Cameroun's independence was unreformed and elected during times of boycott and violence in 1956. Additionally, Ahmadou Ahidjo¹¹ was handpicked by the colonial administration in 1958 to further French ideology in the new dispensation at the expense of Camerounians who wanted genuine independence and the reinstatement of their sovereignty.¹² France carefully disrupted the smooth reinstatement of Cameroun's sovereignty by reinforcing French-African or French-Camerounian ties, which the French achieved by maintaining the power of those elites

⁷Cameroun is the French accepted spelling of (Cameroon), Cameroon is the English and Kamerun, the German spellings. In this thesis I generally use the English spelling. However, the French spelling has been used in all instances prior to 1961.

⁸T Deltombe M Domergue & J Tatsitsa *Une guerre cache aux origines de la FrancAfrique (1948-1971)* (2011) 1. The UPC was the harbinger of the liberation movements that arose in Portugal's African territories. The UPC, which distrusted the colonial ideology in the same way as the PAIGC, Frelimo, and MPLA, believed that Cameroon needed to enter independence subsequent to having achieved the socialist transformation necessary for perpetual growth of the country in order to break with dependence and other forms of domination that the country might fall into after independence. R Joseph "The Gaullist legacy in Franco-African relations in R Joseph *Gaullist Africa: Cameroon under Ahmadu Ahidjo* (1978) 29-30.

⁹Above.

¹⁰R Joseph "The Gaullist legacy in Franco-African relations in R Joseph *Gaullist Africa: Cameroon under Ahmadu Ahidjo* (1978) 13.

¹¹The disapproval of Roland Pre's French policy and action at the UN led the French parliament to engage in more liberal reforms in the colonies, which culminated in the passage of the *loi-cadre* in 1956. This policy proposed elections for a new assembly, which elections were conducted in 1956. The assembly, ALCAM, was to negotiate independence with France. In the meantime, the assembly produced internal self-government for Cameroon. Under a changed constitution, Jean-Marie Andre Mbida became the first prime minister in May 1957. N Rubin *Cameroon: An African federation* (1971) 68-70. The then French High Commissioner, Jean Ramadier, forced Mbida to resign and replaced him with Ahidjo who served as prime minister from 1958 and later became the first president of the republic at independence in 1960. V Le Vine "Leadership and regime changes in perspective" in M Schatzberg W Zartman (eds) *The political economy of Cameroon* (1986)

¹²As above 30.

exclusively endorsed by France to inherit legal sovereignty.¹³ This unjustifiable means of self-determination created a gap in governance that has led to serious compromise on the rule of law and constitutionalism in post-independent Cameroun. That is, France maintained colonial regime continuity in Cameroun by maintaining the power of Camerounian elites who were loyal to the colonial regime. The French colonial government and Camerounian elite had exclusive input into the independence constitution and distanced the people of Cameroun from this process.¹⁴ Thus, the outcome of the final document could only promote and encourage neo-colonialism. At independence, the colonisers decolonised the colonial state, not the African peoples subjected to this state. Self-determination was not exercised by the victims of colonisation but rather by their victimisers, the elite who had control over the international state system.¹⁵ Continued dependence on the former coloniser was assured under the post-colonial state by using the instrument of the narrow elite and their international backer.¹⁶

The Constitution of the Fifth Republic of 1958 was used as a blueprint to construct the Camerounian constitution, and in the same way that the French president has sweeping powers, albeit with some legal and constitutional guarantees to regulate by decree,¹⁷ the powers the Camerounian constitution attributed to the president excluded most legal and constitutional checks and facilitated a penchant for authoritarianism.¹⁸ This was a colonial attribute that evolved into a democratic dispensation. Most African countries in the postcolonial era are equally experiencing colonial regime continuity.¹⁹ Poku observes as follows:

As a result, notions that authoritarianism was an appropriate mode of rule were part of the colonial political legacy. Ironically, it was ultimately this curious identity of interest between the new elites and the colonial oligarchy which facilitated the peaceful transfer of power to African regimes in most of colonial Africa. What emerged from the post-colonial agreement, therefore, was above all an agreement between nationalist elites and the departing colonizer to receive a successor state and maintain it with as much continuity as possible.²⁰

The present research problem proposes the following assumptions:

¹³Joseph (1978) 4.

¹⁴N Awasum "Politics and constitution-making in Francophone Cameroon, 1959-1960 (2002) 49 *Africa Today* 5.

¹⁵M Mutua "Breaking the barriers: Radical constitutionalism in the new African century" in Oloka-Onyango (ed) *Constitutionalism in Africa: Creating opportunities, facing challenges* (2001) 308-309.

¹⁶Above.

¹⁷N Brown & J Garner French administrative law (1983) 7.

¹⁸Awasum (2002) 24.

¹⁹N Poku & A Mdee *Politics in Africa* (2011) 18 & 22.

²⁰Above

- The present predicament relating to constitutionalism and the rule of law in Cameroon has its roots in colonialism.²¹ The independence of Cameroon and its use of the Fifth French Republic's Constitution as a blueprint for the construction of its own constitution,²² facilitated continuity of colonial brutality.²³ The above conditions clearly illustrate the reasons for the existence of a Machiavellian²⁴ and Leviathanian²⁵ constitutional dispensation in Cameroon.²⁶
- The independence of Cameroon and the emergence of self-rule and, by implication, the establishment of a democracy after the departure of the colonial powers is a myth.²⁷ Constitutionalism and the rule of law, although nominally respected, are in fact respected more in the breach than in observance.²⁸ This is informed by the absence of political will as evidenced by the fact that testing powers regarding constitutionality of laws and amendments to the constitution are vested in the Constitutional Council, which is not a court of law but a quasi-political body.²⁹
- The apparent regard for the rule of law and constitutionalism in post-independence Cameroon, as evidenced by the presence of sham institutions, resulted from an ideological struggle prior to independence, pitting Camerounian nationalism under the auspices of the UPC against French imperialism.³⁰ The subsequent dominance of French imperialism in this struggle was manifested in the establishment of the Camerounian constitution, which converted the president into an "imperial president", and French comprador, who for all intents and purposes, has no restraint and is considered to be the same as the all-powerful colonial governor general.³¹ These qualities negate the rule of law and constitutionalism.

²¹J Mbaku "The separation of powers, constitutionalism and governance in Africa: The case of modern Cameroon" http://works.bepress.com/john_mbaku/7 (2013) (accessed on 25/5/2013).

²²Africa report no. 160 Cameroon: Fragile State? (2010) 6-7 (The Constitution of Cameroon of 1960).

²³Mbaku (2013) 30.

²⁴Morally questionable methods in the interests of the State in politics. Politicians that use cunning, intimidation and scheming methods in State governance for their own interest: RE Allen (ed) *The Concise Oxford Dictionary* (1990) 710.

²⁵This refers to the absolute power a ruler exerts over his subjects, even when this power is in opposition to the desires and aspirations of the common good: LB Curzon *Jurisprudence* (1995) 28.

²⁶V Ngoh "Biya and the transition to democracy" in J Mbaku & J Takougang *The leadership challenge in Africa: Cameroon under Paul Biya* (2004) 443-444.

²⁷S Dicklitch "Failed democratic transition in Cameroon: A human rights explanation" (2002) 24 *Human Rights Quarterly* 152-176 at 165.

²⁸Anyangwe (1989) 34-35.

²⁹CM Fombad "The new Cameroonian Constitutional Council in a comparative perspective: Progress or retrogression?" (1998) 42 (2) *Journal of African Law* 172- 186 at 172 & 184. (Fombad (1998) *JAL*)

³⁰N Rubin Cameroon: An African federation (1971) 64.

³¹C Fombad E Nwauche "Africa's imperial presidents: Immunity, impunity and accountability" (2012) 5 *African Journal of Legal Studies* 96.

- The present constitutional environment in South Africa acknowledges the brutality of South Africa's past.³² At the dawn of the South African democracy, structures that encouraged brutality were transformed into structures that promote respect for human rights, democracy, and the rule of law.³³ This has been elegantly demonstrated by Le Roux, who uses the constitutional court building as a memorable metaphor to depict how the brutality of the past has been curtailed, and how the present dispensation, which is founded on a culture of respect for human dignity, evinces a promising future.³⁴
- An analysis of constitutionalism and the rule of law in post-independent Cameroon in light of the framework of constitutionalism and the rule of law in post-apartheid South Africa suggests that Cameroon should adopt a structural model along South African lines, with a view to improving the constitutional position in Cameroon.³⁵ This thesis contends that South Africa has experienced greater democratic transition within a period of 20 years than Cameroon has achieved since independence in 1960. This fact is vividly illustrated through South Africa's erection of institutions that support democracy in terms of Chapter 9 of the constitution, and its respect for human rights as an indispensable tenet of South African constitutionalism, while Cameroon has no such arrangements entrenched in its constitution. Indeed, Cameroon needs to depart from merely theorising about the rule of law and constitutionalism to a practical institutionalisation of its fundamental tenets.³⁶
- The jurisprudence of the South African Constitutional Court is based on respect for human rights, including social rights such as the right to housing, health, and nutrition.³⁷ While numerous controversies surround the socio-economic rights jurisprudence, the emergence of such jurisprudence in post-apartheid South Africa reveals a shift in ideology from the pre- to post-democratic period.³⁸ Such an ideological shift is not evident in Cameroon.

These assumptions have resulted in the main question: What informs government's disregard for the rule of law and constitutionalism in post-independence Cameroon, given its transformation from colonial rule to a republic in 1960?

³²W Le Roux "War memorials, the architecture of the constitutional court building and counter-monumental constitutionalism" in W Le Roux & K Van Marle (eds) (2007) *Law, memory and the legacy of apartheid* 65

³³Above

³⁴Above

³⁵S Liebenberg *Socio economic rights adjudication under a transformative constitution* (2010) 27-29.

³⁶J Oloka-Onyango "Constitutionalism in Africa: Yesterday, today and tomorrow" in J Oloka-Onyango *Constitutionalism in Africa: Creating opportunities, facing challenges* (2001) 3.

³⁷S Woolman, T Roux & M Bishop *Constitutional Law of South Africa* (2007) 56A-6-56A-12

³⁸H Klug *The constitution of South Africa: A contextual analysis* (2010) 6.

The following ancillary questions enable the clarification of this main question, and determine the thesis structure:

- Under what constitutional and historical context did colonialism operate in Cameroon ?
- How did South Africa transform from an apartheid regime to a constitutional dispensation, and to what degree has this dispensation been transformative in post-apartheid South Africa?
- What were the effects of colonialism on Cameroon?
- Can the post-apartheid South African situation be used as a model to improve the Cameroonian situation, and what lessons if any, can Cameroon learn from South Africa?

Analysing Cameroon in light of South Africa reveals deficiencies in Cameroon's constitutionalism and its application of the rule of law. South African post-apartheid jurisprudence has been drawn upon in making recommendations to address the deficiencies. These recommendations have been assessed within the context of the prevailing situation in Cameroon to establish which of the recommendations are capable of immediate implementation and which of them will require contextual change to enable implementation. That is not to say that the South African dispensation is perfect. There are deficiencies in the South African constitutional dispensation that will be borne in mind when recommendations are made.

The South African legal system promotes a desirable paradigm that is premised upon a transformative constitution that, amongst others, clearly sets out a bill of rights to protect human rights in terms of Chapter 2 of the constitution,³⁹ and entrenches Ubuntu⁴⁰ and institutions supporting democracy in terms of Chapter 9 of the constitution.⁴¹ This paradigm is worthy of emulation by other African nations, and by Cameroon in particular, given that the Cameroonian constitution does not protect citizenry rights.⁴² However, while South African standards and principles may not be used by members of the Economic Council of West African States (ECOWAS) or Economic and Monetary Community of Central Africa (CEMAC) of which Cameroon is a member, the objective of this thesis is not to accept a paradigm which continuously entrenches dictatorship and oppression or continuity of the colonial order, but one that provides a

³⁹B Bekink *Principles of South African constitutional law* (2006) 69. (Constitution of the Republic of South Africa, 1996) ch. 2.

⁴⁰As above 70 & the Interim Constitution of the Republic of South Africa, 1993, Preamble and Post-amble. In the Constitution of 1996, *Ubuntu* was not directly entrenched but simply regarded as an underlying principle of the new value system created by the constitution: Bekink as above 76.

⁴¹Bekink (2006) 414.

⁴²P Lippens & RA Joseph "The power and the people" in R Joseph *Gaullist Africa: Cameroon under Ahmadou Ahidjo* (1978) 113.

typical transformative, innovative and progressive paradigm necessary to advance human rights and democracy in post-colonial Cameroon in particular and post-colonial African countries in general. In this regard post-apartheid South Africa, by virtue of its current jurisprudence provides a more progressive paradigm than Benin, an ECOWAS state which has hitherto stood out as an exception to nominal monism in terms of human rights in Africa.⁴³ In emulating the South African constitution, attention has been given to the fact that the South African constitutional environment is still undergoing transformation, as evidenced by recent events such as President Zuma's lawyers' refusal to comply with a court order constraining them to hand over "confidential" tapes,⁴⁴ the executive's interest in reviewing the powers of the CC judges,⁴⁵ the Guptagate saga, and Marikana massacre,⁴⁶ which, amongst others are all evidence of disregard for constitutionalism (human rights violations) and violations of the rule of law.⁴⁷ This thesis clearly juxtaposes the two countries' systems, and demonstrates how post-apartheid South Africa surpasses post-independence Cameroon in terms of respect for the rule of law and constitutionalism, despite Cameroon having a significantly longer history as a democracy. Therefore, Cameroon has lessons to learn from post-apartheid South Africa.

1.2 THESIS MOTIVATION

I have been motivated to carry out this research because despite Cameroon achieving independence in 1960, the ideology of colonialism still continues unabated in the post-colonial state.⁴⁸ More specifically, I was motivated to carry out this research to ascertain the reason for the existence of a façade of democracy in post-independence Cameroon. My primary findings, which will be confirmed in the last chapter of this thesis, trace this impasse back to a combination of ideological and jurisprudential underpinnings reaching back prior to independence.

⁴³ F Viljoen *International human rights law in Africa* (2012) 520.

⁴⁴ B Ndenze "Zuma on attack over spy tapes" *iol news* (13/03/2013) www.iol.co.za/news/courts/zuma-on-attack-over-spy-tapes-1.1485558 (accessed on 10/6/2013). March 2012: The SCA overturns the high court ruling and orders that the NPA hand over some of the spy tapes to the DA. April 2012: The NPA fails to comply with the SCA's order. August 2013: The North Gauteng High Court orders the NPA to abide by the SCA order within five days. Zuma's legal team announces its intention to apply for leave to appeal against the high court ruling. August 28, 2014: SCA dismisses Zuma's appeal against the release of the tapes.

⁴⁵ H Tamukamoyo "Double speak about judicial reform in South Africa raises alarm bells" (23/03/2012) www.issafrica.org/iss-today/double-speak-about-judicial-reform-in-south-africa-raises-alarm-bells (accessed on 12/6/2013).

⁴⁶ S Gilbert "Guptagate shows lack of accountability" *Saturday Star* (18/05/2013) www.iol.co.za/saturday-star/guptagate-shows-lack-of-accountability-1.1518027 (accessed on 10/6/2013).

⁴⁷ The transitional crisis faced in post-apartheid South Africa is addressed in ch. 3 *infra*.

⁴⁸ Lippens & Joseph (1978) 112 & 119.

Le Vine confirms that a series of Franco-Camerounian conventions, which were both public and secret, testify that France was no longer the final locus of power in Cameroon after independence, but remained in the background as part of the new ruler Ahmadou Ahidjo's sustenance system.⁴⁹ This explains the reason why the unpublished security agreements enabled Ahidjo to request French military assistance to help quell the UPC insurgency during the years 1960-1966.⁵⁰

The Brazzaville Conference certainly served as an incentive for the creation of a "greater France", which entailed maintaining colonies as part of France. Thus, the 1971 Gorse Report clearly demonstrated how France has succeeded in entrenching the dependence of its former colonial territories in Africa.⁵¹

In order to clarify my motivation, I initially attempt to examine the history that led to this present predicament. Cameroon has experienced the administration of three different colonial masters, to wit:

- 1884-1914: The Germans administered Kamerun. Owing to the German defeat during the First World War, all her protectorates were seized.⁵²
- 1916-1946: The League of Nations mandated Cameroon to France and England.⁵³
- 1946-1960: The UN's mandate over Cameroon was converted into a trusteeship but its administration remained entrusted to France and England.⁵⁴

Firstly, under the colonial hegemony of Germany, and secondly, under France and England, the Cameroonian citizens experienced unacceptable and untold suffering, to the extent that the Royal Reichstag had to summarily recall one of its colonial administrators, Von Puttkamer, and discipline him for his conduct.⁵⁵

Those who directed brutality against indigenous people in Cameroon were Europeans who were destined to leave when the UN trusteeship ended.⁵⁶ However, their departure did not positively impact on the Cameroon citizenry. The same colonial exploitative, marginal, and dictatorial structures that existed during the trusteeship were maintained by the new order and the same

⁴⁹V Le Vine "Leadership and regime changes in perspective" in M Schatzburg W Zartman (eds) *The political economy of Cameroon* (1986) 23.

⁵⁰Above.

⁵¹R Joseph "The Gaullist legacy in Franco-African relations" in R Joseph (ed) *Gaullist Africa: Cameroon under Ahmadu Ahidjo* (1978) 27.

⁵²CM Fombad "Researching Cameroon law" <http://www.nyulawglobal.org/Cameroon.htm> (accessed 9/5/2012). (Fombad www.nyulawglobal.org)

⁵³Le Vine *supra* n 9 at 7.

⁵⁴As above 11.

⁵⁵Africa report (2010) 2.

⁵⁶Fombad (www.nyulawglobal.org)

European tendencies continued to be practiced by the ruling elite.⁵⁷ Wa Thiong'o reflects on these issues as he expresses desperation and despondency in the following words: "I ran away from coldland only to find myself in frostland!"⁵⁸ While most post-colonies in Africa are characterised by this same plight, South Africa, notwithstanding its present numerous challenges, basks in a transformative constitutional aura.

The new South African constitutional dispensation demonstrates a jealous regard for constitutionalism and the rule of law.⁵⁹ Van Marle and Le Roux succinctly establish the fact that the brutality that acted as a bridge to the "rule by law"⁶⁰ should be suspended in favour of a bridge that encourages respect for human rights. Thus, a new order has been founded upon the rule of law and equality for all South Africans.⁶¹

Interestingly, South Africa ensured systemic transformation and encouraged the exercise of tolerance and forgiveness towards the perpetrators of apartheid brutality.⁶² *Ubuntu* is a value articulated in the preamble and implicit in the general structure of the constitution.⁶³ *Ubuntu* is an African philosophy that entrenches solidarity amongst communities and, by so doing, reduces scarcity of resources and represents humanness and morality.⁶⁴

Ubuntu was implicitly entrenched in the South African constitutional system because it was believed that instead of victimisation of the perpetrators of apartheid brutality, which might still further entrench divisions in the South African community, *Ubuntu* and understanding should be embraced.⁶⁵

These can now be addressed on the basis that there is a need for understanding but not vengeance, a need for reparation but not retaliation, a need for *Ubuntu* but not for victimization.⁶⁶

⁵⁷B Muna *Cameroon and the challenges of the 21st century* (1993) 4.

⁵⁸N WaThiong'o & N WaMirri *I will marry when I want* (1982) 19:

Most post-colonial African countries still suffer neo-colonial ills. They ended colonialism by conquering the colonialists and therefore considered themselves free, only to discover that the treatment meted out to them by their own elected governments was worse than that of the colonialists. Independent African governments and the elite only became interested in enriching themselves in any way possible, completely ignoring the plight of the masses who legitimised their mandates.

⁵⁹Woolman *et al* (2007) 6-44.

⁶⁰This concept is addressed in Chapter 1 below under "definition of terms and concepts."

⁶¹Le Roux & Van Marle *Post-apartheid fragments* (2007) 61-63.

⁶²Van Marle "Law's time, particularity and slowness" in Le Roux & Van Marle *Law and Memory* (2007) 16.

⁶³Klug (2010) 110.

⁶⁴JY Mokgoro "Ubuntu and the law in South Africa": Paper delivered at the first colloquium on the Constitution and Law held at Potchefstroom (1997) 1-2. Available at www.ajol.info/index.php/pels/article/viewfile/43567/27090 (accessed on 10/7/2012).

⁶⁵Above.

⁶⁶Above.

For complete transformation to be realised in South Africa, *Ubuntu* needs to be applied to change a society formerly characterised by violence and brutality.⁶⁷ This idea is found in the Preamble to the South African Constitution.⁶⁸

In the groundbreaking judgment of *S v. Makwanyana*,⁶⁹ a moratorium was placed on the death penalty in South Africa. The judgment reveals the transformation of the legal system as the judges expressed a preference for the application of *Ubuntu* in the post-apartheid constitutional dispensation rather than victimisation.⁷⁰ The death penalty was identified as an act of brutality with no place in the present dispensation.⁷¹

The most important step towards constitutionalism and the rule of law is establishing appropriate structures or institutions.⁷² This step has been followed in South Africa where the new dispensation is engaged in crushing apartheid and colonial structures.⁷³ Many of the structures were transformed as a result of ideological and jurisprudential shifts.⁷⁴ This process of transformation is ongoing and is as yet incomplete. Frustration with this incomplete process of transformation is reflected in the desire of some South Africans to wage another war of freedom as anticipated below:

Serge, I have been trying to tell you that our wars were not merely to replace a white face with a black one, but to change a system which exploits us, to replace it with one which will give us a share in the wealth of this country. What we need is another war of freedom, Serge.⁷⁵

⁶⁷Constitution of the Republic of South Africa, 1996, Preamble.

⁶⁸Above.

⁶⁹*S v Makwanyane & Another* 1995 (3) SA 391 (CC).

⁷⁰Above Para 223-312.

⁷¹Above.

⁷²Bekink (2006) 413-414 and Ch. 9 Institutions of the Constitution of South African of 1996.

⁷³Le Roux & Van Marle *Law & Memory* (2007) 61-63.

⁷⁴Above.

⁷⁵Quoted in T Madlingozi “Good victim, bad victim: Apartheid’s beneficiaries, victims, and the struggle for social justice” in Le Roux & Van Marle (2007) *Law & memory* 107. One of the key achievements of South African transformation is the establishment of the CC that rules on the constitutionality of any law or constitutional issue. It has succeeded in stopping inappropriate appointments: www.webkeywords.net/go/Constitutionallyspeaking.co.za/category/Menzi-Simelani (accessed on 15/6/2013).

The CC has also rejected unconstitutional Bills introduced in parliament by the South African president, and thus stands as a beacon of hope in protecting the fundamental rights of citizens from the whims and caprices of the president, and to assure justice and maintain order in the country. https://www.google.co.za/?gws_rd=dsqFUusr14PmswaDkoC4CA#q=themediainline.co.za/2013/04/secret-bill-next-stop.constitutional-court (accessed on 15/6/2013).

Sadly, in Cameroon, the Supreme Court, which is the highest court in the land, does not rule on the constitutionality of laws but rather on the “logical interpretation of a legislative enactment”. C Anyangwe *The magistracy and the bar in Cameroon* (1989) 32.

While South Africa's cry for another war of freedom suggests that transformation is still ongoing, the structures established by the former coloniser suggest the preparation of Cameroon for neo-colonialism. The French administration imposed a policy of assimilation on Cameroonians.⁷⁶ The English, for their part, administered Anglophone Cameroon not as an independent territory, but rather as part of Nigeria, under indirect rule and the common law system.⁷⁷

The end of the World War II had an immediate effect on French African policy as it introduced the institutional framework from which only progressive change will ensue rather than institutions that provided for immediate transformation of French policies.⁷⁸ These war-time reforms enabled the emergence of domestic nationalist movements throughout the French territories. Even though the French had not anticipated such a turn of events, it has been asserted that the decolonisation policies subsequently implemented by the Fifth French Republic took its cue from reforms drafted at the Brazzaville Conference of 1944, organised by General de Gaulle.⁷⁹ Even though the theme of the conference was "The Social Evolution of the Indigenous People in the Colonies," the outcome of the conference was social evolution instead of political emancipation.⁸⁰ The conference addressed and modified three major issues: the *indigénat*, which segregated laws between Europeans and Africans, and *corvée*; freedom of trade unions to operate; and laws regulating traditional practices such as polygamy and dowry.⁸¹ All in all, the Brazzaville Conference was ironic when one considers that the primary aim of the conference was aimed at reinforcing France's grip on the overseas territories.⁸² One observation of the Brazzaville Conference, which will later serve as an incentive to colonial ideological continuity in Cameroon in the post-independence dispensation, is the fact the preamble to the Brazzaville Conference recommendations observed that any move aimed at developing the sort of autonomy that replaced French administration with local self-government would be disallowed.⁸³

Prior to the 1944 Brazzaville Conference, which culminated in the introduction of the Fourth French Republic's Constitution, the themes of progress towards self-rule and unification of the

⁷⁶Above.

⁷⁷Fombad (www.nyalawglobal.org).

⁷⁸B Marshall "Free France in Africa: Gaullism and colonialism" in Gifford & Louis (eds) *France and Britain in Africa: Imperial rivalry and colonial rule* (1971) 714.

⁷⁹Above.

⁸⁰E Chiabi *The making of modern Cameroon: A history of substate nationalism and disparate union, 1914-1961* (1997) 34.

⁸¹Above.

⁸²Marshall (1971) 714.

⁸³*Idem* 720.

two Cameroons facilitated a counterpoint dichotomy of political activity moving between parliamentary pressure and extra-parliamentary violence.⁸⁴ The extra-parliamentary conduct was first considered to be opposed to making colonies an extension of France⁸⁵ and resistance against the French imperialist regime in 1944. The Communist-dominated French trade union federation known as the *Confederation Générale du Travail* facilitated the founding of *Union des Syndicats Confédérés du Cameroun*⁸⁶ (USCC) led by Charles Assalé.⁸⁷ The real dynamics of Camerounian politics occurred out of the parliamentary framework since this space served as a forum for the ideological content of Cameroun's nationalism to be introduced, spawned from the militancy of trade unions such as the USCC and political parties subsequently arising out of them.⁸⁸ In 1947 the failure of the USCC to take over *Union Camerounaise Française* (Unicafra) by convincing them to adopt their radical policies, inspired the USCC left-wing trade unionists to establish their own political party later that same year known as *Rassemblement Camerounais* (Racam).⁸⁹ This party was summarily banned by the French administration motivated by the party's radical policies that declared anti-assimilationist policies and demanded independence for Cameroun.⁹⁰ A year after the creation of *Racam*, Ruben Um Nyobe, its former secretary general, formed the UPC with the assistance of the USCC. He masked the intention of the party as only serving the purpose of uniting the inhabitants of the territory in order to boost their living standards.⁹¹ However, the real objective of the party was to achieve the independence of Cameroun from France. Given these radical objectives, which were in conflict with French objectives, on Roland Pre's arrival in Cameroun as French High Commissioner, after having failed to appease UPC, Pre then decided to adopt harsh policies against them.⁹² On July 13 1955 the colonial government resorted to proscribe UPC after having established that they would not break with their radical policy. Even though UPC thereafter operated underground, they still fared well until the *coup de grace* on September 13 when their leader Um Nyobe was gunned down by government forces near Boumnyebel.⁹³

⁸⁴N Rubin *Cameroon: An African federation* (1971) 61.

⁸⁵Chiabi (1997) 32.

⁸⁶Cameroon under the Germans was spelt "Kamerun", under the French "Cameroun" and under the British "Cameroon." So in this thesis these various spellings are used interchangeably, depending on the context applicable.

⁸⁷Rubin (1971) 61.

⁸⁸As above 63.

⁸⁹Above.

⁹⁰Above.

⁹¹Above.

⁹²Chiabi (1997) 91.

⁹³As above 92.

Um Nyobe's death weakened the movement and quelled anti-colonialism sentiments in Cameroun. This historical victory for the colonial government paved the way for a constitution-making process dominated by the colonial government and local elites, which delivered a constitution that facilitated the continuity of colonial ideology in the independence and democratic dispensation.

Francophone Cameroun gained its independence from France in 1960, and in the wake of a political melting-pot, a constitution was adopted in March of the same year.⁹⁴ This constitution was modeled on the constitution of the Fifth French Republic.⁹⁵ Francophone Cameroun later absorbed Anglophone Cameroon pursuant to a plebiscite, and formed the Federal Republic of Cameroon in 1961.⁹⁶ The highly centralised state and strong executive in the independent Republic of Cameroon has its roots in the Fifth French Republic's Constitution.⁹⁷ A slight amendment to the 1960 constitution resulted in the 1961 constitution that was also based on the Fifth French Republic's Constitution.⁹⁸ This constitution compromised fundamental rights to an unacceptable degree, while empowering the chief executive with unrestrained powers.⁹⁹

In 1972, in order to eliminate the existing federation and institute a unitary state, President Ahidjo single-handedly launched a constitutional coup that resulted in a unitary state.¹⁰⁰ Since then, there has been no substantive change in the content of the constitutions of 1960, 1961, and 1972. Therefore, the legacy of colonialism is still apparent in the present 1996 constitution.¹⁰¹ The 1996 constitution is unarguably a relic of the colonial past from which the chief executive legally draws unchecked powers.¹⁰² This constitutional flaw further implies that if the procedures required to amend the constitution, which are the bedrock of constitutionalism, are not rigidly administered,

⁹⁴Africa report (2010) 5-6.

⁹⁵HNA Enonchong *Cameroon constitutional law: Federalism in a mixed common-law and civil-law system* (1967) 82.

⁹⁶W Tamfu *Constitutional law and political systems* (2006) 72-74.

⁹⁷P Konings & F Nyamnjoh *Negotiating the Anglophone identity* (2003) 35.

⁹⁸Africa report (2010) 6-7.

⁹⁹As above 2. The French-speaking part of Cameroun, which later acquired the appellation East Cameroon, went through tyrannous and marginal treatment known as; "*indigenat*" which encouraged forced labour known as "*corvee*". Under the French policy of assimilation, Cameroonians were converted into Frenchmen known as "*petit Français*". Under the "*indigenat*" policy, the French administrators were given unrestricted powers to govern the indigenous Cameroonians. The colonisers were given preferential treatment and not subjected to the same shabby treatment reserved for the governed.

¹⁰⁰C Anyangwe *Imperialistic politics in Cameroon* (2008) 130-133.

¹⁰¹By Law no. 90-60 of 18/1/1996.

¹⁰²The 1961 constitution was again amended in 1972 in what was known as the Fouban Conference, in which Ahidjo, the then president of the Federal Republic of Cameroon staged a constitutional coup by skillfully turning the Federal Republic into the United Republic of Cameroon and centralising all powers in Yaounde, the capital of Cameroon. This was the beginning of an affront on constitutionalism and the rule of law. When Paul Biya took office in 1982, this worked to his advantage since he simply maintained the existing structures and carried on where Ahidjo left off, only with a tighter fist: Anyangwe (1989) 67.

the constitution may be used to satisfy the ambitions of the executive, making a mockery of the principle of constitutionalism and the rule of law.¹⁰³

This potential mockery is clearly evidenced by Article 31 (3) of the constitution, which, while it protects judicial independence, appoints the president, a member of the executive, as the person responsible to maintain this independence. This provision brings judicial independence into question. Article 31(3) reads: “The President of the Republic shall ensure the independence of the judiciary”¹⁰⁴ and Article 53 (3) transforms the president of the republic into a sovereign as he is absolved from any responsibility if, and when he flouts the rule of law. It states that:

Acts committed by the President of the Republic in pursuance of articles 5, 8, 9 and 10 above shall be covered by immunity and he shall not be accountable for them after the exercise of his functions.¹⁰⁵

Article 5 clearly sets out inter alia, that the president of the republic shall be the guarantor of the independence of the nation. Article 8 provides amongst others, that the president of the republic shall enact laws according to the provisions of Article 31 above, refer matters to the Constitutional Council and exercise statutory authority. Article 9 gives the president of the republic vast powers to declare states of emergency and siege where and whenever he sees fit, without consultation with the legislature or judiciary. Article 10 attributes wide powers to the president of the republic to appoint all senior members of government and delegate powers to others.

The rights guaranteed to the president include discretionary powers regarding their use.¹⁰⁶ In such an environment, where there is no supervision or check on how the president uses power, he has the freedom to violate citizens’ fundamental rights.¹⁰⁷ In my opinion, such a situation is reminiscent of the unfettered use of discretionary power during the colonial era and reveals that the norms of democracy are not yet respected.¹⁰⁸

¹⁰³O Nwabueze “A constitutional democracy and a democratic constitution” *Democracy and the law: Papers presented at the second conference of the body of Attorneys-General in the Federation* (1991) 9 -12 Sept 1991 Abuja Nigeria 53-84 at 59.

¹⁰⁴The Constitution of Cameroon, 1996.

¹⁰⁵Tamfu (2006) 72-74.

¹⁰⁶Constitution of the Republic of Cameroon, 1996 art 9 (2). It reads “In the event of a serious threat to the nation’s territorial integrity or to its existence, its independence or institutions, the president of the republic may declare a state of siege by decree and *take any measures as he may deem necessary*. He shall inform the Nation of his decision by message.” The emphasis is mine.

¹⁰⁷Fombad (2004) *EAJPHR* 293.

¹⁰⁸A Eyinga “Government by state of emergency” in Joseph (ed) (1978) 101.

However, these norms have been respected in the evolution of the promotion, protection, and fulfillment of human rights and civil liberties in post-apartheid South Africa.¹⁰⁹ Post-apartheid South Africa is experiencing a progressive transformation of structures.¹¹⁰ In Cameroon there has been neither transformation of structures nor any indication of an intention to transform them soon, despite 54 years of independence.¹¹¹

1.3 DEFINITION OF KEY TERMS AND CONCEPTS

Cameroon and South Africa broke with the oppressive regimes of colonialism and apartheid in 1960 and 1994 respectively. A shift from these erstwhile regimes characterised by authoritarianism into constitutional democracies means that these two countries will conform and comply with the requirements of the new dispensations. A constitutional democracy seeks to limit the powers of government and make it responsible to the law in order to protect citizens' rights and liberty.¹¹² In pursuance of this objective, government must comply with requirements that ultimately constitute constitutionalism and the rule of law. The essence of applying and testing the derivative or constitutive elements of these concepts reside with the desire to firmly discourage the holding of unfettered powers by government, which might lead to the oppression of sovereign people, as was the case during the colonial and apartheid eras. The definition of these key terms and concepts reveals the imperativeness of such concepts in terms of the research problem of this thesis, and their relevance to the discussions in the entire project.

Constitutionalism serves to define a transition from one mode of governance, defined by discretion and exclusion, into another mode of governance limited by law and epitomised by the inclusion of the people in the governance process. Once this system of governance has been established, it becomes paramount to ensure that existing laws are granted equal respect by everyone without exception, and that institutions exist through which these laws are implemented. The rule of law is indispensable in this context, since the essence of constitutionalism and the rule of law is to protect human rights. Popular sovereignty, which assumes that all law-making authority ultimately vests in the people themselves,¹¹³ therefore defines the *raison d'être* of

¹⁰⁹W Le Roux & K Van Marle *Post-apartheid fragments: Law, politics and critique* (2007) 62.

¹¹⁰As above 61-63.

¹¹¹Mbaku (2013) 55-56.

¹¹²S Gloppen *South Africa: The battle over the constitution* (1997) 43.

¹¹³Vile J *The constitutional amending process in American political thought* (1992) 14.

constitutionalism and the rule of law. Popular sovereignty has a dual role in that the people give legitimacy to the constitution through consultation and participation in a constitutional process, and the process and concepts are geared towards the protection and preservation of the people themselves. Briefly, “all power is vested in, and consequently derived from, the people”.¹¹⁴ De Tocqueville posits this view in a more eloquent manner:

....The people take part in the making of the laws by choosing the lawgivers....The people reign over the American political world as God rules over the universe. It is the cause and the end of all things; everything rises out of it and is absorbed back into it.¹¹⁵

Thus, it will take a logical deconstruction of the entire constitution-building process, through the legitimacy of the constitution, to clarify the inclusion and pivotal function of the rule of law, constitutionalism, and popular sovereignty as the building blocks in this thesis, notwithstanding the inclusion of other relative concepts. The aim of this thesis is not to investigate whether or not the desired values, processes, and principles have been applied, but rather to impugn their compatibility with conventional norms, with the view to concluding whether or not there is colonial regime continuity. It is only through this evaluation that a logical conclusion can be reached regarding the plausibility, or otherwise, of colonial regime continuity in Cameroon.

The law in Cameroon is examined as it currently exists and suggestions are made regarding what the law ought to be, if the rule of law and constitutionalism are to be genuinely observed. That is, the rule of law does not mean that laws passed by parliament must be absolutely accepted and respected by the people, but rather that “just laws” and “good laws” passed with the consent of the people in a democracy must be respected by the people.¹¹⁶ In this vein, Olaka-Onyango says “A nicely worded or eloquently phrased document means nothing if the context in which it is supposed to operate is harsh and hostile – a context in which you may have a constitution without constitutionalism”¹¹⁷ Moreover, according to some theorists, relying on the Greco-Roman conception of “higher law”, individuals are absolved from the duty to obey if they are faced with a law that is inconsistent with the natural law.¹¹⁸ Simply because an unjust law is forcefully

¹¹⁴The Virginia Declaration of Rights Art 2.

¹¹⁵A de Tocqueville in C Peters “Adjudication as representation” (1997) 2 *Columbia Law Review* 312-436 at 321.

¹¹⁶M Shapiro & A Sweet *On law, politics, and judicialization* (2002) 166.

¹¹⁷J Olaka-Onyango “Constitutionalism in Africa: Yesterday, today and tomorrow” in J Olaka-Onyango *Constitutionalism in Africa: Creating opportunities, facing challenges* (2010) 2.

¹¹⁸M Cappelletti & W Cohen *Comparative constitutional law: Cases and materials* (1979) 6.

imposed on the people, justification for resistance and even tyrannicide exists.¹¹⁹ The two key factors defining the legitimacy of a constitution are the process of constitution building and the content of the constitution so built.¹²⁰

1.3.1 CONSTITUTIONAL TRANSFORMATION / PROGRESSIVE TRANSFORMATION

Both terms refer to meaningful change in a constitutional dispensation. Constitutional Transformation depicts a change that increases citizen protection, as seen in the Preamble to the Constitution of the Republic of South Africa, 1996. The inclusion of socio-economic rights in the South African constitution is a good example of constitutional transformation. This concept is couched in terms of an ongoing or progressive process that is yet to be completed. “In other words, constitutional transformation” suggests more of a process still in transition than one which has undergone completion.

1.3.2 THE DEFINITION OF CONSTITUTIONALISM

Constitutionalism defines a state that has its roots in law. The concept demonstrates that law is sovereign and the authority of the existing state should be grounded in positive law. The government’s power extends only as far as the law and constitution have previously stipulated and not beyond.¹²¹

In essence, the concept of constitutionalism connotes: a limitation on government; constitutionalism as the antithesis of arbitrary rule; and a government conducted by predetermined rules, and not according to the whims and caprices of the rulers or a despotic government.¹²²

Constitutionalism emphasises how political structures in a state are arranged to curb the excesses of tyrannical or arbitrary power and authoritarian power by political actors, parties, or groups.¹²³

¹¹⁹ Above.

¹²⁰W Wahiu (International Institute for Democracy and Electoral Assistance) *A practical guide to constitution building: An introduction* (2011) 3.

¹²¹B Bekink *Principles of South African constitutional law* (2006) 32.

¹²²Nwabueze (1991) 1.

¹²³E Barendt *An introduction to constitutional law* (1998) 4.

The necessity for constitutionalism in modern democracies is to curb the arbitrary use of power by the executive by means of a constitution.¹²⁴ The need to prevent oppressive use of political power underlies the principle of separation of powers formulated by the French legal philosopher Montesquieu in his book titled *L'esprit des lois*.¹²⁵ He explained that if the same person or body exercised the executive and legislative power, the end result could be the enactment of tyrannous and oppressive laws. Likewise, the judiciary should be shielded from executive and legislative powers to avoid the concentration of powers in the hands of the same parties or factions.¹²⁶ This examination directly relates to the positions that existed in colonial Cameroon and apartheid South Africa. Therefore, the shift from an authoritarian regime into a constitutional democracy must align with the objective of constitutionalism, which seeks to free Cameroonians and South Africans from tyrannous and oppressive laws in the new dispensation. Colonial regime continuity might suggest that constitutionalism has only been a mirage in Cameroon. The following characteristics of modern constitutionalism are analysed to promote a better understanding of the concept of constitutionalism:

1.3.3 CHARACTERISTICS OF MODERN CONSTITUTIONALISM

1.3.3.1 Constitution-building process

Constitution-building is a long-term and historical process as opposed to constitution-making which simply signifies the period during which a constitution is drafted.¹²⁷ In this thesis, constitution-building considers the following:

- (a) accepting that a constitutional change is required and its scope is determined, this resolution in practice is usually only one part of longer processes of historical change in a country.¹²⁸
- (b) relevant principles of constitution-building require the establishment of institutions, and defining the rules and procedures for inclusive and participatory constitution-drafting, which may necessitate the application of provisional measures;¹²⁹
- (c) legally certifying the constitution or ratification of the constitution; and¹³⁰

¹²⁴As above 14.

¹²⁵Above.

¹²⁶Above.

¹²⁷As above 2.

¹²⁸Above.

¹²⁹Above.

(d) the implementation of the constitution, which is a vital stage, most especially in the early years after ratification.¹³¹

The exercise of constitution-building is focused on legitimate constitutional outcomes, rather than a bare constitutional text. The legitimacy of a constitution comprises various facets, amongst which are:

1.3.3.1.1 Legitimacy

- (a) legal legitimacy, which entails the conformity of the constitution to appropriate legal principles and norms;¹³²
- (b) political or popular legitimacy, which is revealed in the sovereign independence of the people who adopt constitutions, people that might form different plural groups;¹³³ and
- (c) moral legitimacy, which requires a relationship between the constitution and the shared values that define the moral foundation of a state; the constitution may also undertake to enforce forgiveness in a case of sustained victimisation and social inclusion or moral rejuvenation of the state.¹³⁴

Essentially, constitution-building and -making do not simply imply the reproduction of certain foundational principles that particular polities must have found in operation, but rather ‘specific political undertakings’ that must consider past experiences and also future aspirations.¹³⁵ At the final stage of the constitution-building process, a constitution is realised, which Mangu observes must be differentiated from constitutionalism.¹³⁶ He refers to a constitution as the form of the document itself, while constitutionalism refers to the content and the values enunciated in the constitutional provisions.¹³⁷ The existence of a constitution that ignores constitutionalism makes the constitution illegitimate.¹³⁸ By implication, this means that the process of constitution-making cannot be complete without giving attention to the legitimacy of the process.

¹³⁰ Above.

¹³¹ Above.

¹³² Above.

¹³³ Above.

¹³⁴ Above.

¹³⁵ H Oketh-Ogendo “Constitutions without constitutionalism: Reflections on an African political paradox” in I Shivji (ed) *State and constitutionalism: An African debate on democracy* (1991) 6.

¹³⁶ A Mangu “Constitutional democracy and constitutionalism in Africa” (2006) 2 *Conflict Trends* 4.

¹³⁷ Above.

¹³⁸ Olaka-Onyango (2001) 94.

Legal legitimacy dwells on the issue of constitutional principles that may be rooted in norms and values that are rooted in diverse spheres, such as the traditional, cultural, and religious.¹³⁹ It is conceded that for the constitution to be accepted as legitimate, the rule of law requires a just legal system in order to function properly.¹⁴⁰ Most constitutions can ensure the rule of law through independent overseeing bodies and courts, the doctrine of constitutional supremacy, and the constitution ensuring the guarantee of fundamental rights and judicial review.¹⁴¹ The entrenchment of provisions can be seen as one of a range of means available to pursue the rule of law constitutionally.¹⁴² Other principles that lend legal legitimacy to a constitution include popular sovereignty or democratic governance, which identifies the people as the basis of governmental power.¹⁴³ In this thesis, legal legitimacy is also used as a blanket term to refer to the independence of the judiciary, separation of power and the rule of law in Cameroon and South Africa. For a full understanding of the concept of constitutionalism, a few ancillary concepts are discussed below.

1.3.3.2 A constitution

A constitution is seen as a document containing the fundamental principles of government organisation. In other words, it is the visible symbol of the values that people hold. By enshrining these values in a document, the possibility of mutability and vulnerability to the whims of rulers is transcended. Thus, it is clear that a constitution reflects the idea of the rule of law.¹⁴⁴ The constitution also serves as the type of rule of law that requires that all political action, and even legislation, be confined and brought under law to preserve the rule of law in a republic.¹⁴⁵

A modern constitution that is written and guarantees the protection of fundamental rights usually imposes constraints on the powers of the legislature and the executive. These constraints make it difficult for a statute to suffice to change a written constitution; rather, special procedures exist for the purpose of its amendment.¹⁴⁶ Bolingbroke expressed the classical views of a constitution in the following words:

¹³⁹N Hedling (International Institute for Democracy and Electoral Assistance) *A practical guide to constitution building: Principles and cross-cutting themes* (2011) 9.

¹⁴⁰As above 17.

¹⁴¹Above.

¹⁴²As above 18.

¹⁴³Above 15.

¹⁴⁴Nwabueze (1991) 55.

¹⁴⁵BP Frohnen "Is constitutionalism liberal? (2011) 33 *Campbell Law Review* 533.

¹⁴⁶Barendt (1998) 1.

By constitution we mean, whenever we speak with propriety and exactness, that assemblage of laws, institutions and customs, derived from certain fixed principles of reason, directed to certain fixed objects of public good, that compose the general system, according to which the community hath agreed to be governed... We call this a good government, when ... the whole administration of public affairs is wisely pursued, and with a strict conformity to the principles and objects of the constitution.¹⁴⁷

The quotation above exposes that older traditional views of what a constitution was only took into consideration substantive principles understood from a nation's development and its available institutions. A more modern concept of a constitution implies that it is the conscious formulation of the fundamental law of the land by its people.¹⁴⁸

The former definition is linked to Bolingbroke, while the latter is linked to Paine. Paine indicates that a governmental action or act that does not conform to the constitution is equated with an act of "power without a right"; Bolingbroke's simply proposes that this kind of government is a "bad government". Bolingbroke confirms Plato's views that a nation's existing customs and laws are probably the best criterion for defining who a people are or determining what they will become, when they are compared and estimated by their conformity to reason.¹⁴⁹

A constitution could be referred to in some societies as the organisation of the society: in other words, "how is society constituted"? However, others see it as a document in which rules and regulations dictating how society should be organised are enshrined.¹⁵⁰ In the same vein, the constitution could be looked at as a prescriptive document if constitutionalism is appreciated within the scope of the law or as the paramount law itself, and as a proscriptive document when it is appreciated outside the law as a political order.¹⁵¹ A constitution acts as a supreme law on the one hand, and on the other as a document that defines political institutions and allocates powers to them.

A constitution is required to be predicated on the traditional values and aspirations of the people, but that is not to suggest that for a constitution to be legitimate it must follow the said rule. However, for the purpose of completely neutralising the idea of remoteness and artificiality in the eyes of the people, the ideas should not be impossible in their minds and thoughts.¹⁵² This is a rule that is in complete opposition to the Cameroonian constitution. Cameroonians have never

¹⁴⁷C McIlwain *Constitutionalism: Ancient and modern* (1975) 2-3.

¹⁴⁸As above 2.

¹⁴⁹As above 3.

¹⁵⁰DT Ritchie "The confines of modern constitutionalism" *Pierce Law Review* vol 3 1 (2004) 3.

¹⁵¹Above.

¹⁵²Above.

really been fully involved in any of the constitution-making processes. On this account, most ideas are almost unattainable from their perspective since these ideas are not their own. As I argue in the subsequent chapters, the same colonial government, rather than the Cameroonians, had substantial input in the independence constitution.¹⁵³ Therefore, disregard for constitutionalism and the rule of law may only be attributed to colonial regime continuity. This makes the examination of this concept significant to the research problem of this thesis.

1.3.3.4 Democracy

For constitutionalism to serve as a regime that promotes the equality of rights of all the citizens, the scope of democracy has to be extended beyond mere majoritarian dictates, to take on board machinery to adjudicate rights.¹⁵⁴

Given that a constitution or the “will of the people” is the bedrock of constitutional democracy,¹⁵⁵ democracy becomes a vital variable of a constitution, because a constitution derives its existence and legitimacy from the people.¹⁵⁶ The nexus between democracy and constitutionalism is that the people’s popular will is relinquished through their legitimisation of the constitution, and the constitution thereafter regulates the functions of those elected by the people to represent them in government.¹⁵⁷

Scholars, practitioners, and professionals differ in their perspectives of constitutionalism and democracy. Some are of the opinion that the two concepts are complementary and that each enables the better understanding of the other. However, some critics are of the opinion that constitutionalism works against democracy by constraining it.¹⁵⁸

Some other scholars view democracy as a concept demanding complete liberalism and no confinement.¹⁵⁹ From this perspective, if the constitution limits the confines of democracy, then the constitution is in breach of democracy.¹⁶⁰ However, rather than considering democracy as a concept inconsistent with constitutionalism, democracy should be understood as a late addition to

¹⁵³J Mbaku “Decolonization, reunification, and federation in Cameroon” in J Mbaku & J Takougang *The Leadership Challenge in Africa: Cameroon under Paul Biya* (2004) 43.

¹⁵⁴JP Roche & LW Levy *The Judiciary* (1964) 216.

¹⁵⁵Nwabueze (1991) 18.

¹⁵⁶Above.

¹⁵⁷Above.

¹⁵⁸ButlerRitchie (2004) 25.

¹⁵⁹As above 28.

¹⁶⁰Above.

the principle of constitutionalism.¹⁶¹ The initial stage of modern constitutionalism arose from the medieval and renaissance structures of rationalism, and did not address the notion that people should have a say in government through representatives.¹⁶² The displacement of sovereignty from a supreme sovereign to reside theoretically in the people, created the need for a means through which the people could exercise this power in a harmonised manner, given the scattered nature of the people. Thus, democracy was used as a device that was structured to involve people in the institutions of constitutionalism.¹⁶³ Previously in the former regimes of both Cameroon and South Africa, sovereign power vested in the colonial and apartheid governments and not the people. With the return of their sovereignty after the collapse of colonialism and apartheid, sovereign power shifted and vested in the people of Cameroon and South Africa, and could only be exercised through constitutional institutions that were not taken seriously in the authoritarian era. Therefore, the examination of this concept is essential to address the research problem of this thesis.

1.3.3.5 Judicial review

It is interesting that in certain jurisdictions, especially those that are monist¹⁶⁴ in nature, the right of recourse to the organ in charge of reviewing the constitutionality or legality of the law is exercised by the president.¹⁶⁵ It was not until 1958 that the Constitutional Council was created and vested with the power of judicial review in France.¹⁶⁶

Judicial review was officially established in the United States of America's ground breaking case, *Marbury v. Madison*.¹⁶⁷ In this case, Chief Justice Marshall argued that it was exclusively the province of the courts to apply the constitution and to determine if the legislation passed by the legislative power was inconsistent with the constitution and if that were the case, to rule the legislation invalid.¹⁶⁸ All constitutional rules and principles must be interpreted by the courts to ascertain whether or not a particular provision that was applied to resolve a specific dispute was

¹⁶¹As above 26.

¹⁶²Above.

¹⁶³As above 27.

¹⁶⁴Barendt (1998) 19. In civil jurisdictions, once an international treaty is ratified it automatically becomes domestic law, but superior to domestic law. Monist jurisdictions are opposed to dualist jurisdictions that are mostly common-law jurisdictions, and subsequent to ratification of an international treaty, it still has to go through incorporation in parliament in order for it to be domesticated and made law.

¹⁶⁵Above.

¹⁶⁶Above.

¹⁶⁷5 U.S. (1Cranch) 137 (1803).

¹⁶⁸Barendt (1998) 19.

legally enforceable or inconsistent with the constitution. In the *Marbury* case mentioned above, the Supreme Court of the United States of America's jurisdiction over matters concerning the inconsistency of legislation with the constitution was questioned. The question was answered in the affirmative, which made sense, because if the response were to suggest that authority cannot be conferred upon the Supreme Court, then the *raison d'être* of a written constitution, whose central tenet is the separation of powers, would have been disputed.¹⁶⁹ This mechanism is vital to a constitutional democracy. In the advent of colonialism in Cameroon and apartheid in South Africa, there was no power that the people could exercise to override government's authority. What the colonial or apartheid governments decided was final. In a constitutional democracy, this mechanism not only challenges government's legislation, which is unconstitutional, but also has the force to challenge decisions taken by the majority. However, the research question of this thesis suggests that this mechanism has not advanced respect for human rights in Cameroon. This contention is analysed and addressed in Chapter Four, which discusses judicial review in Cameroon.

1.3.3.6 The separation of powers, independence of the judiciary, and fundamental rights

Judicial independence was only introduced in the 17th century.¹⁷⁰ Prior to this era, the Normans after their conquest in England saw adjudication handled by the King and the *Curia Regis*, a body that held both the executive and judicial functions.¹⁷¹ The issue of judicial independence only became important with the creation of the parliament and its opposition to the crown's perspectives; it was at this juncture that judicial independence was considered.

The conflict of the King's royal prerogatives or absolute powers in law and parliament's legislative power led the two parties to seek the court's support for their actions. This conflict could be considered to have triggered the emergence of judicial independence from the executive.¹⁷²

A clear instance of the principle of judicial independence in motion is evident in the United States of America's case, *United States v. Nixon*. In this case the Supreme Court of America ordered the then President Nixon to hand over certain tape recordings of sensitive information in relation to

¹⁶⁹As above 21.

¹⁷⁰T Marshall *Judicial conduct and accountability* (1995) 8.

¹⁷¹Above.

¹⁷²Above.

the opposition party's headquarters.¹⁷³ However, the court did not compromise its professional ethics and oath of allegiance to their office for personal favours. This is an expression of judicial independence.

Initially the president argued on the basis of executive privilege, but the Supreme Court unanimously dismissed his challenge and directed him to return the tape. This was a clear indication that the independence of the judiciary was a reality. Moreover, the Chief Justice who wrote the opinion in collaboration with two other justices who joined him in the unanimous decision, were all appointed by President Nixon.¹⁷⁴

The doctrine of the separation of powers is another principle that contributes to the enhancement of the independence of the judiciary. This doctrine concedes that for citizens' freedom to be assured and for executive abuses to be curtailed, the concentration of power should be avoided by means of dividing governmental power into legislative, executive, and judicial powers.¹⁷⁵

Various reasons exist for the fragmentation of government, which comprise inter alia, the Madison's contemplation of the emergence of tyranny and his determination to provide a means for its prevention, by separating executive from legislative functions.¹⁷⁶ This separation was to create an atmosphere of order where checks and balances exist to discard unnecessary excesses. This arrangement was intended to function in such a compelling manner that no one power could be supreme above the other. The national president could veto legislation, the Congress could impeach the president in a motion, and the courts had the powers to invalidate both legislative and executive actions.¹⁷⁷ From the time of Montesquieu's conception of this doctrine, the separation of powers has seen numerous variants, which derive their origins from certain constitutional thoughts and structures, such as the British House of Lords.¹⁷⁸ Essentially, the doctrines need to be viewed as being part of numerous successive theories related to constitutionalism, which are all motivated by the prevention of absolutism, arbitrary government, and despotism.¹⁷⁹

Considering Locke's argument that is concerned with an extension of the executive power to engulf the power to make municipal laws and federative power in charge of foreign affairs, and the emphasis laid by Buchanan in *De jure Regni apud scotos* for the necessity of separation between the powers, it is fairly easy to agree with Madison's view that the bottom line of

¹⁷³Garvey & Aleinikoff *Modern constitutional theory: A reader* (1989) 225.

¹⁷⁴As above 226.

¹⁷⁵As above 84.

¹⁷⁶As above 178.

¹⁷⁷Above.

¹⁷⁸J Mitchell *Constitutional Law* (1968) 40.

¹⁷⁹Above.

separation of powers should consider any activity in which one body combines two powers as dangerous.¹⁸⁰ This concept is essential to the discussions in this thesis, because whether or not authoritarianism has been dealt with in the democratic dispensations in Cameroon and South Africa needs to be demonstrated. It must be highlighted that during Cameroon's colonial period, the three powers were concentrated in the hands of the executive.¹⁸¹

The absence of the independence of the judiciary in Cameroon accounted for massive human rights violations during the colonial era. In the same vein, parliament and the judiciary were controlled by the executive in apartheid South Africa. With such absolute powers in the hands of the executive, violation of human rights is inevitable. This explains why these concepts should be examined in the present democratic dispensations to determine their effect or influence.

1.3.4 THE DEFINITION AND INTERPRETATION OF THE RULE OF LAW

Notwithstanding the numerous and variety of definitions existing for the rule of law, in this thesis I follow the definition of Dicey, who in his famous *Introduction to the law of the constitution* (1885), propounded three propositions under which the rule of law could be examined. However, the last proposition quickly became obsolete because the environment of constitutionalism and the rule of law as understood in the present day no longer conform to the context within which it was applied then.

- The preponderance of ordinary law as opposed to the use of brute force or arbitrary powers. The government's application of prerogatives or discretionary authority is completely discarded. A citizen can only be punished for an existing infraction and cannot be punished for what the law has not anticipated.¹⁸² (Principle of legality).
- Equality before the law. Everyone is equal in the eyes of the law, and every class of people is subjected to the same law that is administered by ordinary law courts. It should be understood that the 'rule of law' as propounded in the United Kingdom does not admit the exclusion or exemption of government officials or other privileged citizens from the jurisdiction of the ordinary tribunal.¹⁸³

¹⁸⁰As above 42.

¹⁸¹C Anyangwe *The Cameroonian judicial system* (1987) 5.

¹⁸²AC Dicey *Introduction to the study of the law of the constitution* (1959) 202.

¹⁸³As above 203.

- Parliament is sovereign since the constitution is barely the result or outcome of the ordinary law of the land initiated or voted by parliament. Human rights and rights in general are appropriately protected by common law, rather than by the constitution.¹⁸⁴

The development of the rule of law did not limit itself within the boundaries of formal and substantive law, but also along the lines of controlling mechanisms that add more clarity to the concept.¹⁸⁵ The rule of law generally provides for an environment within which all members of that society can plan their lives.¹⁸⁶ It should be noted that inasmuch as the rule of law provides for a predictable environment, it is also compatible with dictatorship and monarchy, since the rule of law maintains advantages for a specific social class.¹⁸⁷

In this vein, Montesquieu's interpretation of the rule of law as "institutional restraint to political power" is what this thesis delves into for the purpose of ascertaining whether or not Cameroon's pre-1960 ideology and jurisprudence has shifted post-1960.

A critical study of the rule of law reveals that its definition ranges from 'narrow' to 'wide',¹⁸⁸ and an example of a 'narrow' definition is advanced by Raz.¹⁸⁹ In his opinion, rule of law means people are governed by law and they owe a duty to the state to obey the law. The 'wide' definition has a sweeping scope since it also encompasses the 'narrow' definition as seen below:

In the 'wide' definition, laws reflect the upholding of political and civil liberties, the government operates under a legal framework, and the law is equally applied to the citizens and members of government alike, and government is also law-abiding.¹⁹⁰

Furthermore, the exercise of the executive power must find expression in the law, and the executive or government cannot act *ultra vires*.¹⁹¹ This implies that the executive must be bound by law as much as the citizens are bound by it.¹⁹²

1.3.4.1 Application and controlling mechanisms of the rule of law

¹⁸⁴ Above.

¹⁸⁵ A Bedner "An elementary approach to the rule of law" in *Hague Journal on the rule of law* 2 (2010) 48-74 at 55.

¹⁸⁶ M Neumann *The Rule of Law: Politicizing Ethics* (2002) 88.

¹⁸⁷ As above 91.

¹⁸⁸ Bedner (2010) 54.

¹⁸⁹ Above.

¹⁹⁰ Above.

¹⁹¹ BO Nwabueze *Constitutionalism in the emergent states* (1973) 35.

¹⁹² Above.

Explaining the different application of the rule of law in the United Kingdom and in France, Dicey carefully spelled out the contention in this regard, namely *Droit Administratif* in the French law. *Droit Administratif* is invested with a degree of despotic characteristic of shielding government officials from acts they commit. When the state is performing its affairs, ordinary courts do not undertake to supervise its activities to ascertain illegality in such acts, irrespective of whether or not it was carried out in obedience to superiors.¹⁹³

The point raised above clearly indicates that there is a dichotomy in the way the rule of law is applied in the United Kingdom (common law system) and the way it is applied in France (civil law system). As seen earlier, in the common law system, the rule of law is applied uniformly to the state, government officials, and ordinary citizens.¹⁹⁴ Considering the contradiction in the way the rule of law is applied in common law as opposed to civil law jurisdictions, one can confidently state that the civil law system that dominates in Cameroon is closer to the ‘rule by law’ than the ‘rule of law’ as it operates in common law jurisdictions.

The law would gain more legitimacy as a constraining measure on rulers under a number of defined conditions:

- 1) If the law was codified into an authoritative document.
- 2) If the content of the law in the document was determined by legal specialists and not by political actors.
- 3) If there was protection of the law by institutional organs separated from political influence, having their own resources and power of appointment.
- 4) If the law promulgated actually reflected the social norms and values of the community to which it was applied, not indemnifying the elite who are in control of the political system.¹⁹⁵
- 5) That parliament is sovereign since the constitution is barely the result or outcome of the ordinary law of the land initiated or voted by parliament. That human rights and rights in general are appropriately protected by common law rather than by the constitution.¹⁹⁶

This last proposition of Dicey became the centre of controversy and criticism. The development of the rule of law did not limit itself to the boundaries of formal and substantive law, but also along the lines of controlling mechanisms, which bring about yet more clarity to the concept.¹⁹⁷

¹⁹³RA Cosgrove *The rule of law: Albert Venn Dicey, Victorian Jurist* (1980) 92.

¹⁹⁴Maravall & Przeworski *Democracy and the Rule of Law* (2003) 3.

¹⁹⁵Above.

¹⁹⁶Above.

¹⁹⁷Bedner (2010) 55.

These controlling mechanisms could be in the form of an independent judiciary, national human rights institutions, anti-corruption courts, and ombudsmen or public protectors, as demonstrated below.

- An independent judiciary is a formal element of the rule of law. According to theorists, when taking into account the respect for human rights, judges are required to attain an outcome in judgment that recognises the just application of facts and substantive law. This implies that judges should not only limit their duty to the negotiation of an acceptable outcome to all parties in a dispute. Plato and Aristotle were so distrustful of democracy that they believed for democracy to be pragmatic another organ that would censor the activities of the other bodies and interpret the law should necessarily exist. However, it was not until the advent of Montesquieu that this became expedient. More recent theoreticians have expanded on Montesquieu's reasoning and now include the separation of powers in their definition of the rule of law. Given that the rule of law's constant emphasis is more on independence than impartiality, the concept currently attributes more executive protection to citizens.¹⁹⁸
- National human rights institutions have also played a major role in constraining states to respect the rule of law, especially the executive power. In the last twenty years there were very few human rights institutions, but they have rapidly grown over the course of time and currently number a hundred and twenty. In jurisdictions where the courts are really not functioning well, the national human rights institutions are sometimes used to serve the purpose of courts, even though they are not courts.¹⁹⁹ These institutions mostly attend to issues pertaining to violations of human rights of citizens by the executive.

¹⁹⁸As above 67-68.

¹⁹⁹As above 70.

- Ombudsmen or public protectors also oversee state actions. The judiciary alone is often inadequate or unable to single-handedly attend to all human rights owing to the fact that the welfare state has almost grown out of control.²⁰⁰ For this reason, the United Nations (UN) has even been a force behind the promotion of such institutions as national human rights institutions. The institutions exist in order to prevent the state from possessing citizens' properties in a discretionary manner, and also to prevent the state from meting out arbitrary treatment to citizens.

The aim of instituting the structures of constitutionalism and the rule of law is to shield citizens' human rights from executive excesses in post-independence Cameroon and post-apartheid South Africa. In colonial Cameroon and apartheid South Africa these mechanisms or structures were nonexistent and this led to the undermining of the rights of the people. In order to properly appreciate the rule of law, it must be understood that not all laws enacted by the legislature are accepted as an enforcement of the rule of law unless certain criteria are met:

The realisation of these norms creates a situation that may be described in legal terms as materially just. The constitution therefore, not only binds state authority to uphold procedural safeguards but also obligates the legislature to act in accordance with the requirements of substantive justice when exercising its function of lawmaking.²⁰¹

The rule of law 'must' strictly follow the requirement as stated above. If this norm is not respected then the colonial government in Cameroon or apartheid government in South Africa may claim to have followed the rule of law, since they applied the law that was enacted by parliament or entrenched in the constitution.

1.3.4.2 The dichotomy between the rule of law and rule by law

It is important to shed light on the confusion that exists between similar concepts. For example, the rule by law might be misconstrued for the rule of law. Rule of law connotes law and order even though democracies might adopt laws that are grounded in prejudice.²⁰²

The rule of law and rule by law are different in that if opponent political actors agree to the recourse of law for the resolution of their conflict, this indicates that law rules.²⁰³ However, true

²⁰⁰ Above.

²⁰¹ Quoted in Gloppen (1997) 47.

²⁰² Above 25.

rule of law can only be possible if institutions transform brute power.²⁰⁴ Moreover, a constitution is instrumental in respect for the rule of law since it serves as a focal device to determine whether or not governments have transgressed their limits in state action.²⁰⁵

Rule by law responds to a power system known as autocracy, whereas rule of law responds to democracy.²⁰⁶ Where one political force monopolises power and rules without restraint, it is known as rule by law. In this sense, it is understood that law is used as a tool of the political actor and he is not bound by law. However, Holmes pointed to the fact that rule of law and rule by law do not occupy two mutually separate options. Rather, they both occupy a common continuum and only the power systems differ, as explained earlier.²⁰⁷ In other words, the rule of law is grounded in the justice theory and constitutes the grounds upon which citizens in a community will rely on one another. The citizens drawing from the justice theory will protest whenever their expectations are not met.²⁰⁸

A vital point worth considering is critics' reproach that certain regimes that 'rule by exception' constantly set aside general laws to employ the use of decrees. A decree is the quintessence of the rule by law, as I pointed out above. The danger of a rule by exception clearly indicates that the rule of law can be suspended or set aside in a legal manner.²⁰⁹

In other words, the rule by law is a continuum of the rule of law, but places a rather negative connotation on the meaning of the rule of law.²¹⁰ The reason is clear: it implies that the state actually creates and owns the law and can therefore use the law as it pleases, even as a weapon of oppression against the citizens, since it cannot be subjected to any inherent restraint imposed.

1.3.5 Definition of sovereignty

²⁰³ M Maravall & A Przeworski (2003) 3.

²⁰⁴ As above 8.

²⁰⁵ As above 9.

²⁰⁶ Above.

²⁰⁷ As above 3.

²⁰⁸ J Rawls *A theory of Justice* (1999) 207.

²⁰⁹ Bedner (2010) 57.

²¹⁰ Above.

Sovereignty is generally defined as the exercise of the general will. Because it is the exercise of the general will, it follows that it can neither be divided nor alienated,²¹¹ and the will of the people as an act of sovereignty makes law.²¹²

The words ‘sovereignty’ and ‘sovereign’ have their roots in the middle-Latin word *superanus*. Certainly this word is derived from the Latin prefix *super-*, which means ‘above’. *Superus* and *superbus* mean ‘above’ and ‘elevated’ above others respectively.²¹³

Sovereignty can be understood as “a foundational idea of politics and law that can only be properly understood as, at one and the same time, as supreme authority in the state, and an idea of political and legal independence of geographically separate states.”²¹⁴ That is, sovereignty is a combination of two different facets that cannot be divided. This means that sovereignty is an idea that allows for the constitutional awareness or the protection of rights of citizens and the duties of the government of a specific state.²¹⁵ Sovereignty is also an international idea of numerous states keeping relations with one another, each country occupying a distinct territory and conducting foreign relations with other countries.²¹⁶ Such relations may include peaceful and cooperative relations or conflicting relations that at times culminate in periodical wars.²¹⁷

Verzijl says that sovereignty is the power of the state to engage its free will without exceeding the limits of the law of the nation. It is quite clear that in the modern doctrine of sovereignty, it is associated with legal power.²¹⁸ In other words, looking at the definitions above, it is clearly evident that popular sovereignty and state sovereignty are addressed. However, for the purpose of this thesis, popular sovereignty will be the focus. The research problem of this thesis questions whether the shift of sovereignty from the colonial government in Cameroon to a constitutional democracy, which by implication vested sovereignty in the people, has resulted in a true transition or rather encouraged colonial regime continuity. In order to achieve this goal focus will be on the people in post-independence Cameroon to ascertain whether or not they have been empowered.

1.3.5.1 Popular sovereignty

²¹¹M Loughlin *Foundations of public law* (2010) 117.

²¹²Above.

²¹³G Kreijen *State failure, sovereignty and effectiveness* (2004) 27.

²¹⁴R Jackson *Sovereignty: Evolution of an idea* (2007) x.

²¹⁵Above.

²¹⁶Above.

²¹⁷Above.

²¹⁸As above 28.

Popular sovereignty means that no one person is given the privilege to exercise the authority of the state without consulting with the people, and it cannot be against the will of the people.²¹⁹

This idea was eloquently relayed by Thomas Paine in his political tract on “The Rights of Man”, where he said: “The Nation is essentially the source of all sovereignty; nor can any individual, or any body of men, be entitled to any authority which is not expressly derived from it”.²²⁰

Popular sovereignty means that politicians will sit back while the people talk and the politicians devise a means of providing answers. The politicians may only speak and take action on behalf of the people, and regard the people’s authority to be ultimate.²²¹

Locke argues that people with the right and capacity to initiate political action could still exist even though government has broken down. People are concrete individuals and hold their inalienable rights. For the people to reign individual autonomy has to disappear at an early stage and the individuals are converted into a collective choice, still using people who have now turned into a body.²²² The discussion of popular sovereignty is indispensable in this thesis because during the colonial era the Cameroonians were conquered people and therefore assumed to lack constitutional rights. However, the collapse of the colonial regime suggests that authoritarianism has given way to democracy where the Cameroonians now have to rule through institutions of constitutionalism.

1.3.6 THE RELATIONSHIP BETWEEN CONSTITUTIONALISM, THE RULE OF LAW, AND SOVEREIGNTY

1.3.6.1 The interconnectedness of the rule of law, constitutionalism, and sovereignty

A common issue that is central to the discussion of the rule of law, constitutionalism, and sovereignty is the promotion and protection of the rights of people against arbitrariness. The authority relationship is vital to the understanding of sovereignty and establishes domestic and external legitimacy and stability for government, as well as liberal constitutionalism and the obligation that a legitimate government requires from the governed.²²³ In other words, sovereignty empowers the state to establish the rule of law and a constitutional government.²²⁴

²¹⁹Jackson (2007) 78.

²²⁰Above.

²²¹As above 81.

²²²M Canovan *The people* (2005) 103.

²²³R Prokhovnik *Sovereignties: Contemporary theory and practice* (2007)

Constitutionalism recognises the existence of government but it also provides for limitations being placed on its powers.²²⁵ A constitution is the cornerstone of constitutionalism, and the constitution as a visible symbol of the values and ideas of the people thus represents the idea of the rule of law.²²⁶ For a constitution to be approved and accepted as supreme law there has to be an exercise of popular sovereignty; the constitution should logically be a direct act of the people. Sovereignty is inherent in the people as a whole, and the people should ultimately be capable of exercising this right.²²⁷

A critical analysis of Tocqueville's statement below shows how sovereignty, the rule of law, and constitutionalism are all intertwined.

A general law – which bears the name of Justice – has been made and sanctioned, not only by a majority of this or that people, but by a majority of mankind. The rights of every people are consequently confined within the limits of what is just.²²⁸

This proposes that a law made by the majority of mankind means a law that reflects the thoughts, ideas, and aspirations of the entire populace. This view is known as popular sovereignty, which means no other person or law is above the law made by the people or above the people themselves.

The constitution, which is a written document, is stable and cannot be subjected to the whims of individuals. Therefore, the constitution is a symbol of the rule of law.²²⁹ In order to ascertain whether or not the Cameroonian constitution is a symbol of the rule of law, it must be ascertained whether or not the Cameroonians participated or contributed substantially to the constitution, and whether or not the legislature acted in accordance with the requirement of substantive justice in its lawmaking functions.²³⁰

1.4. METHODOLOGY

10.

²²⁴Above.

²²⁵Nwabueze (1973) 1.

²²⁶Nwabueze (1991) 55.

²²⁷As above 60.

²²⁸A de Tocqueville *Democracy in America* (1835 (2002) 301.

²²⁹Nwabueze (1991) 55.

²³⁰Gloppen (1997) 47.

This study was done by way of desk top research and a literature review of the available materials.

A major obstacle encountered in researching this thesis was the dearth of reliable sources on constitutionalism and the rule of law in Cameroon. However, my research visit to Cameroon has done well to bridge that gap. The purview of the thesis centres on exploring written, expert opinion on the subject matter, and archival sources on constitutionalism and the rule of law for the purpose of drawing conclusions regarding whether or not these principles have been respected. Where they were found not to be respected, these sources were drawn on in an attempt to establish both the causes and consequences of the disregard, with a view to making recommendations to improve the situation. In order to exhaust existing sources for this thesis, informal interviews with judges and practicing lawyers and small seminars with the academic community in Cameroon were used to supplement available information where possible and necessary.

Statistical information and analysis are not readily available from government agencies in Cameroon. As in France, judges in Cameroon start their careers as judges, unlike in common law systems where lawyers are called to the bench.²³¹ Thus, the judges are promoted from court to court.²³² This manner of organisation has rendered judges in Cameroon faithful servants to the executive, probably because they want to secure their promotion to higher courts.²³³ As a result, the information they have given may be politically motivated to justify the acts of the executive.²³⁴ Consequently, this study has not attempted to include reliable statistics but has rather dealt with general information, which could serve as a point of departure for further research in the future.

The literature review is supplemented by informal interviews and discussions with prominent practicing lawyers in Cameroon to evaluate their understanding of constitutionalism and the rule of law in Cameroon. Small seminars or colloquia were also organised at two different universities in Cameroon, in which research students in constitutional law and academic staff shared their views on the topic under discussion.

In applying a methodology that uses South Africa as a framework against which Cameroon is evaluated, certain aspects of the post-apartheid South African transformative project revealed are considered worthy of emulation in the Cameroonian system once appropriately adapted to fit the

²³¹ Anyangwe (1989) 72.

²³² As above 38.

²³³ Above.

²³⁴ As above 37.

Cameroonian context. These measures are aimed at shielding the fundamental human rights of citizens from executive encroachment.

The use of South Africa to evaluate the progressiveness of the Cameroonian situation is meaningful since both systems have experienced colonialism. Additionally, both have customary legal systems that apply alongside the national legal system.²³⁵ South Africa has a mixed legal system that is influenced by Roman-Dutch law, English common law, and South African indigenous law.²³⁶ Cameroon has a bi-jural legal system²³⁷ that is made up of French civil law and English common law.²³⁸ It is thus clear that both systems have experienced English common law as well as civil law influences.

The two countries submit to two opposing camps of treaty enforcement ideologies. While Cameroon is a proponent of monism, South Africa is a proponent of dualism. The divergence of their ideological camps or approaches provides a reliable opportunity from which lessons can be burrowed by one another and not relying solely on a single approach which might turn the present analysis or paradigm into an immaterial and senseless engagement. This will be the case if for instance Cameroon were to be examined against Benin instead. By virtue of Benin and Cameroon subscribing to the same approaches regarding the relationship between national and international law, only a modest analysis can result out of such a venture.

Monism means that when Cameroon ratifies any international human rights treaty that law automatically becomes part of the national law. This suggests that legislative action would not be necessary to convert international law norms into domestic law even though this might simply be in theory.²³⁹ However, in other West African countries such as Benin, judicial interpretation holds that a ratified treaty only commands superior authority to domestic legislation upon its publication. Dualism on the other hand means that South Africa will not respect international law as national law simply on the basis that it ratified a treaty. For such a treaty to become South African law, it must be explicitly incorporated by an Act of parliament either directly through incorporation or indirectly through a process of reception which entails the amendment or repeal of some national laws to enable conformity with international law without expressly referring to the treaty which is the source of these norms.²⁴⁰ An advantage South Africa can gain from

²³⁵Fombad www.nyulanglobal.org and F du Bois “Introduction: History, system and sources” in GG Van de Merwe & J du Plessis (eds) *Introduction to the law of South Africa* (2004) 40-41.

²³⁶Van de Merwe & Du Plessis (eds) above.

²³⁷Fombad (www.nyulanglobal.org)

²³⁸Above.

²³⁹F Vilgoen *International human rights law in Africa* (2012) 518.

²⁴⁰As above 522.

Cameroon is that as a monist country, on the face of it South Africa would learn to internalize international human rights law rights expeditiously given that as a monist country Cameroon is assumed to encourage and implement the self-execution of international law domestically once ratified. Unfortunately this advantage is tainted and marred by the drawback of “prior legislative measures” that has been witnessed in most Francophone countries. This simply implies that even in monist countries legislative enactments are required for provisions that national law does not immediately consider as national law.²⁴¹ Nevertheless, an advantage Cameroon can gain from South Africa is that, instead of Cameroon rendering lip service as monism never serves its purpose in Cameroon in particular, and Francophone countries in general, dualism should be adopted so that Cameroon will not have to use monism as a trump card during the process of submission of state reports by referring to constitutional provisions of the “integration” of treaty norms into municipal law as guise to state’s failure to adopt necessary enactments.²⁴² If this happens then citizenry human rights are at risk. Another advantage Cameroon can gain from the South African approach is that section 39 of the South African constitution of 1996 provides an accurate and proper way of interpreting the Bill of Rights which if adopted by Cameroon under its future transformative constitution project there will be assurance of the rapid development of a human rights culture. The Cameroonian constitution does not enshrine a similar provision.

A difference that exists between Cameroon and South Africa in terms of monism and dualism is that while international law maybe superior to domestic legislation in Cameroon, both the constitution and local legislation are superior to international law in South Africa.²⁴³

As a point of convergence between monist Cameroon and dualist South Africa, despite South Africa belonging to a different legal culture from that of Cameroon, the fact that even monist countries now require some degree of incorporation of international law into local legislation before it can be applied locally is enough reason to neutralize any unsuitability argument of the two countries in the present analysis.

There is thus a sound jurisprudential basis upon which to assert that insights from one of these legal systems may be helpful in addressing issues in the other legal system.

In developing these insights, descriptive, analytical, and historical approaches are applied to analyse and critique legislation to demonstrate, where necessary, how current legislation is detrimental to the citizens of Cameroon and only serves the interests of the executive. This thesis

²⁴¹ As above 520.

²⁴² As above 521

²⁴³ As above 526.

has used South Africa as a broad framework against which “transformative constitutionalism” is measured in Cameroon.

The aim of the thesis is not to critique constitutionalism, the rule of law and sovereignty, even though I am aware these concepts are or could be variables of neo-liberalism. I therefore do not engage with a critique of the concepts. I rather use and apply the concepts as benchmarks to determine the extent to which Cameroon’s constitution has been successful in its departure from colonialism to democracy.

1.5 STRUCTURE OF THESIS

This thesis consists of five chapters. It starts with a general introduction; followed by a discussion of the constitutional development and history of Cameroon and some remarks on South Africa in the second chapter. In the third chapter I examine the constitutional transformation in South Africa and consider how it fits the present polity.

In the fourth chapter I discuss the effects of colonialism on Cameroon, and consider reasons as to why democratic transformation has not actually taken place in Cameroon despite the fact that colonialism has ended. This is achieved by examining the current institutional framework of the rule of law and constitutionalism in Cameroon.

In the fifth chapter reflections are set forth regarding the rule of law and constitutionalism in Cameroon, and then recommendations are made for the improvement of constitutionalism and adherence to the rule of law in Cameroon, drawing on the post-apartheid South African situation for inspiration. A timeframe for implementation of the recommendations for Cameroon is also included, and thereafter a general conclusion is drawn.

CHAPTER TWO

THE HISTORY OF THE COLONIAL REGIME IN CAMEROON

2.1 INTRODUCTION

The main research problem this thesis addresses is that despite Cameroon's transition from colonialism to democracy, this transition is not evident in the present dispensation. Despite their transition into a democracy, Cameroonians are still politically and constitutionally disempowered and disenfranchised because they were sidelined from the constitution-making process of the independence constitution. The resultant constitution consequently failed to transfer sovereign powers to the people to enable them hold the executive to account. This failure has facilitated colonial regime continuity in the new Cameroonian democratic dispensation.

This chapter attempts to demonstrate how colonialism encouraged the disenfranchisement of the people's rights in Cameroon.

The return of Cameroon's sovereignty in 1960 when it gained independence was considerably more symbolic than substantive, because the people of Cameroon, the assumed holders of sovereignty in the new sovereign territory, were still not empowered with the imputed sovereign power. UPC which was the political party representing the majority of political opinion in the territory was proscribed by the colonial government, and a new but unreformed parliament was elected under conditions that were incompatible with democracy. This allowed the independence constitution of Cameroon as well as those of other post-independent African constitutions to be drafted solely by the colonial government and a handful of colonial regime-minded Cameroonian elites. This unfortunate eventuality, which occurred at independence, has haunted the Cameroonian posterity because the same constitutional philosophy of 1960 has survived into the currently operating Cameroonian constitution of 1996, creating an "imperial presidency" and a constitutional council for the protection of human rights, which is more of a quasi-political institution than a judicial institution. In essence, the new regime has not in any way departed from the colonial regime ideology, and departed even less from its jurisprudence.

Thus, this thesis is a reflection of constitutional optimism as a viable means of transforming the existing situation, using constitutional transformation in post-apartheid South Africa as a desirable paradigm to that effect. It must be borne in mind that the research question and

argument this thesis answers is that the present disregard for constitutionalism and the rule of law by the Cameroonian government is informed by continuity in colonial rule. Nevertheless, this chapter only examines a specific ancillary question of the main thesis question for the purpose of achieving the said goal. The question to be answered by this chapter is: Under what constitutional and historical context did colonialism operate in Cameroon? Towards the end of the chapter I make some observations concerning apartheid South Africa. Given that this thesis is not a comparative research but an analysis of post-colonial Cameroon against post-apartheid South Africa, it is primordial to trace back the colonial history of Cameroon from the beginning as a means of ascertaining the colonial legacies and excesses that have survived and emerged into the democratic dispensation and have obstructed and distorted the course of democracy and human rights. A few observations concerning apartheid South Africa are indispensable since it is the country against which the transformative dimension of post-colonial Cameroon's constitutional dispensation is measured. Thus, significant parts of the history of post-apartheid South Africa are observed as a precursor to fostering in post-independence Cameroon the same rapid pace of transformation that occurred in post-apartheid South Africa and by extension, an assurance that the paradigm is worthy of emulation by post-colonial Cameroon.

In an attempt to explore the reason why Cameroon seems to be saddled with colonial regime continuity, which has in return inspired disregard for constitutionalism and the rule of law, I make allusion to the Brazzaville Conference as elaborated in the last chapter of this thesis. This conference constituted a watershed in Francophone African colonial politics as it called for the inclusion of overseas representatives in the constitutional assembly that followed after the war. It was believed that extensive constitutional reforms were necessary for the purpose of eliminating repressive Vicky legislation, and to step up the Third French Republic's weak institutions.¹ The colonial parliament or federal assembly was proposed for the purpose of meeting many particular needs, such as to guarantee unity in the French world and freedom for each territory that constitutes the French colonial bloc or *la federation française* (French Federation).²

Nevertheless, to examine this conference, the history of Cameroon has to be traced back in a chronological manner before arriving at this state. Cameroon experienced colonial rule under several colonial masters. In 1884 Cameroon was colonised by the Germans and Cameroon was

¹B Marshall *The French colonial myth and constitution-making in the Fourth Republic* (1973) 108.

²Above 109.

under German hegemony until 1914 when Germany lost all of its protectorates, including Cameroon, to the axis powers. Thereafter, Cameroon became a League of Nations' mandated territory and was placed under the administration of France and England. With the birth of the United Nations in 1945, Cameroon was converted into a trusteeship, and the administration of France and England was maintained until 1960 when Cameroon gained independence.

South Africa experienced about 350 years of colonialism and 50 years of apartheid rule before finally entering into a democratic dispensation. Under the apartheid regime, black people were not allowed to operate under the rule of law but under indirect rule coordinated by traditional leaders in a traditional system.

Modern day South Africa came into existence as a result of the four British colonies merging to form the union of South Africa. South Africa became independent as a dominion within the British Commonwealth in 1910. Upon independence, South Africa ignored the Act of 1909 that provided for inclusive democracy, and rather indulged in governance characterised by white minority rule. South Africa then operated under the Westminster statute and acquired parliamentary sovereignty that authorized parliament as the supreme voice in South Africa. The situation remained as such until democracy was established in 1994.

The colonial executive in Cameroon and the Westminster model rule, which promoted parliamentary supremacy in South Africa, both exercised unfettered powers and failed to respect human dignity as a sacred value. On the eve of independence, the Cameroonian government decimated the structures and leaders of the largest and most popular indigenous and grass roots political organization, the UPC, who were pushing for absolute independence in opposition to the French terms of independence, which was nominal independence. The governmental onslaught orchestrated against the Cameroonians was facilitated by the French army. Thus, Cameroon's present democratic dispensation is assumed to be a façade democracy, given that the revolution of the people was brutally quelled by the French forces and this revolution is yet to be completed.

The majority of black South Africans together with coloureds, Indians, and a number of white sympathisers of the liberation struggle made frantic efforts to collapse the apartheid regime and indeed succeeded in a process that began in the late 80s up until 1994.

Even though South Africans are not entirely free in the present democratic dispensation, when the two dispensations under scrutiny are juxtaposed, it can be argued that South Africa has made greater strides during its 21 years of democracy, than Cameroon has made in 55 years.

2.2 THE HISTORICAL BACKGROUND OF COLONIALISM IN CAMEROON

2.2.1 COLONIALISM AND NEO-COLONIALISM AS ANTECEDENTS TO THE DISREGARD FOR THE RULE OF LAW AND CONSTITUTIONALISM IN CAMEROON.

The more capitalism develops, the more the need for raw materials arises, the more bitter competition becomes, and the more feverishly the hunt for the raw materials proceeds all over the world and the more desperate becomes the struggle for the acquisition of colonies.³

Cameroon, like many other African countries that experienced colonial domination, was erected on the non-African foundation philosophy whose foundation history reaches back to a foreign historical source.⁴ A set of ideas of foreign origin were introduced in Cameroon following the European invasion of Africa in the 19th century.⁵ It was the Europeans intention to ideologically arrest Africans in order for the Europeans to succeed in ecological invasion, political domination, and economic enslavement of Africans, with the sole objective of robbing Africa of its natural wealth with the consent, participation, and even assistance of Africans themselves.⁶ Thus, the interaction between Cameroonians and Europeans was established on economic rather than discursive relations. Established during the era of colonialism, this foundation paved the way for the maintenance and continuity of the neo-colonial power structure in post-colonial Cameroon.⁷ The imposition of this neo-colonial power structure in Cameroon destroyed the indigenous foundation on which a veritable depository of ideas should have emerged as a counterpoint dynamic to the Europeans' domination agenda. The Europeans easily achieved their goal with the collaborative assistance of their neo-colonial allies and clients, who were in power, and yet the neo-colonialists did not intend for any common ideals for self-representation, which acknowledged a hybrid interest determined by economic imperatives.⁸

The colonial order in Cameroon sought to establish a social order as they intended to introduce a new order, without practically attesting to such intention. Hence, the new order was not derived

³K Marx quoted in V Chkhikvade "The state, democracy and legality in the U.S.S.R, Lenin's ideas today" (1972) in W Tamfu *Constitutional law and political systems* (1998) 186.

⁴N Aseh "Ideologies, governance, and the public sphere in Cameroon" CODESRIA (2008) 2.

⁵Above.

⁶Above.

⁷Above.

⁸Above.

from an indigenous root and duly conflicted with any indigenous foundation philosophies and would hardly promote the rule of law and constitutionalism. The introduction of a utopian dimension to the “conquered peoples” appreciation of history also required the compliance of the Cameroonians to be incorporated into the neo-colonial power structure, exemplifying the “unconscious” participation of a people in a system of global division of labour, which in essence robbed them of what they were hoping to achieve.⁹

Colonial regime continuity in Cameroon can be said to have been sustained without opposition from the people due to the prior imposition of a foreign foundation philosophy ideology.¹⁰ The historical processes through which the ideological mechanisms of public mediation was forced on the subordinated people of Cameroon by the European invaders was based on a framework of an all-encompassing legal-political and super structure that combined the use of violence and the control of ideas in order to achieve economic goals for the benefit of western industries.¹¹

Given the degree of the disproportionality of benefits between the Europeans and the Cameroonians, it can be extrapolated that the violence (the *indigénat* system that created two court systems in Cameroon, namely customary law for the indigenous people and the rule of law for Europeans) of the colonialists against the Cameroonians and the ideological superstructure established by the colonialists consciously dispossessed post-colonial Cameroon of the smooth functioning of the rule of law, constitutionalism, and power from the people - popular sovereignty.

The subsequent chapters demonstrate that the unfettered powers exercised by the colonial administration and the high jacking of the constitution-making process by the local elites planted a seed of discord that has survived into the post-colonial polity-democratic dispensation. Thus, the new dispensation has consciously harboured the relics of colonialism in the form of neo-colonialism in the post-colonial dispensation, intended to continuously undermine the plight of the Cameroonians while fulfilling the erstwhile colonial master’s long-standing agenda of exploitation in an apparently democratic dispensation. It is evident that the entrenchment of genuine rule of law and constitutionalism, through the kind of constitution-making advocated by the UPC, would have impeded continued French exploitation of Cameroon in the new dispensation. Thus, the reconfiguration of the colonial power structure into a neo-colonial power

⁹As above 3.

¹⁰Above.

¹¹Above.

structure has seriously undermined and disregarded the rule of law, constitutionalism, and popular sovereignty in the new Cameroonian dispensation—a democracy.

The unfettered use of power by the executive or the colonial administrators (governor-generals), most especially the French, who through their policy of assimilation turned the Cameroonian subject into a Frenchman known as “*indigénat*” or “*petit Français*”,¹² conveying the Cameroonian-turned Frenchman into the democratic dispensation and convincing them that unfettered use of executive power and authoritarianism was the way to go. Cameroonians were under foreign domination and the relations between the colonial powers and Cameroon suggested that Cameroonians were conquered and their sovereignty was hitherto held by the colonialist, and by extension the Cameroonians had no rights as a result. However, with decolonisation in the 1960s, the subsequent constitutional rights revolution of the 1990s, and respect for the human rights imperative, a shift from the colonial ideology was necessary in the independence dispensation, if not during the decolonisation period of the 1960s, then after the constitutional rights revolution in the 1990s that reaffirmed the indispensability of a new rights ideology consistent with independence. Unfortunately, since independence the new indigenous government has never developed a new constitution tailored to address the urging necessities of the new dispensation; instead, they inherited the same oppressive colonial structures without any relative adaptations.¹³

This conduct and legacy inherited from the colonial era have survived into the post-colonial polity, thereby negating the rule of law and constitutionalism, and consequently respect for citizenry fundamental rights has been overlooked.

2.3 THE PRE-COLONIAL ERA

A Carthaginian sailor named Hanno navigated the West African coast in the 5th century BC, during which he witnessed a volcanic eruption on the mainland from a high hill that was later called Cameroons Mountain or Fako Mountain.¹⁴ Hanno was so mesmerised by the wonderful site that he named the mountain ‘The Chariot of the Gods’.¹⁵

¹²M Delancey *Cameroon: Dependence and independence* (1989) 37.

¹³B Muna *Cameroon and the challenges of the 21st Century* (1993) vi

¹⁴C Anyangwe *Betrayal of too trusting a people: The UN, the UK and the trust territory of the Southern Cameroons* (2009) 1.

¹⁵Above.

However, the coastal areas of Cameroon only became primarily exposed to Western influence in the 1500's when Portuguese traders pursued trading bridge-heads along the Littoral region.¹⁶ By July 1472 the Portuguese as the first Europeans generally landed along the Atlantic Coast and at the Wouri estuary in particular, where they were welcomed by the Douala people with fanfare.¹⁷ The Douala people welcomed the Europeans with local dishes of shell-fish or prounds, caught from the Wouri River; this led the visiting Portuguese to thereafter name the Wouri River *Rio dos Cameroes*, meaning the River of Abundant Prounds.¹⁸

After the Portuguese encounter, a stream of endless Europeans followed suit including Dutch, Spanish, Swedish, and a number of other European traders who took advantage of the lucrative trade, first in palm nuts and ivory, and later slaves.¹⁹ With the arrival of the colonisers, missionaries and explorers established themselves in Cameroon, and the influence of these colonising parties was soon felt from the coast into the hinterlands, and gradually trade and evangelisation made way for colonisation.²⁰

The Amba Bay area and its hinterland became British territory in the mid-19th century as a result of the activities of a British Baptist missionary society. The work of these missionaries prompted the Cameroonian king of the area, King William, to rally his chiefs and sign a treaty that brought an end to the inhumane and unchristian-like custom of sacrificing human life subsequent to the death of any of the chiefs.²¹ In 1858, Alfred Saker, head of the Baptist mission community, established the first permanent European settlement, known as Victoria, at the foot of Mount Cameroon.²² The British influence along the Cameroon coast at Douala, together with the numerous appeals by the various Cameroonian chiefdoms for the British protection, left observers with the impression that Britain would ultimately annex the territory.²³ However, this view was not shared by the French and Germans who were equally involved in several matters in the area. By 1882 the German traders, who had established long-standing business relations in the area, had convinced German Chancellor Bismarck of their desire for imperial protection to be extended to the Cameroon coast.²⁴ The British government adopted a protracted approach regarding the

¹⁶N Kofele-Kale "Reconciling the dual heritage: Reflections on the "Kamerun idea"" in N Kofele-Kale (ed) *An African experiment in nation building: The bilingual Cameroon Republic since Reunification* (1980) 4.

¹⁷Aseh (2008) 318.

¹⁸Above.

¹⁹Above.

²⁰Above.

²¹Above.

²²V Le Vine *The Cameroon Federal Republic* (1963) 3.

²³As above 4.

²⁴Above.

annexation of the area despite the overwhelming inroads made by British missionaries and businesses in the area. However, when Britain finally became aware of the possibility of the Cameroon coast falling into the hands of others, particular the French, Britain immediately dispatched their “floating consul” Edward Hyde Hewett to conclude annexation treaties with the small chiefs at Douala. Hewett arrived in Douala a week too late, given that by July 12, 1884, Gustav Nachtigal, the then German Consul General in Tunis, had arrived the day before and concluded a treaty with two of the Douala kings for trading rights and the surrender of their sovereignty to Germany.²⁵

As soon as Cameroon was declared a German protectorate, a rudimentary system of administration was established under Dr. Buchner who served as Nachtigal’s aide and named Douala as the capital of the protectorate.²⁶

Even though Britain and France contended Germany’s annexation of Cameroon, given that they were also nursing the same interests, they decided not to offend the Iron German Chancellor, especially in view of the imminent Berlin Conference, and instead recognised Germany’s annexation of Cameroon.²⁷ Even at this juncture, some Cameroonian indigenes were still hostile to German rule; the Fulani, who are locally known as *Peul* or *Fulbe*, continued to mount stiff resistance towards the Germans.²⁸ It was not until 1899 when Captain von Kamp, commander of the military garrison at Wute-Adamawa, launched a military expedition to Tibati, which culminated in the capture and deposition of Mohama, who was the incumbent sultan.²⁹ On the 11th of September 1899, the *Peul* sued for peace and concluded a peace treaty with the Germans. A new sultan, Jerima Chiroma was installed in Tibati and he undertook to unconditionally and unflinchingly comply with German orders in exchange for German protection and to be honoured with a German flag.³⁰ From this period the entire Cameroonian territory experienced Germany colonial hegemony.

2.4 THE COLONIAL ERA

²⁵ Above.

²⁶ C Anyangwe *The Cameroonian judicial system* (1987) 25.

²⁷ Above.

²⁸ As above 26.

²⁹ Above.

³⁰ Above.

Colonialism is not a type of individual relation but the conquest of a national territory and the oppression of a people: that is all. It is not a certain type of human behavior or a pattern of relations between individuals.³¹

In light of Fanon's appreciation of colonialism quoted above, I agree with Anyangwe³² that colonialism, as practiced in Africa in general and Cameroon in particular, could best be described as a subordinate politico-economic relationship that existed between the oppressor or the colonial power and an oppressed state. This relationship should not necessarily influence the terminology used to address the territory as 'protectorate', 'mandate', 'trust territory', or 'colony'. The reason being that despite the use of any of such terminology in the territory, the treatment meted out to the people did not differ and suggested that the territory was conclusively a colony. Through this historical exploration, my prime interest is to establish that colonisation means that the people have been disenfranchised and therefore subsequent independence of such a territory calls for the immediate restoration of popular sovereignty. In order to achieve this vision, constitutionalism and the rule of law have to occupy a central position in the constitution-making process. However, a subsequent examination of the constitution-making process in post-colonial Cameroon might prove otherwise.

Between 1884 and 1916, Cameroon experienced the control of three major European countries. These countries were Germany from 1884-1914, and Britain and France, jointly, from 1914-1918 when they invaded and conquered the former German protectorate.³³ Guided by the terms of the Milner-Simon Boundary Declaration of 1916, the conquered German Kamerun was divided between Britain and France, and the lion's share was entrusted to France.³⁴ Even though the three colonial masters actually operated at two different times, given that Germany was first, then followed by Britain and France, the degree and mode of practice of colonialism in Cameroon were the same, as pointed out by Anyangwe:

Colonialism whether by the Germans, British or French was basically the same in Cameroon: the economic exploitation of the territory, the imposition of alien culture, rule, and law and the rough treatment of the natives. There were always contradictions and differences in the value systems implanted by these colonial powers in Cameroon.³⁵

³¹F Fanon *Toward the African revolution (Political essays)* 81.

³²Anyangwe (1987) 4.

³³N Kofele-Kale "Reconciling the dual heritage: Reflections on the 'Kamerun idea'." In N Kofele-Kale (1980) 327.

³⁴Above.

³⁵Anyangwe (1987) 61.

Generally, the three colonial masters, Germany, Britain, and France had similar characteristic traits in the manner in which colonial justice was dispensed.³⁶ The following characteristics were achieved during colonial rule in Cameroon:

- (1) an acceptable recognition and implementation of customary law;
- (2) the colonialists introduced their own unique law;
- (3) the introduction of concurrent systems of courts, one for whites and the other exclusively for 'locals';
- (4) the separation of power was inexistent given that it was vested in an administrator-cum-judge; the colonial administrator also doubled as a judge;
- (5) the colonial judicial service did not constitute an independent power but merely a branch of the civil service; judges were civil servants; and
- (6) the Germans, British, and French had arbitrary justice systems for the natives; the Germans dubbed theirs *disziplinarstraf* while the French dubbed theirs *l'indigenat*.³⁷

Characteristic 3, 4, and 5 are instrumental since they form the crux of this thesis. My research question and argument is that the present disregard for constitutionalism and the rule of law in Cameroon is informed by the continuity of colonial rule. Characteristic 3, 4, and 5 above directly appeal to this argument given that in the present Cameroonian democratic dispensation, the judiciary is still considered an arm of the executive and not an independent power.³⁸ Moreover, the separation of powers is still currently illusory in Cameroon, given that the president of the republic has been invested with imperial powers by the constitution.³⁹ The bifurcation of the judicial system of Cameroon, though no longer in terms of one for natives and the other for Europeans but only civil and common law, the fact that the present French civil law encourages the existence of two separate courts, one for civilians and the other for the administration, negates the rule of law that espouses the application of a single system of law for citizens and government officials alike.⁴⁰

Indeed, the justice system and rule in Cameroon, under the first colonial master, Germany, was demeaning and unsophisticated, since chiefs were flogged as punishment for offences committed by runaway subjects.⁴¹ With the whole institution of the German colonial system founded on

³⁶As above 4.

³⁷As above 5.

³⁸Anyangwe (1989) 36-37.

³⁹Mbaku J "The separation of powers, constitutionalism and governance in Africa: The case of modern Cameroon" http://works.bepress.com/john_mbaku/7 (accessed 2/04/2014).

⁴⁰M Maravall & A Przeworski *Democracy and the Rule of Law* (2003) 206.

⁴¹Anyangwe (1987) 38.

military despotism and based on the German glorification of militarism, the Germans could not but exercise harshness during the period of their rule over Kamerun.⁴²

2.4.1 German rule in Kamerun

Modern Cameroon only dates back to July 1884 when the accredited German representative Nachtigal and Duala chiefs officially brought Cameroon under German domination under agreements.⁴³ The German protectorate in Kamerun lasted for thirty years.⁴⁴

Germany laid the foundation for modern Cameroon by establishing a transportation system, communication, power factories, etc.⁴⁵ Most of the modern facilities available in Cameroon today, such as railway network, roads linking major cities, bridges, plantations, and development projects were started by the Germans.⁴⁶ By promoting missionary and educational activities, the Germans took a decision to develop an indigenous Kamerunian stratum by mediating between the locals at the hinterland and the Europeans.⁴⁷

However, the Germans really did not have any colonial policy in Kamerun. Their dominant interest was the extensive exploitation of the natural resources in the territory to cater for the growing demands of raw materials by Germany's expanding industries.⁴⁸ Arising out of their selfish motive for colonising Kamerun, German rule was quite repressive, but the Germans neither scorned the traditional institutions nor assimilated such institutions.⁴⁹ They nevertheless created two different systems of courts in Kamerun, one for Europeans and the other for Kamerunians.⁵⁰

2.4.1.1 The German colonial justice system in Kamerun

Even though Cameroon was annexed by Germany in 1884, the British supervised Court of Equity that had been set up by the European traders' community to resolve their trade issues continued

⁴²Above 42.

⁴³As above 4.

⁴⁴V Le Vine (1963) 5.

⁴⁵Above.

⁴⁶Above.

⁴⁷Above.

⁴⁸Anyangwe (1987) 27.

⁴⁹As above 28.

⁵⁰As above 30.

operating as before.⁵¹ This continued relic of British influence was quite irksome to the Germans who now had dominion over the territory. For this reason, Germany had the Douala Court of Equity disbanded in 1885.⁵² Consequently, the German governor set up a temporary court in Douala with himself as the president. This court had jurisdiction over matters between Europeans. Whenever any matter was between a Kamerunian and a European, the matter was first decided by a panel of ad hoc 'judges' appointed by the governor. If any appeal resulted, it was sent to the temporary court and the governor himself then presided over the matter.⁵³ Any matter between two Kamerunians continued to be dealt with by the traditional courts that predated the arrival of the Europeans in Cameroon.⁵⁴

Concerning substantive law, there was segregation in the law applied by the two different courts. The European courts essentially applied German law as applied in German urban courts, while the Kamerunians applied customary law.⁵⁵

A. *The European justice system*

The system of justice for Europeans in Kamerun was characterised by the law applicable in the territory and the court system in operation.

By 1886 the *Reichstag* envisaged laying a constitutional foundation in Kamerun.⁵⁶ This did not happen until 1900 when the administration of justice for the Europeans was regulated in the territory.⁵⁷ Thus, two foundational Acts were passed to declare that German law had become applicable to Europeans in German colonies.⁵⁸ The one regarding consular jurisdiction, known as *Konsulargerichtsbarkeit*, was passed on 7th April 1900, and the other regarding colonial law, known as *Schutzgebietsgesetz*, was passed on 10th September 1900.⁵⁹

The German Civil Code of 1896 became applicable in Kamerun and was enforced on 1st January 1900. In the Imperial German Criminal Code that had been enforced in Germany in 1871, were listed renowned infractions such as treason in Section 80 and high treason in Section 93.⁶⁰

⁵¹ As above 9.

⁵² Above.

⁵³ Above.

⁵⁴ Above.

⁵⁵ As above 30.

⁵⁶ Above.

⁵⁷ Above.

⁵⁸ Above.

⁵⁹ Above.

⁶⁰ Above.

There were two types of court systems, namely the court of first instance and a single appellate court. The appellate court served as a court of appeal for Germans in Kamerun and Togoland, and was a court of last resort.⁶¹

Most judgments passed in these courts, which provided for imprisonment or deportation of whites to Germany, were commuted to fines. This phenomenon became commonplace between 1909 and 1910⁶² and was prompted by the desire to prevent a German from serving a prison term in order to avoid hurting the white man's ego amongst native Kamerunians or Africans, and also to avoid deporting the German transgressor to Germany, which was even more intolerable given that colonial powers were dumping convicts in their colonial territories.⁶³

B. *The justice system for the natives*

When Germany assumed its exercise of sovereignty over, disputes between Kamerunians were decided by German officials with the assistance of interpreters. Missionaries also assumed the same role as Germans and both contributed significantly to arrest feuds between rival villages that had led to bloodshed in the past. By virtue of the Kaiser's royal prerogative, the governor was empowered to legislate for the colonies, as highlighted in Section 4 of the Colonial Law of 1900.⁶⁴ In the case of Kamerun, he exercised this power by a Decree on the 3rd June 1908.⁶⁵

With regard to the applicable law in the justice system for natives, the Imperial Chancellor directed that justice be administered by the governor and his subordinates. Thus, no separation existed between the German colonial judge and the local administrator. The German colonial governor was enjoined to refer to local customs in their settlement of disputes.⁶⁶

In a dispute involving a Kamerunian against a European, the question of which court was competent depended on the race of the defendant in the dispute. If he was European, the courts for the Europeans had jurisdiction, and if he were a Kamerunian, the court for Kamerunians had jurisdiction over the matter.⁶⁷ After 1900 the German Criminal Code also became applicable to Kamerunians.

⁶¹ Above.

⁶² As above 32.

⁶³ Above.

⁶⁴ Above.

⁶⁵ As above 33.

⁶⁶ Above.

⁶⁷ Above.

By means of an Imperial Decree dated 15th June 1896, the Kaiser vested the ownership of all land in the Kamerun hinterlands in the German Crown. This was done on controversial grounds where such lands were considered “vacant and ownerless.”⁶⁸

A court system for Kamerunians was implemented with a triple hierarchy in 1892: village courts, native arbitration tribunals, and the governor’s court. The lowest amongst the three was the village court and was presided over by the chief of the village, and the court of last resort was the governor’s court. Common forms of punishment meted out subsequent to judgment made by such courts ranged from fines to corporal chastisement or flogging, imprisonment, and the death penalty.⁶⁹ The execution of Rudolf Duala Manga and Ngoso Din⁷⁰ attests to the reality of the death penalty that was administered by the German colonial power in Kamerun.

As a result of the I World War, the Kamerun protectorate came to an abrupt end.⁷¹ The French, British, and Belgian troops invaded Kamerun between 1914 and 1916 from many angles and gradually converged upon the administrative capital Yaounde, chasing the German forces into Spanish Guinea where they took refuge.⁷² The British and the French decided to create a condominium, after forcing Germany out of Cameroon. However, this union did not last and ended in March 1916, and the victors decided to provisionally partition Cameroon.⁷³ The portion accepted by Britain amounted to almost one-tenth of Cameroon’s total area and bordered Nigeria in the West.⁷⁴ The rest of the territory was allocated to France.⁷⁵ In other words, France received the majority share of the territory. In 1916 the Anglo-French alliance that defeated the Germans entered an agreement signed by Viscount Milner and Monsieur Simon who were plenipotentiaries of the two respective powers, effectively partitioning the former German colony.⁷⁶ Given that the French had been handed the *Neue Kamerun* and the “Duckbill” to Germany in 1911 in exchange for Germany’s withdrawal from and recognition of French rights in Morocco, the mandated territory of French Cameroon did not include this territory.⁷⁷

The partitioning of Cameroon between Britain and France received international acclamation and legitimacy in 1922 under the League of Nations’ mandate system.⁷⁸

⁶⁸As above 34.

⁶⁹As above 35.

⁷⁰As above 39.

⁷¹Le Vine (1963) 7.

⁷²Above.

⁷³Above.

⁷⁴Above.

⁷⁵Above.

⁷⁶Anyangwe (2009) 4.

⁷⁷As above 5.

⁷⁸Kofele-Kale (1980) 5.

2.4.2 British and French rule in Cameroon

After 1922, Cameroon officially became a League of Nations mandate and its administration was entrusted to Britain and France. In 1924, the British passed an ordinance dividing British Cameroon into Northern and Southern Cameroon. Northern Cameroon was incorporated into the northern part of Nigeria and Southern Cameroon into la republique du Cameroun.⁷⁹ These two parts of British Cameroon were administered as integral parts of Nigeria. The British did not run the Cameroons mandated territory as a single entity but rather as a disintegrated colonial territory.⁸⁰

The French maintained their part of the territory as a single block where several policies were introduced in a progressive manner, beginning with the *politique de protectorat* (protectorate policy), which discouraged the previous policy of assimilation while promoting both association,⁸¹ and the economic policy, *mise en valeur*.

The policies introduced by France resulted in the maintenance of a constant political and cultural gap between the French and the assimilated natives on the one hand, and the native Cameroonian or African on the other hand.⁸² By virtue of the legal separation of the two groups, the *indigénat*, which constituted a wide-ranging set of violation and penalties, could be invoked by the French administrators at will and without limit against the members of the *sujets indigènes*⁸³ group, essentially Africans.⁸⁴

The two colonial systems of justice operated by Britain and France were only similar in structure—since they both had two separate court systems, one for the natives and the other for the Europeans—but adjectively and substantially different.

2.4.2.1 The rule of law and constitutionalism in British Cameroon

It is apparent that colonial justice during German rule did not make any distinction between the executive power and the judicial power. The administrator combined his duty with the task of

⁷⁹ Anyangwe (2009) 5.

⁸⁰ Above.

⁸¹ The slow integration of the Cameroonian into the French political, social, and economic life towards an eventual assimilation but the European is separated from the African community until assimilation is completed. (Le Vine (1963) 9).

⁸² Above.

⁸³ Indigenous subjects.

⁸⁴ Le Vine (1963) 9.

dispensing justice.⁸⁵ The study will proceed to investigate the possibility of unbroken continuity under British rule, with reference to their court and penal system. The later part of this study will demonstrate whether or not the rule of law, constitutionalism, and violation of popular sovereignty has been replicated in the democratic Cameroonian dispensation.

A. *The applicable law and the status of the courts in Southern Cameroons*

The law that was applicable in Southern Cameroons originated from three sources, namely customary law, English received laws, and laws specially passed for the territory or extended to the territory.⁸⁶ Laws specially legislated for or extended to the territory refer to laws, proclamations, and order-in-council especially tailored to the Southern Cameroons. Nigerian ordinances expressly extended to Southern Cameroons and British Imperial Acts of Parliament that were applicable in Southern Cameroons directly or indirectly through Nigeria.⁸⁷

English common law and the doctrines of equity and statutes of general application that were still applicable in England before the 1st of January 1900 were generally applicable in Southern Cameroons.⁸⁸ Even though English common law has since been repealed in England, it is still in force in the former Southern Cameroons.⁸⁹

Customary law applied to specific matters. Amongst them were: title to land subject to the authority of a customary court; marriage; family status; guardianship of children; and inheritance; all of which were subject to the authority of a customary court.⁹⁰ For the purpose of applying customary law, Section 27 (1) makes it clear that the Southern Cameroons High Court Law 1955 commands the High Court in the land to observe and enforce the observance of the customary law, only if such a law passed the “repugnancy or incompatible” test.⁹¹

Regarding the British penal system in Southern Cameroons, it did not differ that much from the German penal system, except for the fact that flogging was administered with a degree of respectability.⁹² The British instituted penalties such as hanging, fines, confinement in stocks,

⁸⁵ Anyangwe (1987)5.

⁸⁶ As above 88.

⁸⁷ Above.

⁸⁸ As above 89.

⁸⁹ Above. See also A Allot *Judicial and legal systems in Africa* (1962) 77.

⁹⁰ Above.

⁹¹ Above. This test or clause verified that no customary law was against natural law or good conscience. In addition the law must demonstrate a many English juristic ideas, such an accused person’s right to be heard before being condemned and prior to prescription. Allot (1962) 78.

⁹² Above 90.

flogging, and deportation.⁹³ However, a defaulter who was granted a prison sentence, usually earned remission of up to one third of his sentence if he worked hard and conducted himself well.⁹⁴ After a long-term period of say two years in jail, a prisoner earned two shillings a month until he was discharged.⁹⁵ In order to deter the further commission of infractions and to maintain good behavior, the prison instituted discipline by maintaining the deprivation of privileges and loss of remission for prisoners.⁹⁶

2.4.2.2 *The rule of law and constitutionalism in French colonial Cameroun*

According to Article 72 of the then new French Constitution of October 1946, only the French Parliament could legislate for overseas dominions in the case of legal, political, and administrative organisation.⁹⁷ The French Parliament had full power to legislate for Cameroun on any subject.⁹⁸ The dual system of court that the French instituted in the judicial sphere in Cameroun reflected their policy of assimilation that distinguished between the two categories of Camerounians, namely Camerounians of the *citoyen* status and those of the *sujet* status.⁹⁹

Under the dual system of French colonial justice in Cameroun, *justice de droit francais* was reserved for Europeans and the assimilated *citoyens*, while *justice de droit indigene* was reserved for indigenous Camerounians who were also subjects.¹⁰⁰ Under the French legal system the indigenous Camerounians were not empowered with rights.¹⁰¹

Generally, the separation of judicial and executive powers was merely theoretical rhetoric, given that civil servants continuously served as judges.¹⁰² Judicial courts had no jurisdiction over administrative matters; these matters were tried by the *Conseil du Contentieux*¹⁰³, which was not the equivalence of the *Conseil d'Etat*¹⁰⁴, but the *Conseil de Prefecture*¹⁰⁵ in France.¹⁰⁶ Most of the lawyers and judges that served in the colonial legal and judicial services were not law degree

⁹³ Above.

⁹⁴ Above 94.

⁹⁵ Above.

⁹⁶ Above.

⁹⁷ Above 97.

⁹⁸ Above.

⁹⁹ As above 98.

¹⁰⁰ Above.

¹⁰¹ N Rubin *Cameroon: An African Federation* (1971) 49.

¹⁰² As above 102.

¹⁰³ Litigation Council.

¹⁰⁴ State National Council.

¹⁰⁵ Prefectural Council ,

¹⁰⁶ Rubin (1971) 49.

holders but rather civil servants who were appointed from the ministries of justice and ministry for colonies.¹⁰⁷

In terms of indigenous justice, the French established a separate set of courts to address disputes between unassimilated Camerounians who actually formed the majority of the population.¹⁰⁸ By virtue of a 1927 decree that was only brought into force by an *arête* of 11 September 1928, four courts were established, namely the *tribunaux de conciliation*, *tribunaux de premier degré*, *tribunaux de second degré*, and the *chambre speciale d'homologation*. A fifth court, the *tribunal coutumier* was also created by decree of 26th July 1944.¹⁰⁹

Since Cameroun was a French colony, judicial paternalism was rooted in the international tutelage system whereby the colonial power had to look after the colonial territory until the colony was fit to look after itself.¹¹⁰ The French administration introduced the bi-jural legal system whereby French citizens could only be tried by a set of courts that applied codes applicable in France but that were adapted in French West and Equatorial Africa.¹¹¹ In a separate court established for natives, offences could be tried by an administrator rather than a judicial officer. Under the *indigénat* system, punishment was the prerogative of administrative officers who could administer it without trial. This system was a tool to curtail civil liberties and enforce conscripted labour. This mechanism placed unbridled discretionary power in the hands of administrative officials.¹¹² Even though the Brazzaville Conference of 1946 abolished the *indigénat* system and the subsequent French Constitution of 1946 created political institutions that enabled African citizens to participate in them, Camerounians comparatively enjoyed civil liberties extended to French citizens and were also subject to the French criminal codes, however, Camerounian's voting rights were restricted.¹¹³ This is evident in one of the paternalistic principles that granted the French president retaining the right of pardon over death sentences passed by Natives' courts.¹¹⁴

Moreover, after World War II, according to the *option de juridiction* and *option de legislation*, France enhanced its paternal right to Cameroun by allowing unassimilated natives the special favour of allowing their disputes to be tried in French courts, if both natives so agreed; this measure was known as the *option de juridiction*. Natives wishing to defer the dispute to the

¹⁰⁷As above 103.

¹⁰⁸Above.

¹⁰⁹As above 104.

¹¹⁰As above 111.

¹¹¹Rubin (1971) 51.

¹¹²Above.

¹¹³As above 52.

¹¹⁴Above.

authority of French law had to make the declaration in writing; this measure was known as *option de legislation*.¹¹⁵ But before any of these procedures could proceed, there must have been a compulsory attempt at conciliation. Natives were restrained by law to submit their disputes to conciliation initially and only to take disputes to any tribunal when the conciliation attempt was unsuccessful.¹¹⁶

The baneful *indigénat* was proscribed in 1946 by Decree No. 46/277 of 20th April. The criminal jurisdiction of courts for natives was abolished in the same year.¹¹⁷ Almost all the colonial courts were maintained up to the eve of independence in 1960 because the various reforms intended by the 1959 ordinance were not realised.¹¹⁸

2.4.3 Constitutional politics in British and French Cameroon

As already mentioned earlier, by virtue of the Milner-Simon Agreement of 1922, Kamerun was divided into two unequal parts between Britain, taking the smaller part, and France taking the largest part. The French constituted their own part of Kamerun (Eastern Cameroun) into a separate political entity, but administered it in association with other parts of French Equatorial Africa.¹¹⁹

The British divided their own part of the region into Northern and Southern Cameroons and each of these two entities had nothing to do with one another or even with Eastern Cameroun.¹²⁰ Northern Cameroons was further divided into three separate entities, and each of such territory was integrated with its closest Northern Nigerian administrative sub-units, which were completely detached from the others.¹²¹

2.4.3.1 Constitutional politics in British Cameroon

Administration of British Cameroon was according to the trusteeship agreement effected through an administrative union with Nigeria. Under the terms of this union, Southern Cameroons was administered from the capital of Eastern Nigeria, Enugu, and Northern Cameroons from the

¹¹⁵As above 112.

¹¹⁶As above 113.

¹¹⁷As above 114.

¹¹⁸As above 121.

¹¹⁹B Chem-Langhee & M Njeuma “The Pan-Kamerun movement, 1949-1961” in N Kofele-Kale (ed) (1980) 27.

¹²⁰Above.

¹²¹As above 28.

administrative center of Northern Nigeria, Kaduna.¹²² After 1922, a novelty was introduced to Nigeria, namely the Clifford Constitution that established the principle of electing African representatives into the legislative council.¹²³ Out of the nineteen African members, Southern Cameroons was not represented. With pressure from the Cameroons Welfare Union (CWU), Manga Williams was given a seat at the legislative council as the representative of Southern Cameroons.¹²⁴ When Nigeria became regionalised in 1947 following the Richards Constitution, Southern Cameroons became a province of the Eastern Region.¹²⁵ The administration of Southern Cameroons as an integral part of Eastern Region of Nigeria left Southern Cameroons on the horns of a dilemma since it did not know where to seek help. Its economic, political, educational, and social background was very underdeveloped. As a result, educated Southern Cameroonians began criticising the administration of Eastern Nigeria, and sought the creation of a separate region for Southern Cameroons that was equal to the other regions in Nigeria in order to guarantee Southern Cameroons' development.¹²⁶

The reforms instituted in Nigeria by the Macpherson's Constitution of 1951, gave Southern Cameroons the opportunity to send 13 elected members to the Eastern House of Assembly.¹²⁷ In 1953, the representative of the "Cameroons bloc" in the Eastern House, Dr Endeley, won a local election that addressed the issue of separation from Eastern Nigeria.¹²⁸

Following the promulgation of the Lyttleton Constitution of 1954, the Southern Cameroon's wishes were acceded to and it was made a quasi-federal territory with its own separate house of assembly and an executive council. The Southern Cameroons sent six representatives to the Nigerian House of Representatives in Lagos, and a ministry in the Nigerian government was reserved for them.¹²⁹

The spokesmen of the Northern Cameroons had not exhibited any interest in separating from the Northern Region. Therefore, Northern Cameroons was given representation in the Northern Regional House of Assembly and House of Chiefs at Kaduna, including a minister for the Northern Cameroons as well as a Consultative Committee for Northern Cameroons Affairs.¹³⁰

¹²²Le Vine (1963) 13.

¹²³V Ngoh *Southern Cameroons, 1922-1961: A constitutional history* (2001) 11.

¹²⁴As above 12.

¹²⁵Le Vine (1963) 13.

¹²⁶Ngoh (2001) 22.

¹²⁷Above.

¹²⁸Above.

¹²⁹As above 14.

¹³⁰Above.

With this state of events, it was quite clear that the views of some of the leaders of Southern Cameroons and Northern Cameroons territory were in opposition. The leaders of two dominant political parties, the Kamerun National Congress (KNC) and the Kamerun's People's Party (KPP), voted to remain an integral and independent part of the Nigerian Federation, and also to accept the permanent integration of Northern Cameroons with Northern Nigeria.¹³¹ However, between 1954 and 1955, this situation was slightly modified.

The Southern Cameroons electorate was growing more and more supportive of the ideas of integration, unification, and reunification premised on John Ngu Foncha's request to sever links with the KNC because their ideology was merely based on the separation of people based on some artificial and incomprehensible barriers created by Europeans.¹³² With the support of William P. Lebaga (King of Youths), Augustin Ngom Jua, Tafoh Ngunjoh, Angela Lafon, Ndeh Ntumazah, Fon of Nkwen, Chibikom, and P. M. Kemcha, Foncha was able to form the Kamerun National Democratic Party (KNDP) that was founded on the principles of secession and reunification of the British and French Cameroons.¹³³ Even though by 1955 the KNC and KPP were still emphasising regional autonomy for the territory within Nigeria while the KNDP maintained secession, nevertheless, as a result of the attitude of the constituency the two parties joined the KNDP in demanding reunification.¹³⁴ This union did not last for long because the coalition never really had a solid ideological foundation for unification, except for the flimsy argument that Kamerun was united before 1914.¹³⁵

An additional issue that lost the idea of unification favour in the territory was the fact that the UPC, which introduced the ideology of unification, was under fire in Eastern Cameroun because many political parties or semi-political organisations sprang up to counter their advocacy for immediate reunification and independence.¹³⁶

Even though the Pan-Kamerun idea of the UPC was gaining favour in the international arena, with support from the Soviet Bloc and China persuading the United Nations to grant the desire of the Kamerunians, the notion of reunification was still shrouded in a degree of uncertainty given that in addition to the UPC in Eastern Africa, the issue of reunification was already on a decline in Southern Cameroons by 1956.¹³⁷ The decline could be attributed to the fact that in Southern

¹³¹Kofele-Kale (1980) 39.

¹³²As above 40.

¹³³Above.

¹³⁴Above.

¹³⁵Above.

¹³⁶As above 41.

¹³⁷As above 42.

Cameroons, the KNC, the KPP, and Christian churches started declaring war on the UPC, the most rigorous proponents of reunification, and branded the UPC's leaders and members as vicious communists.¹³⁸ Before long the UPC and KNDP disintegrated and began quarrelling with each other. As a result of this fallout, the electorates rejected the UPC and immediate reunification, equating it with violence and communism. In 1957 the British and the KNC-KPP alliance formed a government in Southern Cameroons and outlawed the UPC. This decision was greeted with great jubilation by the greater part of the Southern Cameroons community and other political groups that regarded the UPC as an unwanted and troublesome influence in their territory.¹³⁹

The situation in Southern Cameroons was maintained until January 1959 when Dr. Endeley, who advocated for continuous co-habitation with Nigeria, was defeated in the South Cameroons general election by John Ngu Foncha who campaigned on the basis of unification with French Cameroun. Foncha thus went ahead to become the premier and Dr. Endeley was dropped.¹⁴⁰

2.4.3.2 Constitutional politics in French Cameroun

With the collapse of the League of Nations in 1946, the two Cameroonian mandates were converted into trust territories under the United Nations trusteeship system. According to Article 47 of the United Nations Charter, France was compelled to introduce new policies that had promoted progressive development towards self-government or independence.¹⁴¹ In order to render this goal achievable, the French quickly classified Cameroun under their new Constitution of 1946 as an Associated State within the French Union.¹⁴² Even though complete control of the territory was still in the hands of the French Assembly, Cameroun was now able to send representatives to both houses of the French national parliament, including other important organs of the French Union as well.¹⁴³

These major innovations in French colonial policy were informed by the Brazzaville Conference of 1944 that was convened on January 30 to February 8 in Brazzaville, Congo. Deferring to the pre-war promise, the theme of the conference was addresses thus: "The social evolution of the

¹³⁸ As above 42

¹³⁹ As above 43.

¹⁴⁰ Le Vine (1963) 14.

¹⁴¹ As above 11.

¹⁴² As above 12.

¹⁴³ Above.

indigenous people in the colonies.”¹⁴⁴ Basically the focus of the conference was more on social evolution than political liberation. This notwithstanding, there were also political changes that encouraged Africans to participate in the political process.¹⁴⁵ It is not clear whether or not France had encouraged apartheid or segregation in Cameroun during their trusteeship, but in 1946, elections were held in separate blocks of electoral colleges: one for blacks competing against blacks and the other for whites competing against whites.¹⁴⁶ Even though Cameroonians were still compelled to vote their representatives to the French Assembly in 1946, by 1947 a home-based representative body, the *Assemblée Representative du Cameroun* (ARCAM) had been introduced, attracting leaders such as Paul Soppo Priso, Daniel Kemajou, Charles Okala, and Martin Abega. The Brazzaville Conference projected De Gaulle as a veritable godfather to many African leaders and subsequently he became the link between colonialism and neo-colonialism since a number of African leaders depended on him to maintain a firm grip of power.¹⁴⁷ By implication, the Brazzaville Conference could be postulated to have laid the foundation for disregard for the rule of law and the promotion of presidentialism in the guise of constitutionalism. As earlier proposed, De Gaulle’s motivation for the Brazzaville Conference was social evolution of the colonies, as evidenced by the subsequent establishment of the Fourth French Republic’s Constitution of 1946 that created new social institutions, and not political emancipation as propounded by Ruben Um Nyobe and the UPC political ideology. Despite the colonial government maintaining its ideology of ruling out any autonomy and evolution outside the French bloc in its colonies¹⁴⁸ and of imperialism, according to Felix Eboue’s report, the local elites preferred self-administration over self-government.

Having imbued the Camerounian elites with such a dependence ideology, it is evident that the independence constitution drafted by the local elites and colonial administration, who firmly believed in this ideology, intentionally entrenched sham institutions. This means that the norms of conventional constitution-making were ignored. If these norms were respected, then the people would be empowered to define their political future themselves instead of France doing it for them. Therefore, it is possible that France only encouraged ostensible rule of law and constitutionalism by encouraging a presidentialist system as a means of infiltrating the so-called

¹⁴⁴E Chiabi *The making of a modern Cameroon: A history of substate nationalism and disparate union, 1914-1961* (1997) 34.

¹⁴⁵Above.

¹⁴⁶Above.

¹⁴⁷As above 35.

¹⁴⁸Marshall (1973)107.

new democracy, to maintain and continuously exploit Cameroun at independence in the form of neo-colonialism.

Nevertheless, real constitutional autonomy and institutional reforms were only introduced in the territory with the enactment of the French Law No 56-619 of 23 June 1956, known as the *Loi-cadre*.¹⁴⁹ Even though, the French high commissioner was still in possession of wide discretionary powers, and France remained in charge of such matters as defence, external affairs, currency, courts, education, and security forces, the legislative assembly was vested with considerably wider powers than it had been before the introduction of the 1956 reforms.¹⁵⁰ By virtue of the powers vested in the high commissioner to designate the prime minister, albeit subjection to the legislative assembly's confirmation, the high commissioner was able to appoint Andre Marie Mbida as prime minister in 1957.¹⁵¹ Andre Marie Mbida experienced a myriad of political obstacles, and in February 1958 he lost a vote of confidence in the legislative assembly and was replaced by Ahmadou Ahidjo.¹⁵²

By the 1940s and 1950s, French exploitation of and injustice against Camerounians was no longer tenable. French words and actions created a sense of awareness in Camerounians and led them to adopt a radicalised approach against the French.¹⁵³ By the mid-1940s Paul Etoundi's house in Mvog-Mbi, Yaounde was used as a venue for Camerounians to discuss "white exploitation and discrimination." Among the attendants was Ruben Um Nyobe who was no longer comfortable with French social permeation.¹⁵⁴ These anti-French imperialism Camerounians complained about the influx of incompetent Frenchmen to Cameroun and how the French Government had turned Cameroun into a garbage bin where all undesired items were dumped.¹⁵⁵ All sorts of French fortune seekers were present in Cameroun immediately in the post-World War II era. This situation typified the post-independence era and disrupted any clear break between colonisation and decolonisation. Thus, with the end of colonisation, neo-colonisation immediately picked up and soon became noticeable.¹⁵⁶

A Government-sponsored resolution in the legislative assembly culminated in the termination of the trusteeship agreement and a resultant reunification of the two portions of Cameroon in

¹⁴⁹C Fombad "Cameroon: Introductory notes" <http://ebookbrowse.net/cameroon-constitution-final-pdf-d333321325>. (accessed 10/05/2014).

¹⁵⁰Above.

¹⁵¹Above.

¹⁵²Above.

¹⁵³Chiabi (1997) 33.

¹⁵⁴Above.

¹⁵⁵Above.

¹⁵⁶Above.

1958.¹⁵⁷ For the purpose of facilitating the reunification of these two territories, the legislative assembly passed Law No 59-56 of 31 October 1959 authorising the Government to enact an ordinance and to draft a new constitution that was to be submitted to the country for approval.¹⁵⁸ The constitution-making process that followed has choked the imagination of constitutional pundits and has resulted in various Cameroonian authors of constitutional history writing much against the process. Based on the public choice theory, proponents such as Mbaku¹⁵⁹ assume that in order to come up with rules that govern a nation, those that will bring about a common good for all the members of society, the following should be considered: the constitution-making process should be a bottom-up, inclusive, and participatory process; that rules should only be accepted if they are unanimously selected by agreement; true agreement can only be achieved without the use of force or coercion by Government; the content of the final document must be accepted by all members of society; and people should be the exclusive basis from which value is derived.¹⁶⁰ Furthermore, Enonchong,¹⁶¹ while reaffirming the fact that the document that was later hailed as the Constitution of the new Republic of Cameroon resulted from the work of the Consultative Committee created by Law No. 59-56 of October 31, 1959, it should be questioned whether the people were adequately represented.¹⁶² The failure to adopt a bottom-up approach, inclusiveness, participation in the constitution-making process, and adequate representation in the constitution-making body constitutes the issues addressed by this thesis, namely popular sovereignty. If the final document is not endorsed through consensus, suggesting that the people are happy with the content of the law that amongst others, addresses the issue of the limit of the powers of the president and respect for human rights, i.e. constitutionalism, then the fundamental law itself will breed disregard for the rule of law because the people will see the law as an alien law.

Given that in this pre-independence constitution-making process the UPC, the colony's largest, most representative, and most important political party was sidelined in the process, it is evident that the entire process was a top-down, elite-driven, non-participatory, and worst of all, the colonial government rather than the indigenous people had significant input in the process.¹⁶³ It should be noted that the UPC was the greatest opponent of continued French rule in Eastern

¹⁵⁷Fombad (<http://ebookbrowse.net/cameroon-constitution-final-pdf-d333321325>).

¹⁵⁸Above.

¹⁵⁹J Mbaku "Decolonization, reunification, and federation in Cameroon" in J Mbaku & J Takougang *The Leadership Challenge in Africa: Cameroon under Paul Biya* (2004) 42.

¹⁶⁰Above.

¹⁶¹Sited in Mbaku as above 43.

¹⁶²Mbaku (2004) 43.

¹⁶³Above.

Cameroon. The UPC had declared unreservedly that it was going to take an independent Cameroon society out of the French community and disrupt any French domination of entrepreneurial and commercial interests in the political economy in the post-colonial Cameroon polity.¹⁶⁴ Infuriated by this declaration, by July 1955 the French government proscribed the UPC and forced them underground. The colonial government embarked on this resolution in the hope of manipulating the conditions for independence to suit continuous French interests in post-independence Cameroon.¹⁶⁵

After the French had succeeded in curbing the UPC's considerable influence and ultimately proscribed the party, the UPC precipitated the independence process and achieved it on 1 January 1960 without a constitution.¹⁶⁶ Notwithstanding the opposition parties' vigorous campaign to reject the resultant constitution from the consultative committee's work after independence had been declared,¹⁶⁷ this constitution was still narrowly approved in a nationwide referendum of 20 February 1960, about two month after independence.¹⁶⁸ Given that the colonial government had ensured that the most indigenous political party in the territory was sidelined from the constitution-making process, it was no surprise that the resultant document from that process was basically a replica of the Fifth French Republic's Constitution that preserved all its identities, such as a strong executive and an absolutely centralised regime of government.¹⁶⁹ Even though the Fifth French Republic Constitution may not be bad for French democracy, the Cameroonian constitutional engineer adopted a constitution friendly to one democratic environment, yet completely different and inappropriate for the purpose without necessary adaptations of the constitution to the new environment. Worse still, upon adopting the Fifth French Republic's Constitution in Cameroun, constitutional imperatives such as checks and balances and human rights guarantees were scrapped.¹⁷⁰

Cameroon's independence was a façade because the French colonial government had hijacked independence after proscribing the UPC on 13 July 1955.¹⁷¹ Consequently, with UPC out of the picture, the president promulgated a constitution that had scant regard for human rights and attributed absolute powers to him. Thus, it is appropriate to state that the objective of the revolution intended by the people under the auspices of UPC were not met since the revolution

¹⁶⁴ As above 44.

¹⁶⁵ Above.

¹⁶⁶ As above 45.

¹⁶⁷ Above.

¹⁶⁸ Fombad <http://ebookbrowse.net/cameroon-constitution-final-pdf-d333321325>.

¹⁶⁹ Above.

¹⁷⁰ N Awasum "Politics and constitution-making in Francophone Cameroon, 1959-1960 (2002) 49 *Africa Today* 24.

¹⁷¹ J Mbaku *Institutions and reforms in Africa: The public choice perspective* (1997) 81.

did not culminate in genuine independence in 1960, but independence granted by the French colonial government on their own terms. Cameroun gained its independence on the 1 January 1960 but only concluded the cooperation accords with France on 13 November 1960.¹⁷² These accords or agreements accorded the statute of a state to Cameroon, and a number of competences of statehood, such as ministries, were transferred to Cameroun by France but excluding the ministries of finance, international commerce, customs, defence, external relations, justice, interior, and commerce, which were all still held by the French government.¹⁷³

On 30 December 1958 France handed over the autonomy and responsibility of justice and maintaining peace and order to Cameroun. However, the French government notified the UN of the accord concluded with Cameroun to terminate the UN's trusteeship on the date of its independence. The UN approved of this request after satisfying itself of appropriate representation in the legislative assembly.¹⁷⁴ The French ordinance of 30 December 1958 became a provisional measure by virtue of the accords concluded between France and Cameroun.¹⁷⁵ The final cooperation Agreement passed by a UN decision on 5 December 1959 fixed the date for the termination of the UN Trusteeship in Cameroun on the 1 January 1960.

These cooperation agreements were mostly characterised by excessive secrecy. The original cooperation agreements and the revised versions of the Agreement signed between 1973 and 1974 have never been published in full.¹⁷⁶ More importantly, subsequent to Cameroun's independence on 1 January 1960, the constitution of the land was only drawn up in February of that year. The constitution did not refer to any of the secret agreements between France and Cameroun concluded in December 1959, and provided for cultural, diplomatic, fiscal, monetary, and economic cooperation between both countries, and both financial and military assistance by France to the independent government of Cameroun.¹⁷⁷

2.4.3.3 Comparison between the rule of law and constitutionalism in French and English Cameroon

The rule of law and constitutionalism in the two territories was observed or practiced at different degrees. While the British appeared to decentralise power and engage the colonised in governance through indirect rule, the French adopted a more paternalistic system where Africans had to

¹⁷²Above.

¹⁷³Above 38.

¹⁷⁴Above 39.

¹⁷⁵Above.

¹⁷⁶Joseph (1978) 17.

¹⁷⁷Rubin (1971) 101.

gradually grow from one level to another, and governance was more centralised in the hands of the French colonial master.

The French decided that French Cameroun was merely going to be a self-administering instead of a self-governing body and was going to remain an integral part of the French Republic as its overseas territory.¹⁷⁸ British or Southern Cameroons was administered through the Eastern part of Nigeria and witnessed successive constitutional arrangements introduced for Nigeria between 1946 and 1958,¹⁷⁹ resulting in the Southern Cameroons becoming first a quasi-federal territory after the 1954 constitutional conference in London, then requesting to become a full regional self-government in 1958, and achieving this in 1959 after yet another constitutional conference in London.¹⁸⁰

The rule of law, and by implication, constitutionalism was more effective in Southern Cameroons than in French Cameroun. The movement from the ARCAM to the Territorial Assembly of Cameroun (ATCAM) never really made any meaningful impact, because under ARCAM Cameroun's powers were still limited because the metropolitan *Conseil d'état* still had veto powers in important issues even though membership was enlarged under ATCAM, the powers remained the same and Africans only constituted the "second college" in voting terms while the French constituted the "first college."¹⁸¹ In other words, Cameroun could not effectively change any constitutional or legislative matters independently unless the French were in accordance. Excessive powers of the French that encroached on human rights and limited the powers of the French governors could be changed by neither ARCAM nor ATCAM. This was different in British or Southern Cameroons where the British applied indirect rule wherein the people themselves were quite involved in the administration and governance of their territory to a lesser degree, as the 1954 Lyttleton Constitution defined a regional status with a House of Assembly for Cameroon. Although the region was not independent of the British Commissioner or colonial administration, it nevertheless enabled Cameroon to have on-the-spot forums, which allowed more Cameroonians to participate in political affairs and define its status *vis-a-vis* Nigeria.¹⁸²

While French Cameroun was administered as an integral part of France based on French constitutions that only relegated human rights to the preamble in all their constitutions, the rule of law in French Cameroun may not have been evident in the subsequent making of the Fifth French

¹⁷⁸Rubin (1971) 53.

¹⁷⁹As above 75.

¹⁸⁰As above 77-78.

¹⁸¹As above 54.

¹⁸²Chiabi (1997) 55.

Republic of 1958, which gave the president full powers and left no hopes of constitutionalism in French Cameroon. Conversely, the Southern Cameroons operated under a domestic and not foreign constitution - firstly, under the Nigerian constitution Richard's, Macpherson and Lyttleton amongst others and then ultimately to the Southern Cameroons Constitution or Order in Council, 1960 No. 1654.

Fundamental rights were entrenched in Chapter vii of this order in council. This order in council gave a general sense of the rule of law and the various provisions in Chapter vii limited executive powers, thereby enforcing constitutionalism.

While the French established the *indigénat* system that enforced separate laws as a means of perpetuating social injustice to Africans¹⁸³ where the rule of law was reserved for Europeans only, in English Cameroon, colonial courts were compelled to serve their functions no less than courts in England would serve their functions. Two common principles that defined the common law system were: *Nemo iudex in sua causa* (no one should be the judge in her/his own case) and *audi alteram partem* (the guarantee that all parties will have a fair hearing).¹⁸⁴ Thus, these principles were also applicable in the British colonies.

Finally, the governmental systems practiced in England and France were also reproduced in their respective colonies. Given that Britain practiced the parliamentary system, most executive power was conferred by the legislature and therefore circumscribed inherent executive discretion to act arbitrarily against citizens. Conversely, the French were immersed in the presidential system,¹⁸⁵ especially by virtue of the Fifth French Republic that made the president an “imperial president” alongside his occasional *plein pouvoirs*, and this suggests that reasonable power was held by the president independently without parliament, and such discretionary powers were likely to facilitate executive authoritarianism.¹⁸⁶

2.4.3.4 The French Constitution of 1958 as the source of Cameroon's independence constitution

The new constitution of Cameroon raised a lot of eyebrows in even the staunchest of government supporters. The consultative committee turned out a questionable document that combined

¹⁸³Chiabi (1997) 34.

¹⁸⁴B Ibhawoh “Stronger than the maxim gun law, human rights and British colonial hegemony in Nigeria” (2002) 72 *Journal of International African Institute* 74.

¹⁸⁵L Keith & A Ogundele “Legal systems and constitutionalism in sub-Saharan Africa: An empirical examination of colonial influences on human rights” (2007) 29 *Human Rights Quarterly* 1071.

¹⁸⁶Above.

politics and constitutionalism, French tradition and Cameroonian aspirations.¹⁸⁷ In the preamble of this new Cameroon constitution, just like that of France, it recognised and adhered to fundamental liberties enunciated in the Universal Declaration of Human Rights and the Charter of the United Nations.¹⁸⁸ Le Vine confirms that besides the long preamble of the new constitution, the constitution had striking similarities to that of the French Fifth Republic's Constitution. The section dealing with the presidency highlights this outstanding similarity between both constitutions. The president of Cameroon was attributed imperial powers by the constitution as was the case with the French Fifth Republic's Constitution. The president was to hold office for five years but to be eligible for reelection, the president was vested with the powers to appoint and dismiss the prime minister, and upon prime ministerial recommendation he could appoint and dismiss cabinet ministers just as the French president was empowered to do.¹⁸⁹

Emulating the French Fifth Republic Constitution, the Cameroonian president, like his French counterpart, presides over the Council of Ministers, head of the armed forces¹⁹⁰, appoints, promotes, and disciplines judges and the head of the Higher Judicial Council. Additionally, Article 16 of the French Fifth Constitution is nearly identical in terms of the wording in Article 20 of the independence constitution of 1960 and Article 9 of the current constitution of 1996. These articles simply highlight that the president may make a decree in the council of ministers but after consultation with the president of parliament he may proclaim a state of emergency, in which case he will acquire absolute powers or *plein pouvoirs* and assume the responsibilities of government.¹⁹¹

Le vine proposes that the appropriateness of closely modeling Cameroon's independence constitution on the French Fifth Republic's constitution is questionable because while the latter was written particularly to align with President Charles de Gaulle's political views, since the constitutional drafting process was subject to the constitutional crises that made De Gaulle president, this situation did not in any way match the circumstances that surrounded the writing of the Cameroonian constitution.¹⁹² He argues that although Ahidjo suggested that the independence constitution would be a compromise between the Third French Republic and American presidential system, ultimately the final constitution did not reflect any compromise but rather,

¹⁸⁷V Le Vine *The Cameroons: From mandate to independence* (1964) 224.

¹⁸⁸As above 225.

¹⁸⁹Above.

¹⁹⁰Above.

¹⁹¹As above 226.

¹⁹²As above 227.

was a questionable version of the constitution of the French Fifth Republic.¹⁹³ French political history reveals that the aftermath of the French Revolution has been epitomised by repeated transfer of power between executive and parliament.¹⁹⁴ An authoritarian Bonapartist tradition inherited from the *Ancien Regime* has existed based upon a strong and centralised bureaucracy acting independently of parliament, and a parliamentary regime whose elected assembly imposes its will upon the executive while still maintaining a strong bureaucracy.¹⁹⁵ Even though the Fifth Republic departs radically from the two traditions, practically it assumes a midway position between the Bonapartist and parliamentary traditions.¹⁹⁶ Under the Fifth Republic parliament has been weakened while the powers of the executive have been strengthened and unequally distributed between the president and prime minister, and the constitution vests extensive powers in the executive to regulate by decree.¹⁹⁷ Cameroon has inherited this legacy, given that the 1960 constitution under Title III attributed sweeping powers to the president and under Title II the national assembly was simply attributed peripheral powers. Furthermore, the independence constitution reproduced 48 articles from the French Fifth Republic's constitution and the constitutional engineer ensured that all liberal and democratic provisions were reviewed and replaced with authoritarian and anti-democratic ones.¹⁹⁸

Article 10 of the French Fifth Republic's constitution is replicated in the independence constitution as Article 34. This article requires that the president of the republic promulgates an enacted law within 15 days of the transmission to government of the law as adopted by parliament.

Title 7 of the French Fifth Republic's constitution, which created a constitutional council in France, did not exist in Cameroon's independence constitution, however it was included in Part VII of the 1996 constitution. This institution, as entrenched in the various constitutions, functions in an identical manner. The constitutional council of France is a court in everything except its appellation. However, this is not to suggest that it functions exactly like the American and German courts. The procedure for reviewing legislation differs significantly from those of a judicial process, even in comparison to the ordinary French courts. It only reviews laws prior to

¹⁹³ Above.

¹⁹⁴ N Brown J Garner *French administrative law* (1983) 6.

¹⁹⁵ Above.

¹⁹⁶ Above.

¹⁹⁷ As above 7.

¹⁹⁸ N Awasom "Politics and constitution-Making in francophone Cameroon, 1959-1960" (2002) 49 *Indiana University Press* 24.

promulgation, and after promulgation every review process is immuned from ordinary court challenge.¹⁹⁹

Article 64 of the French Fifth Constitution is replicated in the independence constitution as Article 41, which states the same wording without any modification, namely that the president of the republic is the guardian of the independence of the judiciary.

The president is assisted by a higher judicial council. In both cases the judiciary is reduced to a mere authority and not a power. Even though no provision is entrenched in the independence constitution to the effect that the president of the republic presides over the higher judicial council and that the minister of justice is his vice, as stipulated by article 65 of the French Fifth Republic's constitution, in practice, as stipulated by the organic law governing the higher judicial council, the president of the republic is its president and the minister of justice is its vice-president.

The factors discussed point to the fact that Cameroon conclusively used the constitution of the French Fifth Republic as a blueprint for the construction of its independence constitution. Davidson argues that in Africa the sovereign models of constitutions were borrowed from English and French history.²⁰⁰ Both countries were also former colonial masters of Cameroon.

2.4.3.5 The transition of the two Cameroons to a federal regime

After the Lyttleton Constitution of 1954, a conference was again held in 1957 with yet another revision of Nigerian constitution. This new constitution took effect in 1958. Under this constitution, Southern Cameroons was given a constitution equal to those of other regions of Nigeria.²⁰¹ Southern Cameroons had requested full regional status, and for this reason a constitutional conference was held to address the issue in London.²⁰² In 1959 the people's aspirations were determined at the polls and their request was validated. After implementation it became effective from 1 October 1960.²⁰³ Despite this important development in Southern Cameroons, Northern Cameroons still remained a self-governing territory within the Nigerian Federation. The new constitution of 1957 introduced institutions into Southern Cameroons that were similar to those in Britain, such as a parliamentary system consisting of the House of

¹⁹⁹J Bell *French constitutional law* (1992) 55.

²⁰⁰B Davidson *The black man's burden: Africa and the curse of the nation-state* (1992) 267.

²⁰¹Mbaku (2004) 81.

²⁰²Above.

²⁰³Above.

Assembly and the House of Chiefs, an executive council consisting of ministers and prime minister, and the Queen's representative in the person of a British Commissioner.²⁰⁴ Southern Cameroons exercised an extensive measure of regional autonomy from 1954 until 1960.²⁰⁵

The United Nations General Assembly Resolution 1350 (xiii) was adopted on 13 March 1959 recommending that the British government take steps under the supervision of the UN to organise two separate plebiscites.²⁰⁶ The two plebiscites were to be organised for Northern and Southern Cameroons, following the British government's decision to grant independence to Nigeria on 1 October 1960 and the French government's decision to grant independence to French Cameroun on 1 January 1960.

After Southern Cameroons was separated from Nigeria on 1 October 1960 and the implemented Order in Council went into force, the territory became fully self-governing from 1 October 1960 to 30 September 1961, and fully responsible for its internal affairs, except for defence and foreign affairs, which all fell under Britain's jurisdiction.²⁰⁷

In a UN supervised plebiscite organised in February 1961, the majority of Southern Cameroonians opted for Cameroon citizenship by virtue of the number of votes they cast in that regard.²⁰⁸ This decision followed the UN's ultimatum to the Cameroonians to choose to achieve independence by joining either Nigeria or the French-speaking Cameroun, which had already gained its independence from France in 1960.²⁰⁹ Meanwhile, after the UN had adopted General Assembly Resolution 1608 (XV) terminating Northern Cameroons trusteeship agreement with Britain on 21 April 1961, Northern Cameroons joined Nigeria as a separate province of the northern region on 1 October 1961.²¹⁰

On 1 October 1961, pursuant to Resolution 1608 (XV) and Article 76b of the UN Charter, Southern Cameroons' acceptance to join the Republic of Cameroun meant independence had been achieved, and a federal state was formed thereafter.²¹¹ A de facto two-state federal union came into existence but lacked any legally valid founding text; it was therefore clearly an informal

²⁰⁴ Above.

²⁰⁵ Anyangwe (2009) 5.

²⁰⁶ Fombad (<http://ebookbrowse.net/cameroon-constitution-final-pdf-d333321325>).

²⁰⁷ Anyangwe (2009) 5.

²⁰⁸ B Chem-Langhee & M Njeuma in in N Kofele-Kale (ed) *An African experiment in nation-building: The bilingual Cameroon Republic since reunification* (1980) 25.

²⁰⁹ Anyangwe (2009) 6.

²¹⁰ Fombad (<http://ebookbrowse.net/cameroon-constitution-final-pdf-d333321325>).

²¹¹ Anyangwe (2009) 19.

federation and the political association of two independent and equal states.²¹² Henceforth Cameroon became the Federal Republic of Cameroon.

2.5 POST-COLONIAL CONSTITUTIONAL EVOLUTION IN CAMEROON FROM 1961-1972 AND THE PRE-BIYA ERA

In the context of constitution-making in Africa, this era is classified as the post-colonial period and the modern era, during which period colonies gained independence and started facing nationhood challenges.²¹³

In 1960, prior to the creation of the federal polity, Southern Cameroons and the Republic of Cameroon had agreed in writing to the effect that a federation of two states equal in status would be formed in an event where the plebiscite vote went in favour of Southern Cameroons joining the Republic of Cameroon.²¹⁴ They had agreed that details of this anticipated federation were to be concluded and evidenced by a federal constitution bargained by both parties, and submitted either to the respective peoples or the legislatures of the two countries for ratification before 1 October 1961, but this did not happen.²¹⁵ The law that followed on 1 September 1961 stated that “federal constitution”, which was an “amending constitutional law” on the constitution of the Republic of Cameroon of 1960, was in breach of international law because there was neither an adoption nor signature of a constitutional text nor a submission to the respective peoples or parliaments for ratification.²¹⁶ In reality, no legally valid federation was created on 1 October 1961, but rather a *de facto* federation came into being.²¹⁷

In the African Commission on Human and Peoples’ Rights case of *Gunme and Others v Cameroon*, the complainant “alleged an unlawful and forced annexation and colonial occupation” of Southern Cameroon, the English speaking part of Cameroon by “La Republique du Cameroun” which is the French speaking part of Cameroon. This allegation constituted a violation of article 19 and 20 of the African Charter on Human and Peoples’ Rights (ACHPR). After thorough findings were conducted the Commission concluded that Southern Cameroon qualified to be referred to as a “people” under the terms of the Charter and emphasized that it was up to other

²¹²above.

²¹³S Ouma “Constitution making and constitutional reform in fledgling democracies: An East African appraisal” in *The Kenyan section of the International Commission of jurists Reinforcing judicial and legal institutions: Kenyan and regional perspectives* (2007) 43.

²¹⁴Above 6.

²¹⁵Above.

²¹⁶Above.

²¹⁷Above 7.

external “people” to accept their existence, but could not deny it.²¹⁸ Furthermore, the Commission opted to address the question whether Southern Cameroon was entitled to self-determination or not on the basis of the 1993 and 1994 constitutional demands in relation with the claim for the right to self-determination of the Southern Cameroon people and not based on the 1961 United Nations plebiscite or the 1972 unification. For its part, the respondent, who was La Republique du Cameroun argued based on a previous decision of the Commission on the Katanga self-determination case, that this can only be accepted where there are tangible evidence of massive violations of human rights and where there is evidence confirming the refusal of the nationals of Southern Cameroon, the right to partake in running the public affairs of the state of Cameroon. Pending this proof the respondent dismissed the allegations. In this regard, even though the Commission found out that the respondent had violated articles 2, 4, 5, 6, 7, 11, and 19 of the Charter, the Commission was nevertheless of the opinion that for self-determination to be activated under the African Charter, violations experienced must meet the test set out in *Katangese peoples’ Congress v Zaire* (2000) AHRLR 72 (ACHPR 1995).²¹⁹ In the final analysis the respondent state indirectly acknowledged the existence of the challenging state of affairs and the Commission advised that the grievances should be addressed by means of a comprehensive national dialogue since secession is not an appropriate remedy. Conclusively, the Commission gave a number of recommendations to both the respondent and complainant on how to keep both parties happy while human rights are protected.

President Ahidjo of the Republic of Cameroon headed a delegation that favoured a highly centralised form of a federation to Founban where the constitutional talks took place.²²⁰ Foncha headed the Southern Cameroons’s delegation, which favoured a “loose” federation.²²¹ During the talks, Ahidjo declared his support for a highly centralised federation that was almost a non-federation, such support was informed by his orientation to the French centralised and unitary system of government.²²² President Ahidjo considered a centralised form of federation an important transitory phase to his ultimate goal, which was the integration of the two territories into a single, strong, and unitary state.²²³

²¹⁸ Sec 179 of the Decisions of the African Commission in *Gunme and others v Cameroon* (2009) African Human Rights Law Report (AHRLR 9)

²¹⁹ There must be concrete evidence of violations of human rights to the point that the territorial integrity of the state party should be called to question, coupled with the denial of the people, their right to participate in the government as guaranteed by article 13(1).

²²⁰ Ouma (2007) 296.

²²¹ Above.

²²² As above 295.

²²³ Above.

The final version of the constitution was not a “loose” form of federalism that guaranteed equal partnership for both parties as envisaged by the Southern Cameroons leaders.²²⁴ This outcome arose out of the reality that the Republic of Cameroon commanded greater bargaining power since they occupied a greater territory, had a larger population, greater resources, and more significantly, by the time of these negotiations, the Southern Cameroons could only achieve independence by joining the already independent Republic of Cameroon.²²⁵ President Ahidjo capitalised on these factors and the recognition of his territory’s “senior status” to dictate the terms of the union to Southern Cameroons.²²⁶ According to the federal constitution, the former Republic of Cameroon was henceforth called the Federated State of East Cameroon, and the former Southern Cameroons was called the Federated State of West Cameroon.²²⁷ The president was very powerful, and by virtue of his wide-ranging powers the constitutional environment was more favourable towards “presidentialism” than federalism.²²⁸ There was no real separation of powers provided for in the constitution, and the president was vested with powers to legislate by decree without consulting the national assembly, and didn’t need legislative endorsement for his appointments. The president played an important part in the legislative process since he could propose legislation or could delay or obstruct the passage of legislation if it was against his interests to do so.²²⁹

Fed up with the federal system, on 6 May 1972 in the national assembly, President Ahidjo announced his intention to transform the federal republic into a unitary state on condition that the electorates backed the idea in a referendum that was to be convened on 20 May.²³⁰ The intention to dissolve the federation had the following repercussions: President Ahidjo was infringing proviso 1 of Article 47 of the federal constitution that provided that no revision that might impair the unity of the federation would be accepted. More so, proviso 3 of the same article provided that even if an amendment were to be carried out, it should not be by way of referendum but rather via adoption by simple majority of the federal assembly, if the majority includes the majority of representatives in the federal houses of assembly of both federated states.²³¹

²²⁴P Konings “The Anglophone struggle for federalism in Cameroon” in L Bastia & J Ibrahim (eds) *Federalism and Decentralisation in Africa: The multi-cultural challenge* (1999) 290.

²²⁵As above 296.

²²⁶As above.

²²⁷As above 297.

²²⁸As above 299.

²²⁹As above 298.

²³⁰As above 303.

²³¹Above.

On May 1972, the text for the new constitution was submitted for referendum and adopted thereafter. It became the fundamental law of Cameroon.²³² This law lacking in procedures and at the level of elaboration; the constitution was never debated nationally, solely for the purpose of avoiding public attention, given that it flouted technical rules and did not allow any level of discussion, whether popular or parliamentary.²³³ The public procedure of elaboration was completely absent; there was no technical phase, and no consultative phase. Notwithstanding all of these irregularities, President Ahidjo went ahead and dictatorially decreed the federation dissolved, and formerly incorporated the Southern Cameroons into the Cameroun Republic.²³⁴

2.6 Fundamental aspects of constitutionalism, the rule of law, and popular sovereignty identified to have been disregarded and violated in colonial Cameroon and apartheid South Africa

2.6.1 Colonial Cameroon

In terms of constitutionalism, the constitution-making processes of 1960, 1961 and 1972 were all marred by irregularities. The processes were non consultative, elite-driven, top-down, non-inclusive, and non-participatory. All the referendums conducted were bogus. The public procedure of elaboration and technical phases were completely absent in the constitution-making processes.

Various categories of human rights were violated. Firstly, civil and political rights were violated. When the people of Cameroon were conquered by Germany, Britain, and France, their sovereignty was surrendered to the conqueror. Freedom was curtailed, their human dignity was suppressed, and they underwent brutal treatment such as marginalisation, torture and flogging (*indigénat*), and forced labour (*corvée*). Cameroon's entire population was also disenfranchised. Secondly, socio-economic rights were also curtailed. The people were economically disempowered. They were constantly exploited. They were forced against their will to work, and the products of their work were exported to Europe for European industries. The people's living conditions were despicable, their health was inadequately attended to, and most of the *indigenes* remained uneducated and undereducated. Thirdly, third generation or group rights of the

²³²W Tamfu *Constitutional law and political systems* (2006) 76.

²³³Above.

²³⁴Anyangwe (2009) 20.

Cameroonians were seriously infringed. There was a massive dispossession of the peoples' native lands. Land is a very important aspect in the life of a native African. Therefore, taking land away from Africans means compromising their right to development, for fishing, ancestral worship, hunting, and gathering. Another group right that was violated was Southern Cameroonians right to self-determination. Ahidjo unilaterally decided to terminate the federation and incorporated the Southern Cameroons into the Republic of Cameroon. The Southern Cameroonians were not consulted on this decision and the bogus referendum was meant to deviate the international community's attention to avoid evoking the principle of *eraga omnes*. (The responsibility to protect).

The principle of separation of powers was also violated during the time of German colonisation and even later during the French and British mandate and later during trusteeship. During the period of colonial hegemony, there was no such thing as the separation of powers. All the powers were concentrated in the hands of the colonial administrators. The administrator was simultaneously a judge in the court, and members of the judiciary were appointed directly from the civil service to serve in the courts. The judiciary was not considered a power that ran parallel to the legislative and executive power, but was rather considered a branch of the civil service.

During the advent of colonial rule in Cameroon, the rule of law was disregarded in several ways. Contrary to one of Dicey's key propositions that everyone is equal before the law, there were two separate courts systems and legal systems applying to the colonialists and to the colonised.

The colonialist or European operated under the rule of law and the Africans or indigenous Cameroonians operated under customary law. In the same way, the court system for Europeans guaranteed more protection than that of the African system. Most Africans would be found guilty and given a death sentence, flogging, or other shabby treatments. Whereas the European were assured of proper procedures and the dispensation of justice and most often, the Europeans were almost immune from prosecution or were readily acquitted in their courts. Even if Europeans were found guilty and it was deemed necessary to sentence them, they would be deported to Europe to serve their sentences. Moreover, the constitution provided for a separate court for the citizens and another for the administration in Cameroon.

An amendment was made to the constitution of 1960 enforcing a law in 1961 that was in breach of international law because it was neither adopted nor signed by the people nor their parliamentary representatives. A federation existed *de facto* but no federation existed *de jure*, because no constitutional text was ratified to that effect.

There was clearly an instance of illegality committed by President Ahidjo when he infringed provisos 1 and 3 of Article 47 of the Federal Constitution of the Republic of Cameroon. Essentially the proviso avoided any attempt to dissolve the federation, yet Ahidjo went ahead and dissolved it. This marks utter disrespect for constitutionalism.

The chief executive was attributed enormous powers by the constitutions starting with the constitutions of 1960, 1961 and 1972, to the extent that he was considered to be above the law. He amended the constitution even though there existed no constitutional text sanctioning the act, and dissolved the federation even though the constitution made such an act unconstitutional. His powers were cross-cutting and his presidency was imperial since he had influence over all the three state powers, the legislature, the executive, and the judiciary. The chief executive appointed judges and was responsible for their discipline and dismissal. He introduced legislation and could influence the passing of legislation and had the powers to dissolve parliament.

Popular sovereignty was also violated because the Cameroonians have never genuinely participated in any constitution-making process or elections. For instance, in constructing the 1960 constitution, it was the colonial government and not the indigenous people of Cameroon who made significant input into determining those to be appointed to serve on the constitution-making committee.

The UPC, which was the biggest indigenous party in the colony and widely represented the political views of the colonial people of Cameroon, was outlawed and barred from participating in the constitution-making process.²³⁵ The indigenous people or their leaders were not given an opportunity to participate in constitutional negotiations.

As a matter of principle, it is understood that members of a committee entrusted with power by the people to participate in a constitution-making process on their behalf will always emerge from the country's major political parties, as determined by elections conducted nation-wide. Yet, constitution-making in French Cameroun was a top-down, elite-driven, and non-participatory process.²³⁶

2.6.2 Apartheid South Africa

Generally, the same methods that the colonial powers used to govern Cameroon were applied in apartheid South Africa. The colonialists used indirect rule/ divide and rule in Cameroon and in

²³⁵Mbaku (2004) 46.

²³⁶As above 43.

South Africa during the apartheid era. A retrospective view into the background of apartheid in South Africa raises the question whether or not most of the illegal, unconstitutional, and undemocratic conducts of the apartheid regime were curtailed at the dawn of democracy in 1994 and appropriate democratic conduct was adopted thereafter. Chapter one already observed that most of the institutions that support and promote democracy that were erected in South Africa after the fall of the apartheid regime are either not present or not constitutionally entrenched in Cameroon's current constitutional and political dispensation. Thus it is of no value to attempt to establish the similarity of institutions or the constitutional and political environments in both countries. Rather, most of the institutions and mode of governance practiced in the present democratic dispensation in Cameroon are similar to those that existed during apartheid in South Africa.

Apartheid law was legal, but mostly illegitimate.²³⁷ One way to determine the legality of law includes the examination of the legal norms and institutions of the time because legal norms and institutions are essential to the organisation of social life.²³⁸ Whilst it has been noted that some judges pursued a policy of judicial restraint for purposes of removing the courts from the political arena, other judges were also held to be responsible for collaboration in the enforcement of apartheid law.²³⁹

In a society previously governed by principles other than those of democracy, the regulatory function of the law is used to drive forward the period of transition and later consolidation.²⁴⁰ A transition from a political regime requires a period of extrication and then a period of a democratic constitution.²⁴¹ Democratisation can only be considered to have been achieved once the consolidation of democracy is completed.²⁴² The South African constitutional history and development from 1910 until 1990 are all evidence of an uneasy alliance with democracy. This is because since the South Africa Act of 1909 was passed, the franchise of the four colonies-turned-provinces were only limited to whites in three of the provinces and an insignificant number of coloured and African voters in the Cape province were restricted from experiencing those

²³⁷Meierhenrich (2008) 24.

²³⁸Above.

²³⁹Above.

²⁴⁰As above 25.

²⁴¹As above.

²⁴²As above.

rights.²⁴³ More seriously, by 1956 Africans had no voting rights at all, and coloureds in the Cape province could only elect four members to represent them in the exclusively white parliament.²⁴⁴

In 1961 a Westminster statute was enacted by the British parliament, which removed a number of constitutional limitations on all British dominium, thus reducing the role of the British Crown.²⁴⁵

This status gave South Africa impetus to pass the statutes of the Union Act of 1934 that allowed South Africa to block any British parliament act that was not endorsed by the Union of South Africa's parliament.²⁴⁶

In 1960, following the drafting of a new constitution, white South Africans voted in a constitutional referendum to abolish the Union of South Africa. Subsequently as a result of the 1961 constitution all ties with the British empire were severed and a president replaced the British Crown and the Governor-General.²⁴⁷ This new dispensation naturally scrapped words like 'Crown', 'King', 'Queen' at replaced them with 'State'.²⁴⁸ However, in the new independent dispensation, selective reforms in 1964 and 1968 created a political space for Asians and coloureds, affording them limited political participation in ethnic affairs. For purposes of enforcing this reform, a Coloured Persons' Representative Council was created in 1964, and a South African Indian Council was created in 1968.²⁴⁹

The ascension of the National Party's PW Botha to the pinnacle of power in the late 1970s gave him impetus to craft a new constitution that co-opted coloureds and Indians into the parliamentary system while maintaining white political control.²⁵⁰ This co-option resulted in the Republic of South Africa Constitution Act of 1983, which again disenfranchised Africans but enfranchised coloureds and Indians, and also established a parliament consisting of three separate legislative chambers for whites, coloureds, and Indians.²⁵¹ This constitution lasted up to 1993 when the Interim constitution of Democratic South Africa was passed.

The constitutional system during the apartheid era was marked by positivism. It was not important to the apartheid government if the constitution complied with conventional norms and standards that are applicable in the constitution-making process. The courts did not have the *locus standi* to rule upon the act of the legislature as being unconstitutional. The only authority the court was

²⁴³Dugard et al (1992) 5.

²⁴⁴Above.

²⁴⁵Political system and history <http://www.constitutionnet.org/country/constitutional-history-south-africa>.

²⁴⁶Above.

²⁴⁷Above.

²⁴⁸Above.

²⁴⁹Above.

²⁵⁰Dugard et al (1992) 5.

²⁵¹Above.

vested with was to interpret the statutes without determining whether or not the statutes were constitutional. Judicial review was not accepted in South Africa. The legislative power was supreme.

The Public Safety Act of 1953 conferred emergency powers on the government, which could be evoked in times of peace.²⁵² The act vested powers in the state president, who was a governor-general then, to declare a state of emergency if, in his judgment, any action or any person threatened public safety and the maintenance of public order to the extent that the ordinary law of the land becomes inadequate to address the issue. In such an event the emergency law would substitute ordinary law to deal with the issue promptly.²⁵³ The Public Safety Act was enacted as a response to the ANC-orchestrated defiance campaign that was operating legally at the time. The act was not used in the 1950s.²⁵⁴ The defiance campaign of passive resistance followed a number of discriminatory enactments.²⁵⁵ In 1953, the Criminal Law Amendment Act was passed to reinforce the Public Safety Act, with the intention of dismantling the defiance campaign.²⁵⁶ However, a state of emergency was implemented in 1960 following the shooting of a large group of blacks in Sharpeville for deliberately requesting arrest from the regime by virtue of refusing to carry their passes.²⁵⁷ Regulations passed pursuant to the state of emergency provided for detention without trial, placed an injunction on gatherings, the proscription of publications and organisations, and the introduction of a number of newly defined offences.²⁵⁸

The banning of the ANC and PAC following the Sharpeville tragedy pushed the two political parties to resort to armed resistance. Subsequent to the Sharpeville Massacre in 1960, a state of emergency was pronounced, but South Africa's security legislation was scant. In view of this void and in an attempt to suppress the activities of the ANC and PAC, the government passed the 90-day detention law in 1963.²⁵⁹ The statute authorized the commissioner of police to arrest without a warrant of arrest, anyone he suspected of committing or intending to commit certain offences.

²⁵²Dugard *et al* (1991) 32.

²⁵³Above. This Act vests power in the president to declare a state of emergency if, in his opinion, such a measure was required, and is reminiscent of Art 9 (2), which emphasises inter alia, that the president may declare a state of siege by decree and take any measures he deems fit. The wording of this article suggests that neither judicial nor legislative control is required in such an instance, but only the president's personal assessment, as was the case with the South African Public Safety Act of 1953.

²⁵⁴As above 33.

²⁵⁵Above.

²⁵⁶Above.

²⁵⁷As above 34.

²⁵⁸Above.

²⁵⁹As above 35.

Such arrested person could be held in detention in solitary confinement for up to 90 days without trial, until the commissioner of police was satisfied with the interrogation.²⁶⁰

The courts contributed very little to mitigate the sufferings wrought by the 90-day detention statute. In a number of decisions by the Appellate Division, the already meagre rights of detainees were substantially eroded.²⁶¹ In fact, the Appellate Division, which was South Africa's highest court then, adopted a neutral approach towards the security police.²⁶² This unbecoming conduct of the highest court could be described as "issuing a licence to the police forces to act brutally and unrestrained by legal control."²⁶³

Since the 90-day law was intended to be temporary, in 1965 it was withdrawn and replaced with a further 180-day detention law. This law became a permanent feature of South African law. In 1966 a specific law targeting terrorism was introduced and Section 22 of the General Law Amendment Act authorised a 14-day detention for the purpose of interrogating a terrorism suspect.²⁶⁴ This law became insignificant once the Terrorism Act was passed in 1967. Under the new crime of terrorism, transgression was punishable by the death sentence, and the crime was made retroactive by five years.²⁶⁵ This act criminalised activities that had no connection with state security. The act did not consider the court's usual discretion of making provision for the least period of imprisonment upon conviction.²⁶⁶ The onus of proof was placed on the accused to rebut presumptions beyond reasonable doubt; indeed this law enforced the police state, arbitrary detentions, and unaccounted disappearances.²⁶⁷

In 1982, after the publication of the Commission of Inquiry into the Security Legislation's report, most of South Africa's security laws were combined into a single statute known as the Internal Security Act 74 of 1982.²⁶⁸ Most of the obnoxious provisions of the existing law were retained, while minor safeguards were introduced. In the same year, the secrecy law was consolidated and

²⁶⁰ Above.

²⁶¹ Above. in *Loza v. Police Station Commander*, the court ruled that at the expiration of the 90-day period, the arresting officer could renew the detention immediately. The Appellate Division rejected the argument by a lower court that continuous detention for the same infraction would render the 90-day limit meaningless, and rather relied on the justification that the detainee could be continuously detained for a change in the situation upon which the suspicion was based. In *Rossouw v. Sachs*, the Appellate Division held that a detainee could equally be lawfully deprived of study material while in solitary confinement. The court unanimously regarded access to study and writing material as a matter of discretion and not a right.

²⁶² As above 36.

²⁶³ Above.

²⁶⁴ As above 37.

²⁶⁵ As above.

²⁶⁶ Above.

²⁶⁷ Above.

²⁶⁸ As above 38.

amended, banning demonstrations in or around court buildings.²⁶⁹ The government also introduced statutes that ensured censorship of free flow of information. Thus, it is unsurprising that by the end of 1982, all powers commonly associated with states of emergency had become permanent features of the South African legal system.²⁷⁰ With the introduction of the 1983 constitution, there was nationwide unrest triggered by the non-recognition of the black majority in parliament. This constitution recognised a tri-cameral (three tiered) parliament that represented whites, coloureds, and Indians, but completely excluded blacks.²⁷¹ As a result of the unrest, the highest number of detentions was registered, surpassing those detentions during the Soweto uprising and those that later occurred in 1976-77.²⁷² Compared to 1960 when the government had very little means to intervene, by 1982 the security forces were significantly empowered to deal with any likely eventuality.²⁷³

Civil liberties were suppressed by security forces made up of the South African Police (SAP) and South African Defence Force (SADF).²⁷⁴ These forces, especially the SAP, were equipped with excessive powers. Between 1967 and 1982, up to 60 persons held under draconian detention laws died in detention.²⁷⁵

Civil liberties in South Africa were under constant stress in the 1980s. In 1982, the Department of Defence issued a white paper on defence and ammunition supply. The military was allowed to have legitimate interest in all anti-apartheid activities.²⁷⁶ In 1984, an amendment to the Defence Act permitted the SADF to be deployed in policing duties. To compound this, by the mid-1980s conscription of people into the military became highly controversial. Their aim was to move from a part-time army to a full-time professional army.²⁷⁷ The End Conscription Campaign (ECC) criticised forced conscription and held that military service should be voluntary.²⁷⁸

Given the perpetual manifestations carried out by the black community to show their dissatisfaction with government and its suppression of civil liberties, the police was further endowed with broad executive and legislative powers to deal with the public demonstrations.²⁷⁹ On July 1985, the government declared a partial state of emergency in addition to the already

²⁶⁹ Above.

²⁷⁰ Above.

²⁷¹ Political system and history <http://www.constitutionnet.org/country/constitutional-history-south-africa>.

²⁷² Dugard *et al* (1991) 39.

²⁷³ Above.

²⁷⁴ Above 59.

²⁷⁵ Above 64.

²⁷⁶ Dugard *et al* (1991) 70.

²⁷⁷ As above 72.

²⁷⁸ Above.

²⁷⁹ As above 74.

existing laws on the statute books, such as the 1982 Internal Security Act. The partial state of emergency was intended to give the divisional police commissioners the power to govern black areas by decree.²⁸⁰ The state of emergency also intended to curb the already limited judicial supervision of police power. The regulation of the state of emergency contained a clause that barred the Supreme Court from exercising jurisdiction over security forces, or from setting aside regulations taken in terms of the state of emergency.²⁸¹ The regulations made it difficult for attorneys to have access to the detainees, and lawyers could not monitor or supervise the treatment of detainees. The regulations had the ultimate intention of framing the powers of the security forces in the broadest manner and to avoid legal accountability.²⁸²

The constant use of security forces, violation of the law by the government, preventing the jurisdiction of the courts, and the non-accountability of the use of force all contributed to the suppression of civil liberties in South Africa, and left the citizens in constant fear and without the possibility of freely exercising their rights as human beings. All these unfortunate eventualities highlight the breakdown in the rule of law and the failure of constitutionalism.

It is clear from the above that the rule of law was severely disregarded. The law was significantly ignored when the Terrorism Act was passed in 1967. Under the new crime of terrorism, transgression was punishable by death, and the crime was made retroactive by five years. This act criminalised activities that had no connection to state security.

During the 1950s the National Party constructed a political order, using the instrument of law, in which rights, powers, and privileges were allocated based on race and a rigid separation along racial lines and white domination. This action of the National Party was clearly against the rule of law. Laws are required by the rule of law to be just laws. If the laws that govern society are turned into instruments of oppression, then the rule of law has been turned into rule by law.

The absence of the rule of law eventually culminated in a clear situation of human rights violations. As concerns the law, from 1909 to 1993 several constitutional development phases took place, yet all of these constitutional phases only succeeded in further entrenching the white minority in power and promoted segregation. In addition to the illegitimate constitutional development phases, the apartheid law enforced emergency powers, security legislation, and the suppression of civil liberties. Furthermore, political exclusion ultimately culminated in human rights violations. The illegitimacy in the various constitution development processes led to mass

²⁸⁰ Above.

²⁸¹ Above.

²⁸² Above 75.

action and ultimately human rights violations. The Rivonia Trial was a consequence of the violation of human rights. The refusal of the apartheid government to address the rights of the black majority triggered the entire black community to participate in civil disobedience campaigns before their leaders were arrested and brought before the court for trial. Other incidents of civil disobedience culminated in human rights violations, such as the Sharpeville massacre and Soweto uprisings that left a number of people dead.

There were constant arrests without any warrants and police were given excessive powers that allowed them to hold suspects for a very long time without any court judgment. The Appellate Division, which was South Africa's highest court then, adopted a neutral approach towards the police. This allowed the police to use untold brutality on black people and their actions were not legally controlled.

Popular sovereignty was not respected because not all the voices of the people living in South Africa were represented in any of their constitution-making processes. All the constitutions of South Africa were marred by popular illegitimacy because black people were completely excluded in the processes.

The laws that governed the people were also illegitimate and illegal. The last constitution before the interim constitution of 1993 was the 1983 constitution. This constitution provided for a tri-cameral parliament that represented whites, coloureds, and Indians. The laws voted on lacked popular legitimacy because the blacks who constituted the bulk of the South African population had no representation in parliament. Laws voted in parliament were illegitimate as a result.

2.7 CONCLUSION

This chapter addresses the background of colonialism in Cameroon. A few observations concerning apartheid South Africa were made. The aim of returning to the history was to identify some of the values and challenges that plagued the given eras with the ultimate intention of highlighting in the chapters ahead, whether or not colonial and apartheid regime continuity could have survived into the new democratic dispensations in the two countries. The next chapter will trace the evolution of the South African constitutional situation after the final collapse of the apartheid regime, starting from the late 1980s up until the complete establishment of the democratic dispensation in 1994 and a new constitution in 1996. The ideological and jurisprudential standpoints will determine whether or not post-apartheid South Africa has departed from the apartheid ideology and its jurisprudence. This is evaluated through the

examination of the kind of structures set up in the democratic state in the post-apartheid era. The focus will be on determining whether the new polity will shift from the physical dehumanisation of citizens or their disempowerment and their dispossession of the access, to any sanctioning mechanisms, to the respect for human rights and the establishment of organs that sanction against the violation of human rights. Only the existence of such structures currently with a jurisprudence that espouses the respect for human rights will assert and confirm this desired shift.

CHAPTER THREE

THE SOUTH AFRICAN DEMOCRATIC DISPENSATION AS A DESIRABLE PARADIGM FOR CONSTITUTIONAL TRANSFORMATION

This chapter examines the manner in which the foundation of a dispensation in transition from a previously oppressive regime into a democracy should be structured in order to restore the people's sovereignty, and by so doing simultaneously empowers them with human rights. This thesis's research problem focuses on colonial regime continuity, and the research question it answers ties the present disregard for constitutionalism and the rule of law by the Cameroonian government to continuity of the colonial ideology in the present post-colonial polity. Given this present lack of constitutional and jurisprudential progression in Cameroon in the post-colonial era, South Africa has been adopted as a desirable paradigm to evaluate the degree of Cameroon's ideological and jurisprudential progression in the present post-colonial era. In order to carry out this evaluation, this chapter answers the following ancillary question to the main research question: How did South Africa transform from an apartheid regime to a constitutional dispensation, and to what degree has this constitutional dispensation been transformative in post-apartheid South Africa?

At the outset I disclaim that South Africa as a desirable paradigm is intended to establish that the country is a perfect example of a smooth functioning democracy. If that were suggested, then it would be an incorrect assertion because even the United States of America is still an aspiring democracy. What has been established is that even though South Africa has experienced numerous political and constitutional challenges in the past, from colonialism to segregation and ultimately to apartheid, its present democratic dispensation is resurgent and quite resilient considering that it has made considerable and remarkable strides in its transition to democracy in just over 21 years. This progress has been quite remarkable in comparison to the progress of post-independence Cameroon, which has been a democracy for well over 55 years. South Africa's evolution is essentially exposed through the CC's interpretation of the constitutional principles as being consistent with the CC's jurisprudential commitment to the constitution to ensure and enable a "purposive and teleological application which gives expression to the commitment to

‘create a new order’ based on a ‘sovereign and democratic constitutional state.’” Such a dispensation guarantees citizenry’s exercise and enjoyment of human rights and civil liberties.¹

It must be noted that even though Cameroon may have similar institutions to those of South Africa, South Africa’s institutions are constitutionally entrenched and have proper and functioning internal control measures (checks and balances) against the abuse of executive power. For instance, the South African president is vested with enormous powers, almost as extensive as those of the Cameroonian president. However, certain internal channels and institutional measures are available to control and circumscribe the powers of the South African president, unlike the powers vested in the Cameroonian president, which are reminiscent of a “blank cheque” as is evident in the constitutional allocation of presidential powers. In fact, the Cameroonian president commands unbridled and unfettered powers, has little or no restraints on his use of power, and can thus be described as a horse without a bridle in comparison to the president of post-apartheid South Africa.

The fact that some of the bills tabled by the South African chief executive are opposed or scrutinised, such as the secrecy bill² or the disqualification of inappropriate appointments such as that of Simelane and Heath,³ as pointed out in Chapter One, reveals that presidential powers are controlled and circumscribed in South Africa through the application and enforcement of the rule of law and constitutionalism. This is similar in the United States of America, where the president is Commander in Chief of the armed forces, appoints ambassadors, officers, and judges, and ensures the execution of the law, yet all these powers are exercised with the consent of the senate.⁴ In stark opposition to these views, an opposition or challenge to a presidential bill, or his political appointment, or the power of any other institution in Cameroon is an aberration. This has never happened in the history of Cameroon and may never happen under the present regime.⁵

The desirability of the South African democratic dispensation is not merely on account of both countries being African, but more especially because the South African democratic dispensation, irrespective of its present constitutional and political challenges, has entrenched a bill of rights in Chapter Two of its constitution to redress the brutality of the past. In Chapter Nine, institutions supporting and promoting democracy, and hence, a liberal democracy and a constitutional court to

¹H Klug “Introducing the devil: An institutional analysis of the power of constitutional review” (1997) 13 2 *South African Journal on Human Rights* 203.

²Human Rights Watch South Africa: “Secrecy Bill” improved but still flawed <http://www.hrw.org/news/2013/04/29/south-africa-secrecy-bill-improved-still-flawed> (accessed 13/09/2014).

³P De Vos “Another legal oversight by the President?” Constitutionally Speaking (2011) <http://constitutionallyspeaking.co.za/2011/12/> (accessed 15/7/2014).

⁴E Barendt *An introduction to constitutional law* (1998) 11-12.

⁵N Wakai *Under the broken scale of justice: The law and my times* (2009) 95.

oversee the constitution are entrenched. The use of these institutions as an attempt to diffuse executive power defines post-apartheid South Africa's constitution as part of the post-Cold War wave of constitutional changes.⁶ These institutions in Cameroon are not constitutionally entrenched, but rather created by a presidential decree or by legislation of a parliament in which the ruling party has a transient crushing majority, and, where these institutions are available, they do not operate efficiently but merely exist to obfuscate its actual non-existence. These institutions are necessary since they protect democratic governance by neutralising excessive executive power within a state, instead of solely depending on the separation of powers for that purpose.⁷

Furthermore, when a polity is transformed into a democracy, robust civil societies in the polity also rein in governmental power, thereby strengthening the rule of law and constitutionalism. Civil society has motivated the South African populace to resist certain unconstitutional conducts of government. The dominant opposition political party in South Africa, the Democratic Alliance (DA), has also been responsible for exposing certain illegal and unconstitutional practices of the ruling party to the public, and consolidating constitutional democracy as a result.⁸

Given that the aim of this chapter is to investigate whether or not the South African constitutional environment provides a desirable paradigm for constitutionalism and the rule of law in a transformative term that is worthy of being emulated by Cameroon, it is important to explore the constitution-making process in South Africa. This process will confirm whether or not constitutionalism and the rule of law in the new South African constitutional dispensation are observed. To this end, the constitution-building process in South Africa will be examined progressively since constitutionalism and the rule of law in South Africa are ongoing and better described as a work in progress. A section in this chapter will highlight and address issues related to constitutionalism and the rule of law that were not properly addressed during the constitution-making process and subsequently pose challenges in the progress of the new South African constitutional dispensation. Issues such as the powers attributed to the South African president by the constitution, and the style of popular sovereignty adopted by the constitution is examined to establish whether the citizens really feel, or if in essence they are empowered. In other words, to establish whether participatory democracy in South Africa is real or whether the people merely hold marginal and peripheral powers. Generally, the discussion in this chapter focuses on arguing

⁶H Klug *The Constitution of South Africa: A contextual analysis* (2010) 187.

⁷Above.

⁸Lipset M & Rokkan S "Party Systems and Voter Alignments" (1967) in Hoene *The Racial/Ethnic Interpretation of South Africa* (2004) at 3.

how certain core issues pertaining to the rule of law and constitutionalism have facilitated a practical shift of sovereignty from parliament to the people themselves in post-apartheid South Africa. Juxtaposition with post-independence Cameroon may reveal the lack of political will to empower the people, since increasing executive powers suggest the trading of constitutionalism for presidentialism in post-independence Cameroon.

For the purpose of contextualising the comparison of constitutionalism and the rule of law in Cameroon and South Africa, the same factors in both countries will be evaluated. Such evaluation or examination will constitute the following in post-apartheid South Africa: The constitution building process; the South African constitution so constructed in terms of separation of powers and presidentialism; the CC; the bill of rights; judicial review; chapter nine institutions; civil society (political parties and NGOs); and the transitional challenges post-apartheid South Africa presently has to manage.

In recent decades the importance of a constitution in a country has grown enormously. Contemporary constitutions that have observed the purpose and importance of constitutions have succeeded in ending an epoch defined mostly by instability and illegitimacy, and starting another era under the authority of new social forces.⁹ This reflects the pressure to democratise resulting from disillusionment with a one-party regime. Ever since the inception of the constitution-building process up to the current South African constitution, the constitution reiterates the principles of democracy and constitutionalism, including a detailed bill of rights.¹⁰ Transformation of a society begins with the constitution-making process, and it could take the form of negotiation or consolidation of reforms. The process of constitution-making is necessary for the legitimacy of the constitution and progress towards democratisation.¹¹

3.2 THE CONSTITUTION-MAKING PROCESS OF SOUTH AFRICA

The constitution-making process of South Africa is widely acclaimed as being a positive example of broad public participation.¹² The transition stage that led South Africa out of the apartheid era into a democracy was dominated by political parties in matters concerning the interim government and constitutional reforms. Following the release of Nelson Mandela in 1990 and

⁹Y Ghai & G Galli “Constitution building processes and democratization” in IDEA handbook *Democracy, conflict and human security: Further readings* (2006) 5.

¹⁰Above.

¹¹Above.

¹²Briefing paper no. 20 of Reporting Democracy International “Lessons learned from constitution-making: Processes with broad-based participation” (2011) 6.

even prior to that event, there were already “talks about talks” and ongoing negotiations between the white minority government led by the NP on the one hand, and the ANC, the PAC, Azania’s Peoples Organisation (AZAPO), the SACP, the Inkatha Freedom Party (IFP), and other political parties and organisations.¹³ These negotiations were held by various groups coming together. These groups formed what became known as Conventions for a Democratic South Africa (CODESA) I, and during negotiations constitutional principles were agreed upon and an agreement was reached for the need of an interim constitution.¹⁴ The parties to the negotiations agreed on the need for an interim constitution because they were convinced it would act as a “stop-gap” during the period of the transition to democracy.¹⁵ The absence of democratically elected negotiating parties and democratically proven constituencies at the time informed their joint decision.

During this period interest groups and civil society were not allowed to participate in the process.¹⁶ It is clear that the requirements of a sound constitution-making process that follows the trend of international law and international obligations of states were observed by South Africa. Factors such as broad consultation of the people, constitutional awareness, the civil education of people, legitimacy, inclusiveness, and most especially transparency and accountability, were encapsulated in the process.¹⁷

It is important to note that even though political parties championed the first part of the transition that allowed them to agree on the interim constitution, a constituent assembly was thereafter elected in April 1994.¹⁸ The Constituent Assembly then took over the second stage of the process, which was to draft the constitution, ensuring that it adhered to the three international law principles of inclusivity, accessibility, and transparency.¹⁹ Even though the interim constitution lacked legitimacy because the document was drafted by political parties and no mass participation was involved, it still paved the way for a new constitutional order and provided a structure of constitutional principles to which all parties agreed.²⁰ After the 1994 elections ushered in a new

¹³FT Abioye “Constitution-making, legitimacy and rule of law: A comparative analysis”(2011) 64 1 *The Comparative and International Law Journal of Southern Africa* 75. Alex Callinicos “South Africa after apartheid <http://pubs.socialistreviewindex.org.uk/isj70/safrica.htm>

¹⁴Above.

¹⁵Above.

¹⁶Briefing paper no. 20 (2011) 6.

¹⁷As above 2, 3 & 4.

¹⁸As above 6.

¹⁹As above.

²⁰Abioye (2011) 76.

democratic dispensation, the need arose to draft a more representative and democratic document since all the political parties involved in the drafting of the 1993 Constitution had acknowledged its legitimacy deficiency.²¹ It must be noted that prior to this time when South Africa was about to demonstrate a full-scale participatory constitutional-making process, the public had hitherto not had any direct role in constitution making²² Given that South Africa was developing a new culture of participatory constitution-making, Hart posits that a new culture of constitution-making includes practices such as prior agreement on broad principles as a first phase of constitution-making amongst other factors, and the role of an interim constitution, which is to create space for a longer term democratic deliberation.²³ The participation of the people of South Africa in the constitution-making process occurred in two phases. The first was based on consultation with the people and the second phase involved the constitutional assembly (CA) drafting a refined working draft, after consultation with the people.

The technical committee recommended that the CA be constituted by a joint-sitting of the two houses of Parliament – The National Assembly and the Senate and were given two years from the first sitting of the National Assembly to draw up a new constitution as required by section 73 (1).²⁴ At the second meeting of the CA in August 1994, a 44-member constitutional committee was established to serve as a steering committee, and an administrative structure was established to manage the constitution-making process. The constitutional committee handled both support for the CA and its administrative team and also facilitated other important aspects of the process such as public participation programmes, constitutional education programmes, constitutional public meetings programmes, and a newsletter known as *Constitutional Talk* that was entrusted to explain the processes and the distribution of a draft text approved by the CA.²⁵ The entire constitution-making process could be appreciated appropriately in the following manner:

3.2.1 Consultation with the people (public participation)

Experiments with the public participating in the process of constitution-making are an outstanding feature of “new constitutionalism”.²⁶ Insofar as public participation in constitution-making is

²¹ Above.

²² V Hart “Democratic constitution-making” (2003) *Special Report 107 2*.

²³ As above 8.

²⁴ South African Const, 1993

²⁵ H Klug “South Africa’s experience in constitution-building” available at <http://ssrn.com/abstract=1808168> (accessed 25/07/2014).

²⁶ Hart (2003) 4.

desirable, it still remains a matter of opinion, making participation difficult to enforce as a right.²⁷ However, international law via the Universal Declaration of Human Rights and general comments by the United Nations Human Rights Committee has demonstrated that citizens have certain civic duties and rights that cannot be restricted by governments.²⁸ Essentially, citizens may enforce their right not to vote, but if they decide to vote then no government can restrict them from doing so.

In Africa, experiments with new structures and forms of participation are presently developing an open process that embraces citizens in constitutional conversation.²⁹ In South Africa, a constitutional committee that was established by the elected representatives of the people as a CA, reached out to educate the citizens and capture their views.³⁰ The constitutional committee's educational strategy to reach out to the citizens included media and advertising campaigns using newspapers, radio, television, bills boards, and sides of buses, and an Assembly newspaper comprising approximately 160 000 cartoons.³¹

Citizens were called on to present submissions and about 1 000 educational workshops were organised across the country over twelve months.³² Public meetings also provided a forum to the members of the CA and opportunities to present their work and get the reaction of participants. Generally, direct interaction took place between more than 117 000 people and members of the CA.³³ 13 443 substantive submissions were presented, and 90% of the submissions came from individuals, and over 2 000 000 people signed petitions on different issues.³⁴ After all the information on constitution-making was gathered, the next step was the constitution-making process since Section 5 of the Interim Constitution of 1993 required at least two-thirds of all the members of the CA to vote for a new constitution.³⁵ This success story of public participation was certainly a mark of approval for the constitution by the people, confirming that the text was not

²⁷As above 5.

²⁸Above.

²⁹As above 7.

³⁰As above 8.

³¹Above.

³²Briefing paper no. 20 (2011) 6.

³³Above.

³⁴Above.

³⁵Klug (2010) 13.

exclusively drafted by political elites. On the contrary, the public participation initiative facilitated “ownership” of the constitution by all South Africans.³⁶

3.2.2 The Constitutional Assembly and the constitution-making process

A proposal of a constitutionally entrenched system of power-sharing was accepted by the ANC’s National Executive Committee for the first five years after the first democratic elections.³⁷ This proposal was known as the “Sunset Clause”. During this five-year period of democratic elections, the democratically elected parliament was empowered to write a new constitution that excluded the provisions of the 1993 constitution, whose sun had thus set.³⁸ At this point the democratically elected CA took over the reins of the constitution-making process.

The CA was tasked with the expeditious writing of a new constitutional text. The CA was supported by a technical refinement team that ensured consistency in the fast-growing document, and to ensure that it was written in simple language within the reach of ordinary citizens.³⁹

The CA also created another formal mechanism of an independent panel of seven constitutional experts stipulated by the interim constitution, for the purpose of providing advice to the CA and also serving as a partial deadlock device when the CA was unable to attain the two-thirds majority within the stipulated time.⁴⁰ Moreover, apart from the technical committee recommending the establishment of the constitution-making body, the CA, it also proposed the establishment of a constitutional court, which amongst other functions, had to certify the conformity of the draft constitution to the agreed constitutional principles.⁴¹ The Constitutional Court was also important because the CA was a sovereign body charged with the duty to draft and adopt a new constitution subject only to the agreed constitutional principles.⁴²

However, the constitutional vacuum in which the CA functioned made it possible for the majority to ignore minority aspirations. The new constitution would have thus functioned as an authoritarian regime disregarding minority proposals. This would have implied that the CA had

³⁶C Murray “Negotiating beyond deadlock: From the Constitutional Assembly to the Court” in P Andrews & S Ellmann *Post-apartheid constitutions: Perspectives on South Africa’s basic law* (2001) 112.

³⁷H Klug “Participating in the design: Constitution-making in South Africa (1996)3 1 *Review of Constitutional Studies* 40.

³⁸Above.

³⁹Klug (2010) 13.

⁴⁰As above 15.

⁴¹H Ebrahim *Soul of the nation: Constitution-making in South Africa* (1998) 159.

⁴²As above 160.

powers to consolidate its power in an authoritarian fashion.⁴³ In order to avoid such an ordeal, the CC had to be established to adjudicate any controversies amongst other functions.

Furthermore, the CA secretariat processed all the submissions to the body and channeled them to the technical groups of the various thematic committees to encourage more accessibility by the public. After the publication of the draft text, the public was again invited for the second time to issue submissions regarding any amendments they viewed necessary on the draft text.⁴⁴ With the new inputs, the members of the CA began with the final negotiation process. This negotiation exercise was greatly criticised by few observers on account of deals on deadlock issues being struck behind closed doors. Nevertheless, majority of the people were satisfied with the level of consultation and the CA passed the final constitutional text with a majority of 80%, making up the required two-thirds majority.⁴⁵

3.2.3 Certification of the Constitution

The certification process began with the final draft text, which left the CC in a difficult position. Clearly, the constitutional principles agreed upon were the result of a political agreement between two parties, ending a conflict. The CC was faced with 34 principles that could be loosely interpreted, yet it had to use these principles against the background that allowed the text to be adopted and to test the constitutional text.⁴⁶ Political parties represented in the CA who wished to submit oral argument had to notify the CC and to submit their reasons for the objections.⁴⁷ Any other body or person interested in objecting to the certification of the text was also invited to submit written objection. Objections were lodged by 84 private parties, the political parties, and the CA, and 27 other bodies were attributed the right of audience.⁴⁸ Hearings started on Monday 1 July 1996 up to 11 July 1996. Representations were permitted from persons having *locus standi* and members of organisations that were duly authorised.⁴⁹

In the court judgment delivered on 6 September 1996, the judges found that the text adopted in 8 May 1996 failed to comply with the constitutional principles in eight categories. However, the CC

⁴³As above 123.

⁴⁴Briefing paper no. 20 (2011) 6.

⁴⁵Above.

⁴⁶Ebrahim (1998) 224.

⁴⁷Above.

⁴⁸As above 225.

⁴⁹Above.

pointed out that inasmuch as these inconsistencies existed, the CA drafted a document that adhered to the overwhelming majority required for the constitutional principles.⁵⁰

Additionally, the non-compliance with the principles did not present any outstanding obstacles in the formulation of a text that complied with the requirements.⁵¹ As a result of the CC's judgment, a few amendments were carried out to the text before it was finally certified. A couple of inconsistencies were highlighted by the CC, amongst the most significant were: the bill of rights; two of the Chapter 9 institutions; the public protector and the auditor general; clarification on the state of emergency clause; and the powers of a province relating to policing. The CC ruled that for the public protector and auditor general to be effectively independent, firm measures other than a mere requisition for an ordinary majority in order to remove the two office-bearers were required. The CC called for a two-thirds majority in this regard.⁵² The CC did not object to the state of emergency clause but advised that Section 37(5) be improved and amended. This amendment should distinguish derogable rights from non-derogable rights in a thoughtful and rational way.⁵³ The CC also emphasised that the bill of rights must be entrenched. The CC insisted that any amendment to the bill of rights required a greater majority than a normal amendment, or the amendment should involve both houses of parliament.⁵⁴ The CC also found that the powers of a province regarding policing were reduced, which could affect the province's ability to give directives to provincial commissioners, to approve or veto these commissioners' appointments, or to initiate legal proceedings against them.⁵⁵ All the amendments were carried out and the sub-committees tabled their reports to the constitutional committee, and the amendments carried out were approved for adoption. On the 8 of May 1996, the amended text was passed with the same overwhelming majority.

Immediately after the revised text was passed it was tabled before the CC for certification. The task of the CC was to check that the text had complied with constitutional principles relating to Sections 73A (1), (2), and (3) read with section 71(2), as dictated by the interim constitution. The judges approached the certification exercise in light of the previous judgment because the CA took this judgment into consideration in the drafting of the amended text.

⁵⁰ Above.

⁵¹ Above.

⁵² As above 228.

⁵³ Above.

⁵⁴ As above 229.

⁵⁵ Above.

Even though the two certification exercises were similar, one important difference existed. While an objector to the certification could raise any issue, irrespective of whether it was previously considered or not, the person who supported the contention had a more daunting task.⁵⁶ Given that the first certification exercise was conducted in a broad spectrum of South African society through oral and written submissions, the CC found that no important issue could have been neglected.⁵⁷

Finally, the president had to sign the constitution into law, not just as an ordinary law, but a constitution that had been democratically finalised in the most effective public participation process in pursuance of the mandate the electorate gave the CA in the April 1994 elections.⁵⁸ The constitution was finally certified on 4 December 1996 by the CC that amended part of the constitution so that it was consistent with the principles.⁵⁹ A day was subsequently planned for the president to sign the constitution into law.

Whereas courts such as the Supreme Court of India and the Federal CC of Germany have espoused doctrines under which constitutional amendments against constitutional principles could be evaluated, certifying that a constitution democratically created by a constituent body, normally seen as an incarnate of popular sovereignty, did not act *ultra vires* was an innovation.⁶⁰

Seven million copies of the new South African constitution in the eleven official languages were distributed, and a survey carried out by the CA showed that awareness about the constitution was fairly high.⁶¹ The fact that this same survey confirmed a strong sense of ownership was evidence that public participation was a significant accomplishment.⁶² It is clear that through this genuine participatory process in constitution-making, South Africa's Constitution of 1996 gained popular legitimacy. As already highlighted in Chapter Two, the two key factors defining the legitimacy of a constitution are the process of constitution-building and the content of the constitution.⁶³ Thus,

⁵⁶As above 233.

⁵⁷Above.

⁵⁸As above 235.

⁵⁹Murray (2001) 122.

⁶⁰H Klug "Postcolonial collages: Distributions of power and constitutional models, with special reference to South Africa" (2003) 18 1 *International Sociology* 124.

⁶¹Briefing paper no. 20 (2011) 6.

⁶²Above.

⁶³W Wahiu (International Institute for Democracy and Electoral Assistance) *A practical guide to constitution building: An introduction* (2011) 3.

an evaluation of the constitution is indispensable for the purpose of ascertaining whether or not the rule of law and constitutionalism was observed. The motivation for this process has been to demonstrate how post-apartheid South Africa has addressed this core constitutive element of the rule of law and constitutionalism. The indispensability of this core element lies in the fact that in the apartheid era the black majority was prevented from participating in the constitution-making process, and as a result the constitution was expressly racist in form and permitted inequality between coloured people and white inhabitants in every sphere.⁶⁴ Blacks were excluded from both citizenship and the franchise. The finding in the post-apartheid constitution-making process demonstrates a radical departure from the apartheid model, confirming that this core element has been properly addressed in post-apartheid South Africa. Of prime interest is to compare this progress with the situation in post-independence Cameroon in the next chapter, and then take a position regarding the colonial legacy in post-independence Cameroon, the rule of law, and constitutionalism.

3.3 AN EVALUATION OF THE RULE OF LAW, CONSTITUTIONALISM, AND THE PROGRESSIVENESS OF THE SOUTH AFRICAN CONSTITUTION

The importance of the evaluation of the built constitution is informed by the need to ascertain the degree of observance of the rule of law and constitutionalism in South Africa in light of the separation of powers, presidentialism, the CC, the bill of Rights, judicial review, Chapter Nine institutions, and civil society (trade unions, political parties, and NGOs). All these are core issues South Africa has addressed since the collapse of the apartheid regime and my focus in this thesis is to demonstrate South Africa's progressiveness in addressing these outlined core issues.

3.3.1 The separation of powers in South Africa

Since constitutionalism aims at constraining the arbitrary use of political power, the doctrine of separation of powers serves as an indispensable factor to achieving this objective. This doctrine restrains arbitrary treatment of citizens in the sense that the separation of powers requires the vesting of the three distinct powers in different organs but does not suggest that the separation should be rigid; instead, mutual support between the organs is indispensable, as observed by

⁶⁴J Dugard *Human rights and the South African legal order* (1978) 20.

James Madison⁶⁵ who wrote that the maxim of separation of powers does not require the legislative, executive, and judicial organs to be wholly disconnected from each other. Rather, these organs are supposed to be connected and blended, in order to ensure constitutional control on each by the other organ.⁶⁶ Therefore, if there is a rigid separation of the various organs, the degree of separation that the maxim requires as essential to a free government will never be realised in practice.⁶⁷

The United States' experience of the separation of powers reveals that the blending of powers together in certain respects in "separation of powers" and has served as a system of "checks and balances", where each branch of government constrains, and is constrained by the other.⁶⁸ The resultant effect of this separation and collaboration of the powers is that power is diluted, and little hope exists for a government to wield untrammelled powers on its citizens, and the objective of constitutionalism is achieved. Constitutionalism and the rule of law are interwoven concepts since constitutionalism symbolises a state founded on the law,⁶⁹ and the rule of law is a yardstick that enables assessment of a government's compliance with the law.⁷⁰ Given that, by itself, the rule of law is little more than the proverbial "pie in the sky", lacking the power of enforcement, and has no mode of organisation in government, Montesquieu espoused the theory of separation of powers to address this stalemate.⁷¹

Montesquieu argued that government is made up of three distinct organs, namely the legislative, executive, and judiciary.⁷² The fact that the rule of law promotes protection of citizens from the executive is evidence that the concept stresses independence more than impartiality.⁷³ Based on this assertion, the study of constitutionalism and the rule of law in South Africa will be incomplete, inadequate, and incoherent without linking the separation of powers to the practical issues in the thesis.

3.3.1.1 The separation of powers and the South African Constitution

⁶⁵S Ellmann "The separation of powers in post-apartheid South Africa" (1993) 8:455 *American University Journal of International Law and Policy* 456.

⁶⁶Above.

⁶⁷Above.

⁶⁸Above.

⁶⁹B Bekink *Principles of South African constitutional law* (2012) 32.

⁷⁰Barnett H *Constitutional and Administrative law* (2000) 85.

⁷¹Montesquieu Charles de Secondat, Baron de, 1689-1755 *The spirit of the laws* in Cohler A, Miller B, and Stone H (eds) (1989) 157.

⁷²Above.

⁷³Bedner A "An elementary approach to the rule of law" 2 *Hague Journal on the rule of law* (2010) 67-68.

The threefold division of labour between a legislator, an administrative official, and an independent judge is a *conditio sine qua non* for the rule of law in modern governments.⁷⁴ Separation of powers, also known as *trias politica*, is a fundamental ideal in a constitutional state that serves as checks and balances in government in order to ensure that the authority of the state is constitutionally constrained and exercised according to the law.⁷⁵ By exploring the various concepts from the constitution-making process to the separation of powers and to the role of civil society in South Africa, the doctrines as applied in South Africa will be interrogated in order to ascertain whether or not their manner of application complies with the *raison d'être* of the concepts.

South African jurisprudence reveals that a model of separation of powers unique to South Africa has been established.⁷⁶ The South African constitution does not expressly mention the separation of powers in any provision. However, it implicitly incorporates this doctrine in the sense that the national legislative authority as per Section 43 is (a)⁷⁷ vested in parliament as set out in section 44, (b) in provincial legislatures as set out in Section 104; and (c) in the local or municipal councils as set out in Section 156. The executive authority of the Republic of South Africa is vested in the president as per Section 85 (1).⁷⁸ Section 165 (1) provides that judicial authority of the country is vested in the courts. Section 85 (2) further clarifies that the courts are independent and subject only to the constitution and the law, which the courts must apply impartially and without fear, favour, or prejudice. The three outlined provisions illuminate the view that the principle of separation of powers is part and parcel of the South African constitution.

Furthermore, one of the founding principles of the interim constitution, namely constitutional principle VI provides that there shall be a separation of powers between the legislature, executive, and judiciary, with appropriate checks and balances to ensure accountability, responsiveness, and openness.⁷⁹ In this regard, Section 98 (2) (e) of the Interim Constitution stipulates that any dispute of a constitutional nature requires the judiciary to act as an arbiter, which will fortify the role played by the judiciary in the

⁷⁴W Robson cited in Wade & Bradley Justice and administrative law in P Labuschagne “The doctrine of separation of powers and its application in South Africa” (2004) 23 *Politeia* 84.

⁷⁵As above 85.

⁷⁶Bekink (2012) 47.

⁷⁷Constitution of the Republic of South Africa, 1996.

⁷⁸Above.

⁷⁹I Currie & J De Waal *The bill of rights handbook* (2013)18.

development of the separation of powers.⁸⁰ The presence of the separation of power is actually considered on the inferences drawn from the constitutional structure and its provisions, and not on an express entrenchment of the principle.⁸¹ By virtue of vesting the *trias politica* in three distinct organs, the South African constitution simply reaffirms its strong conviction for the existence and respect for the doctrine of separation of powers.

It is noteworthy that the South African constitutional model does not make the governmental branches hermeneutically separated from one another.⁸²

According to Section 89 of the constitution, the state president is elected by parliament and sworn into office by the Chief Justice and can equally be removed by parliament in case of violation of the law.⁸³ The constitution opted for a model that encourages a relationship between the legislature and the executive and is closely modeled on the Westminster system rather than on the presidential system practiced in France and the United States of America.⁸⁴ With regard to this model, in the *First Certification Judgment*, the court ruled that the principle of separation of powers foresaw the unavoidable encroachment of one branch of government on the territory of another.

Any constitutional scheme has always been that of partial separation, and no constitutional scheme can actually recommend complete separation of powers.⁸⁵ The court further held that an absolute separation was not necessary; the overlap of powers provided a singularly important check and balance on how executive power is exercised, by making the executive more directly answerable to the elected legislature.⁸⁶

The court stated that the final constitution enshrined a form of separation of powers that in turn shielded the two other branches against over-concentration of power in the executive, while still providing for an active and effective executive.⁸⁷ In another instance, namely the *Pharmaceutical Manufacturer* case,⁸⁸ in relation to the separation of powers principle, the court held that the tenor of the rule of law requiring those holding power to exercise the

⁸⁰Interim Constitution of the Republic of South Africa, 1993.

⁸¹Currie & De Waal (2013) 18.

⁸²K O'Regan "Checks and balances reflections on the development of the doctrine of separation of powers under the South African Constitution" (2005) 8 1 *P.E.R* 125.

⁸³P Langa "The separation of powers" in J Klaaren (ed) *A delicate balance: The place of the judiciary in a constitutional democracy* (2006) 27. Cape Town: Siber Ink

⁸⁴Above.

⁸⁵Bekink (2012) 48.

⁸⁶Above.

⁸⁷Above.

⁸⁸2000 (2) SA 674 (CC).

power should be reasonably connected to the purpose for which the power was given. This procedure reveals that a rationality standard has been observed, but does not suggest that courts can substitute their own opinion with that of the body in which the power had been vested.⁸⁹ Therefore, the court emphasised that whenever the intended purpose did not go *ultra vires* to the authority of the office holder, and his decision remained objective, then the fact that the court disagrees with their decision or considered the power to have been unduly exercised becomes irrelevant.⁹⁰ However, if a mistake occurred while an act was carried out in good faith, the irrationality of the mistake might still undermine the constitution. This accounts for the reason why in *Dawood, Shalabi & Thomas v. Minister of Home Affairs*⁹¹, the court held that abiding by the constitutional scheme that provided for separation of powers, the court would perform its duty judiciously if detailed evidence and arguments were placed before it by the members of government entitled to do so.⁹²

Lastly, in another case in which the separation of powers in South Africa is examined is *South Africa Association of personal injury Lawyers v. Heath*,⁹³ it was confirmed that the constitution provides for a separation of powers between the executive, the legislature, and the judiciary. Laws that do not comply with the Constitution are invalid. Moreover, shielding the judiciary from the other branches of government is really what the Constitution recommends, for the purpose of giving the judiciary an edge to fulfill the role the Constitution requires the courts to play.⁹⁴

The separation of powers has to be upheld as a necessity for the courts to play their constitutional role as independent arbiters in issues between the legislature, executive, and judiciary.⁹⁵ Even though judges are allowed to carry out certain extra-judicial functions, according to the court, certain functions are out of reach of judicial function and permitting judges to perform them will blur the separation between the judiciary and the other two branches of government.⁹⁶ Given that the judiciary has an important constitutional role to

⁸⁹Bekink (2012) 50.

⁹⁰Above.

⁹¹2000 (3) SA 936 (CC).

⁹²Bekink (2012) 51.

⁹³Dawood case (2000) CC paragraphs B-E at 953-954.

⁹⁴Bekink (2012) 51.

⁹⁵Above.

⁹⁶Above.

play in the separation of powers, what relationship do the courts have with the other branches of government?

3.3.1.2 Parliament

The relationship between the judiciary and parliament is manifested the instant that the judiciary makes constitutional challenges to national legislation.⁹⁷ During the first 17 years of its existence, the CC that is at the apex of the judiciary in South Africa, entertained 147 cases regarding constitutional challenges to legislation and declared many invalid.⁹⁸ Since its inception, the court has demonstrated a keen sensitivity to the limitations inherent in political leadership affected by transitional crisis.

The court's relationship with parliament can be seen in its articulation of the bounds of legislative authority, where the court has provided redress after ascertaining legislation to be unconstitutional, and where the court establishes a right to participate in the lawmaking process.⁹⁹ In this regard, the court has not only stopped at limiting Parliament to its constitutional bounds, but also defends those bounds from executive or judicial encroachment.¹⁰⁰ The court demonstrated its fidelity to asserting the constitutional authority of parliament in *Glenister v. President of the Republic of South Africa*.¹⁰¹ The court held that an intervention in a legislative process can only be sought if an applicant demonstrates that his chances of getting an effective remedy are slim, once the legislative process is completed. Glenister, who was acting in the public interest, lodged a complaint to restrain the president from promulgating a law approved by parliament that had the power of moving the Scorpions, an elite crime fighting body, from the independent National Prosecuting Authority and merging it with the police services for ulterior motives in favour of a group of politicians. Glenister's application revealed non-compliance of the disbanding process of the Scorpions to the principle of legality. This legal impasse confronted the court with the limit of its power under the separation of powers.¹⁰² Thus, the court recommended

⁹⁷C Hoexter & M Olivier (eds) *The judiciary in South Africa* (2014) 381.

⁹⁸Above.

⁹⁹Above.

¹⁰⁰Above.

¹⁰¹2009 (1) SA 287 (CC). See also *Minister of Finance v Paper Manufacturers Association of South Africa* 2008 (6) SA 540 (SCA) para 44.

¹⁰²Hoexter & Olivier (2014) 382.

that, except for exceptional circumstances, an applicant can only seek an order to declare a law invalid after the enactment of that law.¹⁰³ The Chief Justice further held that while the court was duty-bound to safeguard the constitution, it cannot intrude on the powers of the executive and legislature. Relying on the facts submitted to the court, the application resulted in a dismissal since the applicant failed to discharge the burden requested by the court.¹⁰⁴ The judiciary has proved to be a veritable protector of the constitution. It engages with the legislature in situations where it considers that Parliament has not complied with its constitutional mandate.¹⁰⁵ Where power balance has inevitably shifted towards the executive, as current tides have revealed, the courts have been useful in regulating executive authority.

3.3.1.3 Executive

As result of the judiciary's pedigree in ruling in favour of the executive during the period of apartheid in South Africa, many observers and citizens have developed a spirit of pessimism towards the courts as a result. Even though the CC was created to function as the ultimate arbiter of state power in the present democratic dispensation, its judgments are still watched closely to evaluate its steadfastness to its constitutional mandate vis-à-vis executive accountability.¹⁰⁶ This assessment can be carried out based on two factors: the court asserting the primacy of the constitution and respecting the doctrine of the separation of powers; and the manner in which the court metes out remedies in respect of the executive. The idea of the primacy or supremacy of the constitution was aimed at reiterating the fact that no office-bearer, no matter how weighty he was, could take any action contrary to the terms of the constitution. In this regard, even President Mandela's action as head of state was reviewed to ensure that it complied with the principle of legality or the rule of law.¹⁰⁷

In *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of South Africa*¹⁰⁸ the court reviewed the president's authority as head of state in promulgating an act not in compliance with the principle of legality.¹⁰⁹ The court found President Mandela to

¹⁰³ Above.

¹⁰⁴ Above.

¹⁰⁵ As above 384.

¹⁰⁶ Above.

¹⁰⁷ As above 385.

¹⁰⁸ 2000 (2) SA 674 (CC).

¹⁰⁹ Hoexter & Olivier (2014) 385.

have failed to comply with the rule of law. Through this case, the court has demonstrated its resolution to ensure that no governmental action is exempt from judicial review under the constitution. Nevertheless, the rigorousness of the scrutiny of such governmental action is only determined by the degree to which discretion lawfully influenced the said action.¹¹⁰

An example to the test of governmental action is seen in *Democratic Alliance v. President of South Africa*.¹¹¹ The court was keen to overrule the president's decision to appoint Menzi Simelane as National Director of Public Prosecution. The court held:

The separation of powers has nothing to do with whether a decision is rational. In these circumstances, the principle of separation of powers is not of particular import in this case. Either the decision is rational or it is not.

In the Simelane case, the court was swift to point out that the only way in which the separation of powers principle could have a connection with a rationality enquiry is that rationality is defined otherwise, and its content is also different if separation of power is involved, other than when it is not involved.¹¹² I believe if the court has been able to keep the other two branches under control then it is attributable to the judiciary exemplifying the independence of the judiciary. This will be examined next.

3.3.1.4 Independence of the judiciary

Section 165 (2) of the Constitution of South Africa says, “the courts are independent and subject only to the constitution and the law, which they must apply impartially and without fear, favour or prejudice.” Section 165 (3) adds, “No person or organ of state may interfere with the functioning of the courts”. Section 165 (5) states “an order or decision issued by a court binds all persons to whom and to organs of state to which it applies”. These sections are theoretically sound; however, the developing jurisprudence as we shall observe hereunder will confirm whether or not such sections have translated into practice. In this vein, the challenge of judicial independence is for the judiciary to actually look away from executive pressure and sectorial loyalty, which defined

¹¹⁰Above.

¹¹¹2013 (1) SA 248 (CC).

¹¹²Hoexter & Olivier (2014) 387.

the apartheid era.¹¹³ It will require the judiciary to follow a trajectory towards embracing the fundamental values of the constitutional democracy currently practiced in South Africa, without compromising its critically independent role assigned by the constitution.¹¹⁴

According to the International Bar Association, judicial independence comprises institutional and individual independence. While individual independence refers to members of the judiciary acting without partiality and without influence from another person or power, institutional independence refers to the availability of guarantees to protect the court's process and to protect the work of judicial officers against interference by members of another branch of government, especially the executive.

Interestingly, the structure, jurisdiction, terminology, and classification used in South Africa has been modified since 1994, triggered by the newly introduced power of judicial review exercised by superior courts under the 1996 constitution.¹¹⁵ Since this thesis argues that post-independence Cameroon has not witnessed any shift from its colonial ideology and jurisprudence, South Africa neatly reveals how true jurisprudential transformation is envisaged. It is evident in the redefinition of the role of the judiciary, where the government of South Africa ensured a shift in the basic law from a tightly sectarian oppressive minority rule to an all-inclusive and participatory democracy.¹¹⁶ If the judiciary is independent then the democracy of any country can truly advance, since such a judiciary will keep the other two arms of government rightfully constrained. Section 165 (5) of the constitution affirms that a judgment passed by courts binds both the persons and the organs to which it applies. The South African CC is vested with the duty of ensuring the rule of law and the supremacy of the constitution.¹¹⁷ How then can independence of the judiciary be made effective so as to enhance transformation and promote democracy?

A. Appointment of members of the judiciary and the judicial services commission

The judicial system itself must enhance independence. In order to maintain both independent and accountable judges in post-apartheid South Africa, a novel judicial appointment process was

¹¹³H Corder "Seeking justice? Judicial independence and responsiveness in a changing South Africa" in P Russel & D O'Brien (eds) *Judicial independence in the age of democracy: Critical perspectives from around the world* (2001) 194.

¹¹⁴Above.

¹¹⁵As above 195.

¹¹⁶Above.

¹¹⁷P Langa "The separation of powers" in J Klaaren *A delicate balance: The place of the judiciary in a constitutional democracy* (2006) 29.

introduced that had the potential to align the jurisprudential orientation with the newly transformed constitutional order.¹¹⁸

Firstly, the appointment of black judges in the post-apartheid judiciary was an innovation since this had never happened under the apartheid regime. Secondly, the coming into force of a new CC that then became the pride of post-apartheid South African legal system and a force to reckon with in the transformation of the law and the independence of the judiciary.¹¹⁹ These recent developments are juxtaposed against a pre-1994 South Africa in which no mechanisms specifically designed to promote independence were allowed.¹²⁰ Section 174 (1) of the Constitution of 1996 says, “any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer. Any person to be appointed to the CC must also be a South African citizen.” In Section 2 it says, “the need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed”. Contrary to pre-1994 South Africa where magistrates and judges were appointed by the minister of justice and president of the republic consecutively, at the dawn of 1994, both the interim and the final constitution differentiate the appointment and regulation of magistrates from judges.

While ordinary legislation defines the powers and composition of magistrates, the constitution controls the powers and composition of judges. These judges can only be appointed with the participation of the Judicial Services Commission (JSC).¹²¹ As per Section 178 of the constitution, the JSC is composed of the Chief Justice and presides over meetings of the Commission, the president of the Supreme Court of Appeal, one judge president selected by judges president, the member of cabinet responsible for the administration of justice, two practicing advocates nominated from within advocates, two attorneys, one law professor, six members of parliament from both ruling and opposition parties, four provincial representatives, and four representatives of the national executive.

On the appointment procedure of judges, Section 174 of the constitution provides that the Head of State can appoint the Chief Justice of the CC and his deputy and the president of the Supreme

¹¹⁸F DU Bois “Judicial selection in post-apartheid South Africa” in K Malleon & P Russel *Appointing judges in an age of judicial power: Critical perspectives from around the world* (2006) 280.

¹¹⁹As above 281.

¹²⁰Above.

¹²¹As above 283.

Court of Appeal and his deputy, only after consultation with the JSC.¹²² The constitution does not provide for the appointment of presidents and their deputies to high courts by the head of state. However, since the inception of JSC, the General Council of Bars of South Africa¹²³ has given force to Section 3 of the Supreme Court Act 59 of 1959. In this regard any appointments made under Section 174 (6) of the constitution by the head of state upon the advice of the JSC, which advice must be held to be compelling to the head of state and not merely persuasive. The appointment process balances accountability and independence by virtue of the fact that the JSC, which is responsible for the selection process, is composed of both politicians and legal professionals. Such a combination reveals that decision-making is ensured not to be an exclusive political or professional interest.¹²⁴

The composition of the organ charged with the selection process provides primary accountability in the selection process. Yet, in the case of *Van Rooyen v. The State and others*,¹²⁵ the CC overruled a High Court decision affirming that magistrates' independence was below the sufficiency level recommended by the constitution. The amendment of the Magistrate Act in 1996 gave enormous powers to the executive in the appointment process of magistrates compared to the initial 1993 Act, and eight members of parliament were added to the number of commissioners normally required.¹²⁶

The restructured Magistrate Court lacked independence since its composition was seen to be outrightly dominated by the parliamentary majority. In setting aside the judgment of the High Court, the CC pointed out that the High Court's ruling had ignored the history of racial and gender discrimination that had to be redressed after the adoption of the interim constitution in 1994.¹²⁷

The CC was of the opinion there was a pressing need for transformation to be carried out within the commission, given that the many institutions by 1993 were under the control of white men

¹²²Constitution of the Republic of South Africa, 1996.

¹²³A Gordon & D Bruce "Transformation and the independence of the judiciary in South Africa" The Center for the Study of Violence and Reconciliation 2007 at 23, available on www.csvr.org.za (accessed 30/08/2014)

¹²⁴Du Bois (2006) 285.

¹²⁵2001(4) SA 396 (T)

¹²⁶Du Bois (2006) 286.

¹²⁷Above.

including the Magistrate Court.¹²⁸ The CC envisioned a re-composition of the commission that would be representative of the entire South African society. With a transformed agenda successfully achieved, what could be done then to assure the judges pass their judgment without fear or favour? This radical departure from the manner in which activities were conducted under the apartheid regime defines the reason why post-apartheid South Africa is preferred as a desirable paradigm for a constitutional transformative project in post-colonial or post-independence Cameroon.

B. Security of tenure and removal of judges

Regarding the protection of the office of a judge of an independent judiciary, upon assuming his role a judge is enjoined to take the following oath of affirmation as a judicial officer:

I ... swear/solemnly affirm that, as a judge of the ... I will be faithful to the Republic of South Africa, will uphold and protect the constitution and human rights entrenched in it, and will administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law.¹²⁹

For a judge to genuinely observe this oath of allegiance to the people, the powers that courts exercise in the adjudication of disputes must remain autonomous of the legislative and executive powers in order to avoid the usurpation of its power by any of these two powers. The appointment, removal, and conditions of duties must also be separated from the legislature and executive.¹³⁰

Section 176 (1) states that a CC judge holds office for a non-renewable term of 12 years, but if the 12 years are attained while the judge is still below seventy years of age, he/she may continue serving as a judge. Section 176 (2) states that other judges who are not CC judges should hold office until they are relieved of their duties in terms of an Act of Parliament.

Section 176 (3) states that the judges' salaries and other benefits and allowances may not be reduced. The Act of Parliament referred to in this section is the Judges' Remuneration and

¹²⁸ Above.

¹²⁹ Schedule 2; section 6 (1) of the Constitution of the Republic of South Africa, 1996.

¹³⁰ B Nwabueze *Military rule and constitutionalism in Nigeria* (1992) 23.

Conditions of Employment Act, 2001, which is Act 47 of 2001, substituting the 1989 Act of the same name.¹³¹ The Supreme Court Act of 1959 also provides for the remuneration of the judges.¹³² If by the age of 70 years a CC judge has not completed 15 years in active service, then his term shall be prolonged until the expiry of the 15 years or when the judge turns 75 years of age, or whichever one occurs first. A CC judge may also be discharged from active service on the basis of the judge's incapacity due to poor health, or at least, at the judge's own request for a reason the president deems sufficient.¹³³

Removal of a judge has not occurred since 1897 and a judge may only be removed from office if the JSC finds that the judge lacks capacity to pursue his/her duties, is grossly incompetent, or is guilty of gross misconduct; the National Assembly may also demand that a judge be removed if such call is supported by at least two-thirds of its members.¹³⁴ Given that the Republic of South Africa's president takes active part in the affairs of the judiciary, what are the role, powers, and limits of the use of power of the South African Head of State? The amount of protection assured to a judge in post-apartheid South Africa suggests that independence of the judiciary has been taken into consideration as an important ingredient to a true and proper functioning democracy. Separation of powers is also assured since judges do not seek favours from politicians and do not owe their survival on the job to any politician. This neutrality serves as a motivator for judges to remain impartial in all circumstances. Post-apartheid South Africa has addressed this core issue by practically separating the judiciary from parliament and the executive. The independence of the judiciary gives the judiciary the impetus to assure that each governmental power remains within its limits, and no one governmental power usurps the power of another. This is a radical departure from the apartheid regime where the judiciary was stripped of testing powers and therefore the executive controlled both the judiciary and parliament. This innovation juxtaposed with the situation in post-independence Cameroon determines the reason for using post-apartheid South Africa as a desirable paradigm to improve the rule of law and constitutionalism in post-independence Cameroon.

3.3.2 Presidential system or presidentialism in South Africa

¹³¹L Van De Vijver *The judicial institution in Southern Africa* (2006) 130.

¹³²Corder (2014) 199.

¹³³As above 131.

¹³⁴Corder (2014) 200.

The South African Constitution of 1996 provides for an executive president as opposed to the Republican Constitution of 1961 that made the president merely a titular one.¹³⁵ The presidency of South Africa is an extra-parliamentary presidency because once the president is elected by parliament; he immediately vacates his parliamentary seat upon assuming office.¹³⁶ Generally, the South African executive is a hybrid one, similar to the executive created by the constitution of the Fifth French Republic of France.¹³⁷

Thus, South Africa and Cameroon have similar executives except for the fact that the former is parliamentary inclined, while the latter is presidentially inclined. Thus, it would not be incorrect to conclude that the South African executive practices presidentialism but has a penchant for the Westminster constitutional theory and practice to a great extent.

Section 83 (1) states that the president is the head of state and the head of the national executive. While the constitution clearly acknowledges this fact, in practice power is formally distributed between the traditional executive branch of government and a number of autonomous institutions.¹³⁸ For instance, the constitution determines which institutions may govern in defined areas such as elections and financial issues, and in some instances they also serve as checks on the authority of the executive.¹³⁹ In addition to the Chapter 9 institutions, other institutions that abound are the Public Service Commission, the Central Bank, and the Financial and Fiscal Commission.¹⁴⁰ Section 83 (2) states that the president must uphold, defend, and respect the constitution as the supreme law of the Republic; and Section 83 (3) states that he promotes the unity of the nation and also advances the Republic.

Section 84 enumerates the functions of the president. The powers and functions of the president are quite numerous and cross—cutting. Section 85 reiterates that the executive authority of the Republic is vested in the president. Section 86 lays down the manner in which the president must be elected. Section 89 specifies the conditions under which the president can be removed from office. The powers of a president have been shown to originate from the constitution, statutes of parliament passed in terms of the constitution, and are also evident in customs or conventions that

¹³⁵G Devenish *The South African Constitution* (2005) 251.

¹³⁶Above.

¹³⁷As above 254.

¹³⁸Klug (2010) 187.

¹³⁹As above 188

¹⁴⁰As above 187.

have been built across time and are constitutionally acceptable by virtue of their patterns of behavior.¹⁴¹

Constitutionalism aims at limiting the exercise of power and the popular will. The power referred to here is executive power. Where popular will is in alignment with executive exercise of unlimited power, danger is quite eminent since the executive could in turn use this power against the same people who, through their popular will, empowered the executive. In this vein, most classical legal philosophers agree that both executive power and popular majorities must be constitutionally restrained.¹⁴² This restraint is exercised for the purpose of diffusing power in the hands of the executive, as stated by Friedrich. In this regard, Friedrich describes constitutionalism as a system of government in which power is divided between diverse bodies and as a result enables the exercise of constitutionalism to be susceptible to restraints and control.¹⁴³ Given that contemporary presidentialist systems vests enormous powers in the executive, there is a need to control or restrain this power in order to avoid abuse of power by the executive. Friedrich enumerates the number of constitutional devices commonly adopted to restrain majorities, these are bicameralism, the separation of powers, the federal division of jurisdictions, proportional electoral systems, informed majorities in deliberative bodies, checks and balances, constitutional rigidity, bills of rights, judicial review,¹⁴⁴ and in recent times the public protector. All these devices anticipated for the purpose of restraining majorities and diffusing executive power are all available in the present South African constitution. Given that the president may embody the power of the state, he might consequently become less accountable to the ‘people’¹⁴⁵ if he is over empowered, but might also lack the required force to intervene in a given circumstance as a result of immobility and ineffectiveness. As a result, there is need for a balance to be struck in this regard.¹⁴⁶

In questioning the assumption of certain traditional presidential systems, Cheibub postulates that the entrenchment of strong constitutional powers, amongst others, is what fuels potential conflicts with legislatures, and he proposes the avoidance of proportional legislative elections and the institution of constitutional limits to re-election of a president, for the purpose of restraining a

¹⁴¹A Miller *Presidential power: In a nutshell* (1977) 9 & 31.

¹⁴²L Boule *Constitutional reform and the apartheid state: Legitimacy, constitutionalism and control in South Africa* (1984) 2.

¹⁴³C Friedrich Limited government: A comparison in L Boule (1984) at 2.

¹⁴⁴Boule (1984) 2.

¹⁴⁵Government, Legislature, political party and the people

¹⁴⁶A Ellis & K Samuels A summary of the International IDEA/UNAM workshop “Making presidentialism work: Sharing and learning from global experience (2010) 7.

‘hegemonic leader’ to use his position to perpetuate himself in power.¹⁴⁷ In this light, Cheibub discouraged term limits in instances where incumbents inevitably possess advantages in electoral contexts relating to access to media and financing of political activities, and he proposed that these should substitute the term limits because elections and the wish to be re-elected is what encourages politicians to be accountable to their electorates.¹⁴⁸ For the purpose of making the president accountable and avoiding an instance of an ‘imperial president’, the following constitutional mechanisms, inter alia, contribute to keep the powers of the South African president in check, albeit his possession of such enormous and wide powers, namely the bill of rights entrenched in the constitution, the CC and judicial review, the Chapter Nine institutions, opposition political parties, and civil society (Trade Unions and NGOs). It should be noted that in proportional electoral systems like South Africa, the measures advanced above are instrumental in guaranteeing a shift in constitutional and even philosophical jurisprudence, given that institutional separation does not guarantee civil liberty by virtue of the fact that parliamentary intercourse is weak. This weakness is a resultant effect of the fact that a cabinet minister who doubles as a member of parliament may not hold the executive accountable, because he/she is a member of the same party with the executive.¹⁴⁹

Consequently, there is a need for alternative measures to keep the powers of the executive in check and advance democracy in South Africa. The various factors will be examined as alternatives for the diffusion of executive powers, but also as institutions or constitutional requirements in their own right aiming for democratic intercourse, enforcing and reinforcing the rule of law and constitutionalism in South Africa. The various executive power diffusion alternatives will be examined below, starting with human rights. Human rights serve as executive power diffusion mechanisms in terms of the Lockean view.¹⁵⁰

Locke understood constitutionalism as a concept to have developed out of the consciousness that government, as the repository of growing state power, required the imposition of limitations upon

¹⁴⁷As above 10.

¹⁴⁸Above.

¹⁴⁹O V Cranenburgh & “Presidentialism and separation of powers in Africa’s hybrid regimes IPSA/ECPR Conference- paper for the panel “Presidentialism in developing countries” Sao Paulo (2011) 14.

¹⁵⁰R Kay “American constitutionalism” (1989) quoted in S Sibanda “Not purpose-made! Transformative constitutionalism, post-independence constitutionalism and the struggle to eradicate poverty (2011) *Stellenbosch Law Report* 3 493

it to bar it from making unjustifiable or tyrannical inroads into the private sphere that is the preserve of private citizens.¹⁵¹

During the apartheid regime, parliament was sovereign and supreme and no other authority could trump the authority of Parliament, which had the final word. Under the post-apartheid regime, only the people by way of the Constitution are sovereign. The South African president is very powerful, but care has been taken not to allow him to become an imperial president. Checks and balances have been implemented for the purpose of diluting his overriding and wide powers. Examining presidentialism in this work is a core issue that must be addressed, since power is no longer supposed to be concentrated in the hands of a single body in a constitutional democracy. The fact that the CC, Parliament, the judiciary in general, civil society, and Chapter 9 institutions check and balance the powers of the president of the republic is evidence that this core element of the rule of law and constitutionalism has been addressed in post-apartheid South Africa. Presidentialism in post-independence Cameroon is examined in the next chapter to determine its progress, and to illustrate why post-independence Cameroon has lessons to learn from post-apartheid South Africa.

3.3.2.1 Human rights

The preamble of the Constitution of the Republic of South Africa, 1996 says

We the people of South Africa, recognize the injustices of our past ... heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights

The preamble suggests, and even indicates, that there has been a shift from a previously unjust past to a present dispensation defined by the respect for human rights and human dignity. Human rights have thus become topical and form the basis of the leading debate of the Constitution of 1996. An entire chapter has been allocated to the protection of human rights, which is Chapter 2 of the South African constitution. The bill of rights in Article 8 (1) states that

The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.

¹⁵¹Above.

In addition to this provision, Article 9 (1) states that

Everyone is equal before the law and has the right to equal protection and benefit of the law.

These two provisions of the bill of rights suggest a shift in ideology and jurisprudence from the former apartheid regime, which was characterised by the disenfranchisement and disempowerment of the majority in the South African polity who were blacks, and the conduct of the apartheid law specifically suggested that whites were superior to the blacks. The bill of rights entrenched in the 1996 Constitution provides for equality before the law and reiterates that the bill of rights binds the legislature, the executive, and the judiciary. In the groundbreaking case of *Makwanyane*,¹⁵² Chief Justice Mahomed established a radical departure of the new constitutional environment in the South African constitution from that of the apartheid past, by evoking through the medium of the interim constitutional text that:

The South African Constitution is different: it ... represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos, expressly articulated in the Constitution.¹⁵³

The transformative nature of the South African constitutional environment, and consequently a shift to a new dispensation that encourages more equality, social and political justice is premised on the notion that contrary to traditional liberal bills of rights whose sole aim was to secure individual liberty and property from government encroachment, the new South African constitution incarnates the idea that the power of the community, and not only individuals, must be deployed with the purpose of achieving outcomes consistent with freedom, so that collective power can be exploited to introduce social conditions with the hope of nurturing and encouraging the community's ability to determine their future.¹⁵⁴ This section will argue that in terms of human rights not only has the entrenchment of the bill of rights in the South African constitution enjoined the various state institutions and organs or powers to enforce and implement equality, the bill of rights also plays a prominent role in limiting government's use of power, and specifically the diffusion of executive power.¹⁵⁵

¹⁵²*State v Makwanyane* 1995 (6) BCLR 665 (CC) found at para 262 of the judgment.

¹⁵³K Klare "Legal culture and transformative constitutionalism" (1998) 14 *South African Journal on Human Rights* 152.

¹⁵⁴As above 153.

¹⁵⁵Sec 37 of the Constitution of the Republic of South Africa determining how states of emergencies must be conducted and the nature enforcement of non-derogable rights.

A democratic foundation in South Africa was enabled by a negotiated political foundation that was premised on the promulgation of a justiciable bill of rights.¹⁵⁶ This democratic transition served as a bridge from authoritarianism to a new culture in which the exercise of power requires justification.¹⁵⁷ Put differently, human rights in the South African constitution have facilitated the transformative plan of the constitution. Sections 1 (c) and 2 reiterate the supremacy of the constitution, and provide that any conduct inconsistent with the constitution must be invalidated. This provision has helped in promoting the rule of law in that the bill of rights, being part of the constitution, is going to be observed by virtue of the dictates of the constitution, as a rule of law. As already seen in Chapter Two hereof, the old South African order under the apartheid regime was founded on rule by law¹⁵⁸ and not rule of law, as the new Constitution of 1996 demonstrates. Even though laws existed under that regime, such laws were not based on democratic values, fundamental human rights, and social change. Therefore, the system could not be equated with a rule of law system and constitutionalism. Although the word ‘reform’ cannot fully describe the present transformative conduct of the South African constitution, however, the idea of an egalitarian, multicultural, popular participation looms large, and quickly brings the idea of human rights to the fore.¹⁵⁹

An examination of the various judgments handed down by the CC regarding human rights portrays a vivid picture of a radical transformative departure from the past or apartheid regime. The *raison d’être* of this new conception of constitutionalism in post-apartheid South Africa is defined by the desire to eradicate poverty.¹⁶⁰ Even though crushing poverty still exists amongst the black communities subsequent to the passage of the 1996 constitution, which has ushered in a new post-apartheid constitutional term - transformative constitutionalism, a number of factors, including a successful transition, a stable democratic government, fairly free media, a multi-party system of a representative democracy, and an independent judiciary are indicators of the gains of political transformation and limits placed on state power in post-apartheid South Africa.¹⁶¹

An examination of human rights cases will reveal a shift from the old ideology, but most especially the accent placed on ‘equality’ human rights – socio-economic or second generation human rights by the South African constitution and enforced by the CC. Even though the

¹⁵⁶Klare (1998) 147.

¹⁵⁷Above.

¹⁵⁸A Gordon D Bruce “Transformation and the independence of the judiciary in South Africa” (2007) *Center for the Study of Violence and Reconciliation* 11.

¹⁵⁹As above 150.

¹⁶⁰S Sibanda “Not purpose-made! Transformative constitutionalism, post-independence constitutionalism and the struggle to eradicate poverty” (2011) *Stellenbosch Law Report* 3 482

¹⁶¹As above 484-485.

Makwanyane's case is closely associated with the right to liberty and by extension a first generation right, and serves better as the *locus classicus* of a shift from an old to a new South African order, a litany of socio-economic rights cases have been ruled by the CC ever since the advent of this case, targeting the improvement of the livelihood of people and/or communities previously disadvantaged. In terms of Sections 8 (2), (4), and 39 of the South African constitution, the bill of rights serves as a veritable mechanism for the diffusion of power, not only for the executive (public), but also the market (private).

As Bhana has observed, the wielding of socio-economic power does not only belong to the state exclusively. She argues that if the bill of rights is not applied horizontally, then the resultant effect will be the perpetuation of apartheid legacy by virtue of maintaining pre-constitutional socio-economic power relations in the private sphere.¹⁶² This perception is equally encouraged by Davis,¹⁶³ who opines that constitutionalism in a given society can only be said to be transformative when the rule of law in that dispensation is perceived by the people or symbolises that the constitution exists for everyone.¹⁶⁴ It therefore emphasises that the rule of law will mean a vertical interpretation of the constitution. This reveals that human rights are not limited to a specific space, but apply wherever they have been violated. Human rights place a limit on the use of governmental power if that government is either required to refrain from taking certain actions, or if it is compelled to carry out an activity to the benefit of the people or community. In this vein, Section 7 (2) of the Constitution of South Africa says:

The state 'must' respect, protect, promote and fulfill the rights in the Bill of Rights.

The state is not given a choice but is ordered to respect human rights, irrespective of the nature of the human rights.

The idea of a transformative constitutional system that places a limit on the use of state power as, evident in the *Makwanyane* case, is exposed through the CC judgments of a number of cases that depict a shift in state use of political power. In the past there has been a shift from government's use of unfettered power to limit on state use of political power in respect of human rights.¹⁶⁵ The

¹⁶²D Bhana "The horizontal application of the Bill of Rights: A reconciliation of section 8 and 39 of the Constitution" (2013) 29 *South African Journal on Human Rights* 353.

¹⁶³D Davis "Elegy to transformative constitutionalism" in Botha, van der Walt (eds) *Rights and democracy in a transformative constitutionalism* (2003) 57.

¹⁶⁴Above.

¹⁶⁵A Gordon & Bruce (2007) 12.

justifiability of socio-economic rights that have been included in the bill of rights¹⁶⁶ demonstrates the new order's effort to bridge the gap of inequalities that exist between the races in South Africa. An examination of the various socio-economic rights handed down by the CC reveal that the new order embraces the spirit of liberty, equality, and brotherhood amongst all South Africans without distinction.

As Sibanda¹⁶⁷ has observed, the inclusion of socio-economic rights in the bill of rights and the ushering in of a democratic era has not fundamentally changed the situation for many black citizens. However, the entrenchment of the bill of rights in the 1996 South African constitution, a thing that never existed under previous constitutions,¹⁶⁸ a judiciary enjoying the power of judicial review and respect for the rule of law¹⁶⁹ are rare factors that have changed the outlook of the present dispensation, and created space within which black South African citizens can actually participate in governance and fulfill their rights. This innovation, in terms of respect for negative¹⁷⁰ and positive¹⁷¹ rights, is what actually makes the South African constitutional system transformative, and by extension, evidence of a shift from a dispensation in terms of ideology and jurisprudence, wherein they were completely disenfranchised and disempowered.

The following cases depict this evolution. In the case of *Soobramoney v. Minister of health (Kwazulu-Natal)*¹⁷², Chaskalson P said that “a commitment ... to transform society... lies at the heart of our new constitutional order”. A remark that reinforces the interest of the new constitutional system to serve the interests and aspirations of all in the new dispensation, and not only the privileged, such as it was the case under the apartheid regime. In this respect, the South African constitution has embraced the aspirations and intentions to realise a democratic and egalitarian society in South Africa that is committed to social justice self-empowerment.¹⁷³ In order not to allow observers or commentators to think that the new democratic dispensation of South Africa is perfect, it is often acknowledged that the new constitution resulted from a specific historical context and that the democracy it practices and also celebrates is permanently a-work-in progress – still transformative and not as yet transformed.¹⁷⁴ This transformative project is

¹⁶⁶Ch 2 of the Constitution.

¹⁶⁷Sibanda (2011) 485.

¹⁶⁸South African Constitutions of 1961 and 1983.

¹⁶⁹Sibanda (2011) 484.

¹⁷⁰Civil and political rights.

¹⁷¹Socio-economic and cultural rights.

¹⁷²1998 1 SA 765 (CC); 1997 12 BCLR 1696 (CC) para 8.

¹⁷³D Davis & K Klare Transformative constitutionalism and the common and customary law

¹⁷⁴Above.

constantly forward-looking and always susceptible to revision and improvement.¹⁷⁵ In this case, the CC, while affirming the decision of the lower court since it was observed that the plaintiff based his argument on Section 27 (3) of the Constitution of South Africa, which amongst others demands that emergency medical treatment be administered, Chaskalson CJ observed that the applicant's request to receive renal dialysis treatment in a state hospital did not fall within the ambit of the right against the refusal of "emergency medical treatment" enshrined in Section 27 (3) of the constitution.¹⁷⁶ This judgment simply reveals that even though at the opening of the judgment Chaskalson, through his oft quoted passage acknowledged that the circumstances of poverty and economic inequality in South Africa has a strong link to socio-economic rights, human dignity, equality, and liberty,¹⁷⁷ the CC was still careful to establish a restraint role for itself in terms of enforcement in order not to encroach on the principle of separation of powers.¹⁷⁸ This case further enlightens the transformative conduct of human rights in the South African constitution. The court held that the case of Mr *Soobramoney* would have been better considered under Section 27 (1) read currently with (2) than 27 (3) where it has been proven that state policies or legislations in this regard were irrationally formulated or implemented.¹⁷⁹ Even though the court declined to order the state to provide for dialysis treatment, it nevertheless considered it necessary for the state to produce a "time-bound plan for providing these services" to be drawn up and implemented.¹⁸⁰ As one of the first 'test cases' of the CC, it was not really successful and this judgment has faced enormous criticisms. However, my interest to have dealt with this case and other socio-economic rights in this thesis is only to demonstrate that despite the fact that the CC did not pass judgment in favour of the appellant, the mere entertainment of this socio-economic right reveals a shift from the apartheid ideology. Matters such as this would never have been dealt with under the apartheid dispensation. I am thus highlighting the case to show that it aligns with the premise of this thesis which argues how South Africa has addressed specific core issues in the current democratic dispensation. The second case that involved a slightly different perspective by the CC was the case of *The Republic of South Africa v Grootboom*.¹⁸¹ This case showed how the court developed a set of specific and detailed criteria, as opposed to the *Soobramoney* case, to form the basis for evaluating the objectiveness of government programmes vis-à-vis socio-

¹⁷⁵ Above.

¹⁷⁶ S Liebenburg "South Africa's evolving jurisprudence on socio-economic rights: An effective tool in fighting poverty?" (2002) 6 *Law Democracy and Development* 165.

¹⁷⁷ As above 164.

¹⁷⁸ As above 165.

¹⁷⁹ Above.

¹⁸⁰ Above.

¹⁸¹ 2001 (1) SA 46 (CC).

economic rights. A group of children and adults were evicted from private land that they occupied unlawfully and they approached the Cape High Court to obtain a judgment to order government to provide them with temporary housing until they obtained permanent accommodation.¹⁸² The High Court held that government had not violated Section 26 of the constitution. It asked government to provide specific solutions to the Grootboom community since it relied exclusively on a ‘rationality review’ in relation to Section 26 to pass their judgment.

The Grootboom community were not satisfied with the outcome and decided to approach the CC for an appeal. The CC affirmed that the underlying values of our society are denied to those who do not have access to socio-economic rights.¹⁸³ Yet these socio-economic rights are key to the enjoyment of other rights in the bill of rights and in bridging the gap between races and genders and enabling the stable evolution of society.¹⁸⁴ Contrary to the judgment passed in *Soobramoney*, *Grootboom* reveals a groundbreaking case regarding the interpretation and jurisprudence of socio-economic rights in South Africa. By rejecting the ‘minimum core obligation’ of Section 26 in preference of the review standard of ‘reasonable measures’, the CC stated that the standard for determining the ‘minimum core obligation’ should be defined by the desire to protect vulnerable people from serious economic and social threat to their survival and the basic functioning of society.¹⁸⁵ In the CC’s opinion, the standard review did not question whether or not a right had been violated but “whether the legislative and other measures taken by the state are reasonable”.¹⁸⁶ In the judgment of this groundbreaking case, by granting the applicants’ request the CC established that the ‘minimum core obligation’ is determined by considering the needs of the most vulnerable group that deserves protection of the violated right in question.¹⁸⁷ However, transcending the ‘minimum core obligation’, an individual claim will succeed in establishing a *prima facie* violation if such a violation is couched in terms of lack of access to basic subsistence needs and that the applicants can neither physically nor economically access these basic needs.¹⁸⁸

The pronouncement of this judgment that shifted focus to socio-economic rights was certainly a novelty, not only by virtue of a departure from the jurisprudential order of the apartheid system,

¹⁸²Liebenberg (2002) 167.

¹⁸³As above 169.

¹⁸⁴Above.

¹⁸⁵As above 174.

¹⁸⁶J Dugard “Courts and the poor in South Africa”: A critique of systemic judicial failures to advance transformative justice” (2008) 24 *South African Journal on Human Rights* 236 at 105.

¹⁸⁷Above.

¹⁸⁸As above 177.

but also in terms of the subsequent departure from the dialectics of *Soooramoney* as the pioneer socio-economic right to be litigated upon by the constitutional court. This transformative trend of socio-economic rights is what makes human rights an indispensable factor in the transformative project of the post-apartheid South African constitutional system.

In *Minister of Health v. Treatment Action Campaign*¹⁸⁹ on access to health, the CC ordered government to administer Nevirapine for kids born of HIV/AIDS positive parents.

The various human rights cases litigated are a post-apartheid novelty that never existed in the apartheid era. These cases depict a new era experiencing a kind of transformative constitutionalism that is firmly located within the framework of substantive equality. Van Marle observed that:

For supporters of this approach, transformative constitutionalism entails the creation of an egalitarian society, which can only be achieved by following a certain program of social and legal reform.¹⁹⁰

Thus, human rights serve as a vital tool in the transformative project of a state since civil and political rights empower people to be liberated, but people become even permanently liberated when socio-economic rights are justiciable. It should be remembered that the desire for a constitution that entrenches a bill of rights with justiciable socio-economic rights is for the purpose of bridging the gap created by the apartheid regime that rendered black people despicably poor and deprived of basic socio-economic amenities. This ordeal can only be redressed through the creation of an egalitarian society following social and legal reform. This idea is captured by Karle Klare as follows:

Long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation of course, but in a historical context of conducive political developments) to transform a country's political and social institutions and power relationships in a democratic, Participatory, and egalitarian direction ... it connotes an enterprise of inducing large-scale social change through non-violent political processes grounded in law.¹⁹¹

¹⁸⁹No 2 (2002) (5) SA 721 (CC).

¹⁹⁰K Van Marle "The spectacle of post-apartheid constitutionalism" (2007) 16 *Griffith Law Review* 2 417

¹⁹¹Quoted in Van Marle as above 417-418.

Such an initiative as outlined above makes human rights indispensable or situated at the heart of a transformative project. How then can these human rights serve as a source of diffusion to presidential powers?

A. Human rights as a diffusing mechanism to executive powers

As a matter of fact, the powers of the executive can be diffused through the check on his powers during a state of emergency and through the enforcement of the rights violated or abused. By virtue of section 37 (2) (b) and (3) (a), (b), and (c)¹⁹² the powers exercised by an executive is not a 'blank cheque'. There are a number of limitations placed on the use of executive power by way of committing the National Assembly at every interval to supervise or serve as a watchdog to the activities of the executive. For instance, the National Assembly is duty bound to determine the length that the state of emergency will last, and what quorum will be required for any extension after the initial declaration of a state of emergency.

Even after the National Assembly has passed its legislation guaranteeing its approval for the state of emergency, any competent court might still rule on the validity of such an act, or on the validity of the extension of the state of emergency and any action taken by the executive as a consequence of such a declaration of a state of emergency.¹⁹³

Furthermore, any act of parliament declaring a state of emergency or an action taking its cue from the declaration of a state of emergency may not derogate from the above-mentioned rules or may not derogate from the rights to equality, human dignity life, freedom, security of the person, slavery, servitude, and forced labour, and may exceptionally derogate from these rights only to the extent that the derogation is strictly required by the emergency, and that the legislation is consistent with the Republic's obligation under international law applicable to states of emergency, and is published in the national Government Gazette as soon as reasonably possible after being enacted.¹⁹⁴ Generally the court controls executive actions regarding the detention of anyone during the state of emergency to ascertain that the action was performed while duly respecting the law. A court may review the detention of a person and release the detainee as soon as possible unless his further detention is deemed necessary for the purpose of restoring peace and

¹⁹²Constitution of the Republic of South Africa, 1996.

¹⁹³Section 37 (3) (a,b and c) Above.

¹⁹⁴Section 37 (4) and (5)

order. In this case, the detainee must be allowed to have legal representation and the state must advance reasons in writing at least two days before the court's review regarding why the detention is necessary.¹⁹⁵

The powers of the executive could equally be diffused in an instant where a number of specific bodies, associations, or persons approach the court alleging that their rights as entrenched in the bill of rights have been threatened.¹⁹⁶ In this way, the court may grant redress to the right violated either by ordering the executive to desist from riding roughshod on citizens, or from taking certain action detrimental to the applicant, irrespective of Section 37 (4)¹⁹⁷ that subjects rights to derogation without compensation from state.

By attempting to protect rights during emergency periods, the National Assembly and the judiciary control the executive use of untrammelled powers under the guise of peace and order enforcement. It is important to note that during periods of emergency, the law is suspended in order to take swift measures to restore peace and order in society, as the executive usually claims. Yet, if there is no oversight to executive action, then it will end up violating human rights and inciting more disorder and anarchy than the peace and order they claimed to restore.

As already mentioned, human rights play a significant role in the transformative project in the new democratic dispensation in South Africa. It must be noted that for this transformative project to survive, there is need for an implementation mechanism that has the power to review certain decisions taken by the executive that are considered unconstitutional. This assignment is to be carried out by the CC that has the power of judicial review. Given that the apartheid regime had a parliament that commanded untrammelled powers, Dyzenhaus noted that:

Heinz Klug drew attention to how surprising this constitutional turn was in the African post-colonial era - the embrace of judicial review in place of the customary post-colonial grant in Africa to government of "nearly untrammelled legislative authority".¹⁹⁸

¹⁹⁵Section 37 (6) (e-h).

¹⁹⁶Section 38.

¹⁹⁷Constitution of South Africa, 1996.

¹⁹⁸D Dyzenhaus "The pasts and future of the rule of law in South Africa" (2007) *South African Law Journal* 735.

The South African Constitution permits state justification of limitation to the bill of rights by showing that the limitations are “reasonable and justifiable in an open and democratic society.” A proportionality test is also set for the purpose of defining the justification of a limitation, thus assigning the final word on the constitutionality of legislation to judges.¹⁹⁹ As a matter of fact These measures serve to enforce, and have actually enforced constitutionalism and the rule of law in South Africa.

As highlighted in the case of *Sachs v. Minister of Justice*, under the apartheid regime, the appellate division ruled that parliament may encroach on any life, liberty, property, or any individual under its authority, and the duty of the courts of law will be to enforce that will.²⁰⁰ Human rights were not given attention. However, under the new dispensation human rights have been entrenched in Chapter Two of the Constitution of 1996, and all three types of rights are justiciable under the South African constitution. Being a core issue in the rule of law and constitutionalism, since it depicts a shift from parliamentary supremacy to a focus on people, this feature is essential to this thesis to such a degree that the next chapter has juxtaposed this core element to determine the degree of citizenry empowerment in post-independence Cameroon and why insights from post-apartheid constitutionalism can be used to improve the present rule of law and constitutionalism morass in post-independence Cameroon.

3.3.2.2 The Constitutional court and judicial review

The South African CC was established as a result of an agreement amongst the negotiating parties who deemed it necessary to establish a specialised court for the purpose of transforming the law of the land to align with the values entrenched in the new constitution.²⁰¹ This ideal initially started with the Interim Constitution of 1993, and the final constitution of 1996 took its cue therefrom.²⁰²

The South African CC was established in terms of Section 98 (1).²⁰³ The CC became the court of final instance over matters in connection with the “interpretation, protection and enforcement of

¹⁹⁹ Above.

²⁰⁰ Dugard (1978) 35-36.

²⁰¹ Dyzenhaus (2007) 739.

²⁰² Above.

²⁰³ D Van Wyk “Introduction to the South African Constitution” in V Wyk, J Dugard, De Villiers, D Davis *Rights and Constitutionalism: The new South African Legal order* (1994) 168.

the provisions of the constitution.²⁰⁴ Put differently, the CC was allocated a constitutionally ordained role as the “guardian of the constitution”.²⁰⁵

When the need arises, the CC is required to review the practices of government and private parties to ensure the protection of human rights.²⁰⁶ This is an innovation, because under apartheid South Africa, the statute of Westminster acquired parliamentary sovereignty. The Supreme Court’s appellate division upheld government statutes by declaring that “it is obviously senseless to speak of an act of a sovereign law-making body as *ultra vires*”.²⁰⁷

The emergence of the CC in the new democratic dispensation in South Africa suggested a shift in ideology and jurisprudence; unlike under the apartheid regime where the constitution was passed by parliament during its usual legislative processes. It was thus adopted by the CA that set up the CC, and therefore treated differently from other parliamentary Acts.²⁰⁸

The CC exercises both original and appellate jurisdiction.²⁰⁹ In most cases where the CC discerns the absence of justice, it controls access to itself by way of granting “leave” in such cases, where, if it did otherwise, the ends of justice would be defeated.²¹⁰ In this light, section 102 (2) provides for direct access to the CC in any matter in which it has jurisdiction, if the interest of upholding justice is the defining purpose.²¹¹ Where majority of the cases on appeal emanate from the Supreme Court of Appeal, the CC will act as an appellate tribunal.²¹² In this regard, in *S v Pennington and Another*²¹³, the appellants challenged their convictions and sentences. The court ruled that the CC had appellate jurisdiction in certain matters. Section 167 (6) of the constitution clearly stipulates that the CC has both original and appellate jurisdiction.²¹⁴

Negotiations were undertaken between the collapsing NP and the ANC from the late 80s. These negotiations resulted in a democratic dispensation, and the ANC, motivated to re-assure the NP’s constituency of their commitment to protect their interests, decided to adopt the American model

²⁰⁴Above.

²⁰⁵S Seedorf & S Sibanda “Separation of powers” in S Woolman & M Bishop *The constitutional law of South Africa* (2013) 12-55.

²⁰⁶Klug (2010) 5.

²⁰⁷O Nwabueze *Judicialism in commonwealth Africa* (1967) 237.

²⁰⁸Above.

²⁰⁹Z Motala & C Ramaphosa *Constitutional law: Analysis and cases* (2002) 60.

²¹⁰Above.

²¹¹As above 61.

²¹²Above.

²¹³1997 (4) SA 1076 (CC).

²¹⁴Bekink (2012) 395.

of judicial review.²¹⁵ Judicial review in South Africa is applied in a dual manner as demonstrated by articles 38 and 167 of the Constitution of 1996; a mix of a decentralised and centralised judicial review systems.²¹⁶ In *S v. Lawrence, Negal, Solberg*, the CC ruled that a court can strike down unconstitutional legislation and can sever any legislative provisions inconsistent with the constitution.²¹⁷ Judicial review is most often traced to the groundbreaking case of *Marbury v. Madison*²¹⁸ where Chief Justice Marshall and his colleagues, guided by the spirit of the constitution, discerned judicial review amid its unclear provisions.²¹⁹

A. The Constitutional Court's application of judicial review as a mechanism for presidential powers diffusion and a transformative institution

The South African CC uses its power of judicial review to control any excessive or *ultra-vires* use of executive powers and, by extension, unconstitutional popular will. Through a number of judgments, the CC has succeeded in constraining the executive to heed to constitutionalism and uphold the rule of law in South Africa. The constitution is quite clear that the judgment of the CC is binding on all institutions. Section 167 (3) says that as the highest court in the land, the CC only decides on constitutional issues and decisions and it also has the final decision on constitutional matters or decisions on constitutional matters. Section 167 (5) also confirms that the CC has the final say regarding Acts of Parliament and provincial Acts and must endorse an order of invalidity emanating from the Supreme Court of Appeal, High Court, or courts of the same rank to give an order force. The CC's decisions are binding on all other courts and institutions.²²⁰

In *Ex parte President of the Republic of South Africa in re Constitutionality of liquor bill*,²²¹ Cameron AJ ruled that the legislation on liquor was still developing. He ruled that even though parliament had passed a bill, it had not received the assent of the president who referred it to the CC for a decision on its constitutionality. The judge pointed out with reference to the presidential referral under section 79, the constitution subjects all legislation to review for constitutionality, and if found inconsistent with the constitution, then it becomes invalid. Hence, with this mechanism, the CC ensures that the executive, with its crushing majority in Parliament, does not

²¹⁵T Roux *The politics of principles: The first South African Constitutional Court, 1995-2005* (2013) 159.

²¹⁶C Fombad "African constitutional courts: Finally getting rid of the shackles of the "big man" syndrome?" (2013) forthcoming 9.

²¹⁷1997 (4) SA 1176 (CC) Bekink (2012) 48.

²¹⁸5 U.S. (1Cranch) 137 (1803).

²¹⁹M Perry *The constitution in the courts: Law or politics?* (1994) 26.

²²⁰As above 58.

²²¹2000 1 BCLR 1 (CC), 2000 1 SA 732 (CC).

pass legislation that is offensive to human rights in general. Thus judicial review has become a mechanism that assures that government legislation complies with constitutional requirement or that it be struck down. In the case of *Democratic Alliance v. The President of South Africa & others*, the Supreme Court of Appeal of South Africa declared the 2009 appointment of the Director of Public Prosecutions (DPP), Menzi Simelane invalid.²²² This matter was on appeal from the North Gauteng High Court (Pretoria). In terms of section 179 of the constitution read with sections 9 and 10 of the National Prosecution Authority's Act 1998 prosecutorial independence must be safeguarded.

The Democratic Alliance (DA) argued that the president of the Republic of South Africa who has the powers to make the appointment of the DPP did not apply his mind to the appointment since the occupier of such an office is required to be of "proper conduct", and the DA, via various objections, demonstrated how Simelane does not meet the requirements. Factors building up to prosecutorial independence that will allow the prosecutor to prosecute without "fear or favour" were not assessed by the president as the constitution requires. While awaiting the final judgment of the CC, since the constitution stipulates in section 167 (5) that it must confirm all orders of invalidity made by the Supreme Court of Appeal, a High Court, or courts of similar status before that order can gain force,²²³ Simelane's appointment has been set aside and he has been given special leave by the president until further notice. This is a demonstration of how the CC and its application of judicial review can diffuse executive use of powers, especially when the powers are *ultra-vires* and considered unconstitutional.

In *Re Heath* the CC ruled that the first appointment of Heath as the Director of the Special Investigation Unit (SIU) was unconstitutional because it infringed on the separation of powers.²²⁴ The unconstitutionality was on account of the fact that at the time of his first appointment by the then president, Nelson Mandela, Heath was still a sitting judge of the High Court. It was held that the functions that the head of the SIU had to perform are far removed from the *raison d'être* of a judiciary.²²⁵

The functions of the SIU are defined by the president, who frames and can even amend the allegations to be investigated. In other words, the appointment of Heath in this capacity is in conflict with the doctrine of separation of powers, which is a constitutional requirement. At the time when President Jacob Zuma reappointed him as the head of the SIU, he had been reinvented

²²²De Vos (2011) <http://constitutionallyspeaking.co.za/2011/12/>.

²²³Constitution of the Republic of South Africa.

²²⁴De Vos (2011) <http://constitutionallyspeaking.co.za/2011/12/>

²²⁵Above.

as an independent consultant and made startling claims to the effect that former President Mbeki might have allegedly interfered with the independence of the NPA, and he also questioned the veracity of the High Court, the Appeal Court, and the CC for confirming that the state had proven beyond reasonable doubt that Schabir Sheik was a crook and had directly bribed Zuma. It was also alleged that Heath was granted leave to undertake private consulting work while still serving as the head of the SIU. All these adverse characteristics and Heath's conduct have raised questions about the legality of his re-appointment.²²⁶ In the case of Heath, the courts have shown from first instance up to the CC that the appointment was improper because the independence of the judge in his capacity as head of the SIU was going to be affected, and the doctrine of separation of powers was going to be flouted.

Finally, even though Heath abandoned his second appointment, not due to the direct decision by the court for him to do so, it can be concluded that his resignation was prompted by the conviction or view that the CC could never in any way approve of the appointment with the given circumstances under which he was appointed. This reveals that the CC, having the power of review, can diffuse executive powers for the purpose of enforcing constitutionalism and upholding the rule of law.

In another related issue, an opposition to the ANC's *Secrecy Bill* that was tabled before Parliament and was approved by majority but because it was later disputed by civil society; it was then sent to the CC for certification. This state of affairs depicts how the powers of the executive or presidential powers can be curtailed by the CC if a specific Bill is said to be unconstitutional. In the Secrecy Bill matter, civil societies boldly opposed the Bill saying that it compromises human rights enormously. The Bill that ostensibly aimed at protecting "National Security" empowered members of cabinet, including certain bodies such as the military and other bodies overseeing security to classify "information" as "confidential", "secret" or "top secret".²²⁷ In this way the minister of state security has powers to authorise other bodies to classify information after parliament's approval.²²⁸ The bill that defines national security is not concise and the meaning is quite open-ended. This bill suggests that national security is not limited to terrorist threats and sabotage and acts directed at undermining the capacity of the state to respond to the use and threats of the use of force.²²⁹ In effect, what the Secrecy Bill means is that, due to its

²²⁶ Above.

²²⁷ P De Vos "New improved Secrecy Bill: Still bad, still unconstitutional" (2011) <http://constitutionallyspeaking.co.za/2011/12/>

²²⁸ Above.

²²⁹ Above.

indeterminate nature, the Guptagate saga, the Nkandla affair, and the sending of South African Military forces to the Central African Republic to protect private interests could be considered issues of national security and classified. Any journal that divulges such information will therefore be liable to a certain amount of years of imprisonment.²³⁰ The Secrecy Bill was returned to parliament for reconsideration by virtue of the bill's arbitrary nature. Even though the bill was amended by Parliament and returned to the CC for certification, given the negligible changes effected, it is highly improbable that the CC will certify the Secrecy Bill. The Simelane case, the Heath case, and Secrecy Bill case are all cases that expose the use of the CC and judicial review to curtail presidential powers and enforce constitutionalism and the rule of law.

i. The nature and application of judicial review

The Constitution of the Republic of South Africa, section 2 read in conjunction with section 165 states that judicial authority is vested in the courts and that the courts are independent and subject only to the law that must be applied without prejudice.²³¹ Section 167 (4) (b) states that only the CC may decide on the constitutionality of any parliamentary or provincial bill, but may do so only in the circumstances anticipated in sections 79 and 121. Any high court may decide on any constitutional issue²³² except those issues specifically outlined in section 169 (a) (i), (ii), and (b). Magistrate Courts and all other courts may decide any matter determined by an Act of parliament, but any court of a status inferior to the High Court may not enquire into or rule on the constitutionality of any legislation.²³³

Provisions of section 172 verify constitutional consistency in line with processes or instruments of justice.²³⁴ All high courts can hear constitutional challenges and can ascertain a constitutional violation in a specific case, but the powers to declare the law or action unconstitutional are reserved exclusively for the CC.²³⁵

ii. The nature of the reviewing organ

²³⁰ Above.

²³¹ Bekink (2012) 59.

²³² Constitution of the Republic of South Africa, 1996. Sec 169 (a).

²³³ Sec 170 as above.

²³⁴ Sec 172 (2) a, b, c, d as above.

²³⁵ Klug (2010) 232.

In 1993 during South Africa's constitutional negotiations, the negotiating parties agreed that there should be an independent, competent, and impartial judiciary that would have jurisdiction to safeguard and implement the constitution and fundamental rights.²³⁶ It was decided that in addition to high courts challenging the constitutionality of acts, albeit not declaring their unconstitutionality, a separate CC was created with final jurisdiction over constitutional matters.²³⁷

The CC and the Appellate Division are treated like co-equals, except for the fact that the Appellate Division is expressly barred from adjudicating matters within the jurisdiction of the CC.²³⁸ Nevertheless, other divisions of the Supreme Court of Appeal, in addition to their habitual competence, also have first-instance constitutional competence.²³⁹

This implies that the organ of judicial review in South Africa is hybrid, a mix of the European model and ordinary courts that have a limited jurisdiction to adjudicate over the constitution.²⁴⁰

The CC is a specialised court and the entire judicial organ in the legal system is decentralised courts.²⁴¹

iii. Appointments of members of the reviewing organs[s]

In South Africa, unlike in Cameroon where the Constitutional Council is not a judiciary organ, judicial review in South Africa is administered by all the courts in the judiciary, except for the magistrate courts. For this reason, appointments shall no longer be examined here so as to avoid duplicity of information, given that this same information was already examined above under 'Appointments of judges in the South African judiciary'.

iv. Powers and admissibility to the reviewing organ[s]

Jurisdiction over constitutional matters is not limited to the CC alone. Section 173 attests to this view, and there additional clauses of the constitution exist that indisputably compel courts at all

²³⁶As above 231.

²³⁷As above 232.

²³⁸D Van Wyk "Introduction to the South African Constitution" in Van Wyk, Dugard, De Villiers, Davis *Rights and constitutionalism: The new South African legal order* (1994) 168.

²³⁹Above.

²⁴⁰Motala & Ramaphosa (2002) 55.

²⁴¹Above.

levels to develop a common law where required to “give effect to” or appropriately “limit”²⁴² a right in the bill of rights.²⁴³

The constitutional drafters decided to create a CC in a hybrid form, capable of hearing cases by direct access, referral, or on appeal.²⁴⁴ The CC is the highest court in all constitutional matters. Even though it is only a court of last resort, certain constitutional matters are exceptionally within the jurisdiction of the CC.²⁴⁵

In the case of *S v. Pennington and Another*²⁴⁶ the appellants challenged their convictions and sentences. The court ruled that the CC had appellate jurisdiction in certain matters. Section 167 (6) of the constitution clearly stipulates that the CC has both original and appellate jurisdiction.²⁴⁷

Whenever any matter falls within the exclusive powers or jurisdiction of the CC, it exercises both original and appellate jurisdiction.²⁴⁸ In most cases where the CC discerns the absence of justice, it controls access to itself by way of granting “leave” in such cases where, if they had done otherwise, justice may not be achieved.²⁴⁹ In this light, section 102 (2) provides for direct admissibility to the CC in any matter in which it had jurisdiction, if upholding justice was the primary motive.²⁵⁰ Where majority of the cases on appeal emanate from the Supreme Court of Appeal, the CC serves as an appellate tribunal.²⁵¹

Admissibility to courts that have jurisdiction in constitutional matters is crucial for effective judicial control over compliance with the provisions of the constitution.²⁵² Section 34 of the constitution on the right to free access or admissibility to courts applies to constitutional issues amongst others, in conjunction with section 38 that provides additional guarantees in favour of the enforcement of the bill of rights.²⁵³

Section 38 equally provides that whenever a right in the bill of rights has been threatened or infringed, a number of persons or institutions have the right to approach a competent court to request suitable remedies.²⁵⁴ These include, inter alia:

²⁴²T Roux “Democracy” in S Woolman & M Bishop *Constitutional law of South Africa* (2013) 11-6.

²⁴³Constitution of the Republic of South Africa, 1996.Sec 8 (3).

²⁴⁴Bekink (2012) 393.

²⁴⁵Sec 167 (4) of the Constitution.

²⁴⁶1997 (4) SA 1076 (CC).

²⁴⁷Bekink (2012) 395.

²⁴⁸Motala & Ramaphosa (2002) 60.

²⁴⁹Above.

²⁵⁰As above 61.

²⁵¹Above.

²⁵²I Rautenbach & E Malherbe *Constitutional law* (1999)260.

²⁵³Above.

²⁵⁴In terms of s 38(a) a person seizing the court must not be the victim of the infringement in person-Ferreira v Levin NO; *Vryenhoek v Powell* NO 1996 1 SA 984 (CC), 1996 1 BCLR 1 (CC) paras 168 and 226A person could be

- (a) anyone acting in their personal interest or a person unable to act in their own right; and
- (b) anyone acting in public in the interest of the public or an organisation on behalf of its members.²⁵⁵

v. *Review types and the extent of reviews*

In the South African constitutional system, the courts that have jurisdiction in constitutional matters have authority over *a priori* and *ex post facto* and concrete and abstract control.²⁵⁶ Prior control is done prior to promulgation of the legislation for the purpose of determining the constitutionality of the instrument in question.²⁵⁷ *Ex post facto* control suggests that the investigation for constitutionality will be conducted after the adoption of the law.²⁵⁸ Concrete control on the other hand occurs in the face of a dispute in court where litigation takes place over the application of the constitution.²⁵⁹ Abstract control refers to a review carried out on the constitutionality of a legal rule when the rule has not actually been applied in a case. This type of review makes it possible to obtain finality over the legitimacy of rules of law prior to their application, for the purpose of discarding any damning consequences.²⁶⁰

Several sections of the South African constitution address the issue of prior control, namely sections 79, 84 (2) (b) and (c), 121, and 127 (2) (b) and (c). These sections address issues pertaining to parliamentary bills and provincial legislatures. The president or any provincial premier may have reservations regarding the constitutionality of bills tabled for their assent and signature. If the legislature directly concerned is given the opportunity of reconsidering the bill, the president or premier may refer the bill to the CC to determine its constitutionality.²⁶¹

Section 144 addresses amendments on provincial constitutions or any text of the provincial constitution. The bills shall not become law unless the CC certifies its compliance with the

assisted by another who is incapable of acting on their behalf in terms of statutory or common law. This extends as well to the principle in *Wood v Ondangwa Tribal Authority* 1975 2 SA. 294 (A) in respect of the right to life and liberty, to all rights in the bill of rights.

²⁵⁵Rautenbach & Malherbe (1999) 260-261.

²⁵⁶As above 255-256.

²⁵⁷Rautenbach & Malherbe (1999) 228.

²⁵⁸Above.

²⁵⁹Above 229.

²⁶⁰Above.

²⁶¹As above 228.

constitution on its adoption. See the *Ex parte President of the Republic of South Africa in re Constitutionality of liquor bill*²⁶² case above.

Regarding concrete and *ex post facto* control and their degree of review, the competent courts act as guardian, and are usually called upon to overrule certain decisions of the majority. This action usually precipitates political and constitutional tensions, and this tension defines constitutional democracy.²⁶³ Thus it is clear that the courts must apply the Constitution and not be obsequious to majority opinion regarding certain controversial beliefs such as the death penalty and others. *S v. Makwanyane*²⁶⁴ contextualizes the issue, in which case the CC declared the death penalty to be unconstitutional irrespective of public opinion.²⁶⁵ This decision was against public opinion, which most often is majority opinion, and this public opinion was in favour of death penalty.²⁶⁶ The court struck down this post-promulgated law on the death penalty because it was inconsistent with the reading of the constitution. This situation reaffirms the supremacy of the constitution and the CC's vested duty to interpret and uphold the provisions of the constitution.²⁶⁷

vi. Constitutional Court review procedure

The South African system applies a mix of the concentrated or European-style review and a diffused American-style review, wherein the CC and other courts of the judicial system conduct reviews, and the courts that have jurisdiction in constitutional matters regulate their own process. Section 173 vests the power in the CC, the Supreme Court of Appeal, and high courts to have inherent powers to regulate their own process and to develop the common law, in the interest of justice.²⁶⁸ Thus, the rules and procedures to be followed will be determined by national legislation. The South African Parliament passed the Constitutional Court Complementary Act in 1995, and in 1997 another act was passed for the referral of constitutional matters to the CC for confirmation.²⁶⁹ This exercise of referral for confirmation usually occurs when an inferior court has made a ruling of invalidity in relation to an Act of Parliament or a provincial Act.²⁷⁰

²⁶²2000 1 BCLR 1 (CC), 2000 1 SA 732 (CC).

²⁶³Bekink (2012) 61.

²⁶⁴1995 (3) SA 391 (CC).

²⁶⁵Bekink (2012) 61.

²⁶⁶Above.

²⁶⁷Above.

²⁶⁸Constitution of the Republic of South Africa, 1996.

²⁶⁹Motala & Ramaphosa (2002) 61.

²⁷⁰Above.

Section 167 (3) provides that as the highest court in the land, the CC decides only constitutional issues and decisions, and it also has the final decision on constitutional matters or decisions on constitutional matters. Section 167 (5) also confirms that it has the final say regarding Acts of Parliament and provincial Acts, and must endorse an order of invalidity emanating from the Supreme Court of Appeal, high courts, or courts of same rank to give an order of force.

CC decisions are binding on all other courts and institutions.²⁷¹ Having examined the CC and judicial review, what other factors facilitate the diffusion of presidential or executive powers while enforcing constitutionalism and the rule of law in South Africa?

The CC and the power of judicial review is what really reinforce the constitutional dispensation of post-apartheid South Africa as having radically departed from the apartheid regime. During apartheid the judiciary was stripped of such powers and thus human rights were not properly protected. Under the post-apartheid dispensation the judiciary is vested with the power to review legislation and can strike down unconstitutional legislation. The CC and judicial review are therefore core elements of the rule of law and constitutionalism that their indispensability must be emphasised. The examination of this same core element in the next chapter determines why post-apartheid South Africa is a necessary desirable paradigm for post-independence Cameroon to copy, namely because the Constitutional Council in Cameroon is stripped of the power of judicial review, as was the case of the judiciary during the apartheid era in South Africa. The Cameroonian Constitutional Council cannot strike down an unconstitutional legislation. As a result, post-independence Cameroon has not shifted from its colonial legacy and might be a threat to the rule of law and constitutionalism.

B. Opposition political parties as a mechanism for checking executive powers and enforcing constitutionalism and the rule of law

Lipset et al argue that in post-independence Africa, political parties play a central role in the strengthening of democracy²⁷² and, by extension, enforcing constitutionalism and upholding the rule of law. Democracy can actually not function properly without a range of political parties

²⁷¹As above 58.

²⁷²D Uwizeyimana “Democracy and pretend democracies in Africa: Myth of African democracies” (2012) *Law Democracy and Development* 16 142.

from which the electorate can make a choice.²⁷³ Democracy's raison d'être is to create a relationship between the state and the people, in terms of how much control the people have over the state. The existence of a variety of political parties in a polity therefore gives the citizens real choices of who should govern them.²⁷⁴ So powers of the executive could be curtailed and constitutionalism enforced through elections. If the citizens are not happy with the governance of the ruling party, they punish it by voting an opposition party of their choice into government.²⁷⁵ The DA is the leading opposition political party in South Africa and has been responsible for exposing certain illegal conducts of the ruling party and, by so doing, diffusing the executive's total grip on power and consolidating democracy as a result. Amongst the major political parties are the DA, the Economic Freedom Fighters (EFF), who are newcomers, and IFP. The influence of these political parties can cause the party in power to change its decision for fear of criticisms. When executive power is checked by the opposition parties, the executive's propensity to act undemocratically is challenged, and in this manner constitutionalism is enforced and the rule of law is upheld.²⁷⁶ The fact that Simelane, as the NPA boss, was given leave, and the court also ordered Zuma's lawyers to hand over the spy tapes to the DA, is evidence that opposition political parties serve as an executive power diffusion mechanism. Once the ruling party and its chief executive have heeded to the various circumscriptions of their authority, the implication is that constitutionalism has also been enforced concurrently and the rule of law has been upheld, since the executive is constrained to do what is acceptable by law.

C. Civil society as an executive power diffusion and transformative mechanism

In the recent past, a number of civil societies, especially human rights non-governmental organisations (NGOs) and trade unions have constantly been at the centre in defense of human rights in South Africa. The fight against the passing of the Secrecy Bill was spearheaded by human rights civil societies. Trade Unions such as COSATU, amongst others, as part of civil

²⁷³As above 143.

²⁷⁴Above.

²⁷⁵Above.

²⁷⁶The DA was responsible for raising the alarm regarding the spy tapes of Jacob Zuma's corruption trial and this is why the National Prosecuting Authority (NPA) dropped the charges. The irregular appointment of Simelane was brought up by the DA. A number of other issues have been brought to the limelight by the DA, either through parliamentary debates or suing the ruling party and/or its leaders, and consequently top government officials for misconduct. The issue of members of the South African Defence Forces dying in the Central African Republic is one amongst many issues.

society have also been in the forefront of negotiating better working conditions for its workers with government. Additionally, COSATU has been instrumental in opposing government's e-toll policy on road taxes.²⁷⁷ Civil societies groups such as the Right to Know, Treatment Action Campaign, the Social Justice Coalition, Section 27, Ndifuna Ukwazi, and Equal Education made a joint statement that says:

The new South Africa is not comparable to the evils of old, but on Tuesday when parliament passed a state secrecy law we were shamed. The ANC became like its apartheid predecessors. The party of Mandela ignored the man himself and muzzled whistleblowers, journalists and its own citizens. It defied its...²⁷⁸

Thanks to the efforts and intervention of civil societies the law was resent to the National Assembly for reconsideration. When the Secrecy bill was first passed in 2011 by the National Assembly, 198 votes were registered in a parliament dominated by the ANC against 74 who opposed the bill.²⁷⁹ Even after the law had been reviewed at the National Assembly, the new version still did not comply with human rights standards for constitutionality, as many observed.²⁸⁰ This bill has been described by members of the civil society as the foremost piece of legislation since the end of racial apartheid 20 years ago to challenge South African democracy.²⁸¹ Other political parties represented in parliament observed that even though the bill had been revised, it still remained flawed and failed to pass constitutional muster. The political parties contemplated referring the bill directly to the CC for review of constitutionality.²⁸²

COSATU mounted radical opposition to government's implementation of the e-toll tax on account of government's refusal to scrap the system and explore other alternatives to pay for the

²⁷⁷Africa Focus "South Africa: Secrecy law evokes apartheid era" (2011) <http://www.africafocus.org/docs11/saf1111.php> (accessed 30/11/2014). COSATU's campaign against the e-toll Bill and the level to which the people of South Africa are solidly behind them in this regard is proof that civil society can diffuse executive power and in turn facilitate and promote transformation. Civil societies have countered the Secrecy Bill for evoking a spirit of apartheid empathy. Trade Unions, as part of civil society, have been instrumental in influencing public policy in the interests of the public. COSATU's success most especially in opposing e-toll taxes has portrayed trade unions as a force against the diffusion of executive powers, and a tool that enables and facilitates constitutionalism and the rule of law, and is consequently a transformative tool.

²⁷⁸Above.

²⁷⁹D Smith "Freedom of speech campaigners warn that bill could have 'chilling effect' on those seeking to expose official corruption" (2013) *The Guardian*.

²⁸⁰De Vos "New improved Secrecy Bill: Still bad, still unconstitutional" *Constitutionally Speaking* (2011) <http://constitutionallyspeaking.co.za/2011/12/> (accessed 15/7/2014).

²⁸¹Smith (2013) 283.

²⁸²Above.

harsh system.²⁸³ COSATU argued that the reason for their opposition to the e-toll Bill was founded on the fact that government was ripping off tax payers.²⁸⁴ The civil society has succeeded in staying government's prompt implementation of a policy that exhibits exploitative conduct towards the sovereign people of South Africa. The conclusion is that civil society is capable of diffusing executive powers, and by so doing enforce respect for the rule of law and promote constitutionalism.

Civil society is a democratic measure to tame power. However, in this thesis it is discussed because it puts pressure on government and government's response to that pressure enforces the rule of law and constitutionalism. The robust nature of civil society in post-apartheid South Africa is an innovation because during the apartheid era civil society could not openly oppose government. Presently in post-independence Cameroon, civil society is still very weak and this is why Post-independence Cameroon has lessons to learn from post-apartheid South Africa.

D. Independent institutions supporting democracy (Chapter 9 institutions)

Independent constitutional bodies became part of post-Cold War constitutionalism for the purpose of fragmenting and contending state power.²⁸⁵ These models of constitutionalism and constitution-making emerged as a post-colonial collage with a view to reconstructing erstwhile colonial states.²⁸⁶ Given that each new wave of state reconstruction attempts to yield new variations of devolution of power between centre and periphery, the latest wave post-cold war has created a range of new independent institutions designed for the dual purpose of protecting democracy on the one hand and circumscribing the powers of legislative majorities and democratically elected governments on the other hand.²⁸⁷ There were further institutions designed for the purpose of advancing the human rights cause and to ensure that governments use power

²⁸³City Press "E-tolls: The state hasn't listened to the people, said COSATU" (2014) *City Press*

²⁸⁴Above. COSATU is against the idea of paying tax meant for new roads, when in reality the roads in question are not new roads. COSATU therefore argued against paying for the construction of the same roads twice. Government's refusal to heed to the people's demands meant that the voices of the people were not heard by government. COSATU represents the working class who often pay the taxes and therefore responded to government's marginalising attitude by protesting against the implementation of the E-toll system. So far, government has not yet succeeded in implementing the system fully, despite a court judgment passed in favour of government to implement the system.

²⁸⁵Klug (2003) 115.

²⁸⁶Above.

²⁸⁷As above 116.

responsibly.²⁸⁸ These various mechanisms established to check the abuse of power were as follows: first category, Independent Electoral Commission, the Judicial Service Commission, the Public Service Commission, and the Financial and Fiscal Commission that enable the insulation of the appointment process, and the distribution of financial and resource allocations of the various organs concerned.²⁸⁹ Other state power dilution organs included the appointment of an ombudsperson known as the public protector, an auditor general, and a parliamentary standing committee having supervisory powers over the national defence force.²⁹⁰ An independent tender board was also created to insulate procurement of goods and services from political interference.²⁹¹

The second category of mechanisms assigned to check abuses of power and to promote human rights includes the Human Rights Commission to create awareness of fundamental rights and the Commission of Gender Equality charged with the task to promote gender equality. The South African Constitution requires that the Financial and Fiscal Commission be consulted before any revenue is allocated, and it is made official that any decision arrived at by this commission shall be taken into consideration and shall give attention to the commission's advice.²⁹² The parliamentary standing committee that monitors the National Defence Force also allows political parties to participate in the control of a strategic state institution.²⁹³ The creation of constitutionally independent central banks that transfer the control of fiscal policy from the government in control to these independent central banks is another innovative feature of the post-Cold War process of political reconstruction.²⁹⁴

Given the scope of this thesis, the public protector, the National Human Rights Commission, and the Independent Electoral Commission of South Africa will be discussed abstemiously. The South African constitution says this about the above-mentioned institutions:

These institutions are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice.²⁹⁵

No person or organ of state may interfere with the functioning of these institutions.²⁹⁶

²⁸⁸ As above 118.

²⁸⁹ Above.

²⁹⁰ Above.

²⁹¹ Above.

²⁹² Above.

²⁹³ Above.

²⁹⁴ As above 19.

²⁹⁵ Sec 181 (2).

²⁹⁶ Sec 181 (4).

These institutions are accountable to the National Assembly, and must report on their activities and the performance of their functions to the Assembly at least once a year.²⁹⁷

i. The Public Protector

The public protector has the power to investigate any conduct in public administration in any government sphere considered or suspected to be improper and resulting in prejudice. These powers are regulated by national legislation and all reports issued by the public protector are open to the public, except if exceptional circumstances demand otherwise. At this point, national legislation must determine that a specific report must be kept confidential.²⁹⁸

The public protector is appointed for a non-renewable period of seven years,²⁹⁹ and the public protector may only be removed from office if the removal is adopted with a supporting vote of not less than two-thirds of the members of the Assembly.³⁰⁰ The public protector serves as a last defence against bureaucratic oppression, and against corruption and malfeasance in public office. Even though the pride of place on how to conduct investigations is assigned indefinitely to the public protector, an indispensable feature related to her investigations is that they must be conducted with an open and enquiring mind, which calls into question the establishment of the truth.³⁰¹ Therefore, questions must be asked and further information must be requested until the entire matter is clarified, if not, suspicion will be eminent and deceit will follow. Even though the constitution requires the public protector to steer away from investigating courts' decisions,³⁰² the empowering legislation, The Public Protector Act, in its wording, suggests that the public protector is still within her constitutional bounds to investigate more broadly than she has hitherto done.³⁰³ Section 6(4) of the Public Protector Act was passed by Parliament, and it is inconceivable why this same institution is questioning the scope of the public protector's powers when the Act is quite articulate about the public protector's sufficient scope.

According to the wording of this Act, the public protector is vested with powers to investigate and provide appropriate remedial action against non-public servants or staff of such non-public

²⁹⁷Sec 181 (5).

²⁹⁸Sec 181 (5).

²⁹⁹Sec 183.

³⁰⁰Sec 194 (2) (a).

³⁰¹P Hoffman "Mandate of public protector wider than critics imagine" (2013) *Business Day* 13.

³⁰²Sec 182 (3)

³⁰³Hoffman (2013) 13.

services such as enterprises, provided their conduct is captured within the category of activities the legislation anticipates.³⁰⁴ The public protector, by virtue of her wide-ranging powers, can then, through her investigative and remedial activities, diffuse executive powers, and this has been evident in the dismissal of the former Minister of Co-operative Governance and the former National Police Commissioner based on the damning public protector's report against them. These efforts of the Public Protector have contributed transformative constitutionalism and the upholding of the rule of law in South Africa. Another institution supporting democracy in South Africa in terms of Chapter Nine of the constitution is the Human Rights Commission.

ii. The Human Rights Commission

Section 184 of the South African constitution establishes the role or function of the Human Rights Commission: to promote and respect a culture of human rights;³⁰⁵ promote the protection and attainment of human rights; and monitor and evaluate the respect of human rights in the country. The powers attributed to the Human Rights Commission for the purpose of better discharging its mandate include: investigating and reporting on the respect of human right, where human rights have been violated, progressive steps should be employed to redress the situation; to carry out research: and to educate the masses on their human rights.³⁰⁶ The Commission must call for the relevant state organs to feed the Commission on progressive measures implemented to realise the rights set in the Bill of Rights with reference to housing, health care, food, water, social security, education, and the environment.³⁰⁷ Another institution instrumental in transformative constitutionalism and the rule of law in South Africa is the Electoral Commission.

iii The Independent Electoral Commission

In terms of Section 190 of the Constitution of South Africa, the Electoral Commission has the mandate to manage national, provincial, municipal, and legislative organs in a manner consistent with national legislation. The Commission must see that the elections are free and fair, and has

³⁰⁴ Above.

³⁰⁵ Sec 184 (1) (a)(b)(c).

³⁰⁶ Sec 184 (2) (a)(b)(c)(d).

³⁰⁷ Sec 184 (3).

the responsibility of declaring the results of those elections results within the shortest reasonable time possible, as prescribed by national legislation.³⁰⁸ The Electoral Act prescribes additional powers and functions of the Electoral Commission.

Even though decisions taken by these Chapter Nine institutions are not as binding as those of a court of law, section 181 (3) of the constitution of South Africa, 1996 is persuasive since it states that all organs of state must assist, protect, and ensure the effectiveness of chapter nine institutions. It is thus obvious that all state organs, including public and private individuals, will find it noble and constitution-abiding to respect and enforce any decision taken by such organs or accept their recommendations where they exist. The dictates of section 181 (3) of the constitution reveal that these institutions are able to diffuse state or executive power and enforce constitutionalism and the rule of law in South Africa. The recent works of the public protector regarding Nkandlagate, and how much dust this matter has raised in the South African political arena attests to this premise.

These institutions have a constitutional mandate in post-apartheid South Africa and have been a force to reckon with against executive excesses in the recent past. In Cameroon these institutions are not constitutional institutions but administrative institutions. This means that the executive can still maneuver their activities for its benefit. For this issue to be addressed, a leaf should be taken out of post-apartheid South Africa's book in this regard because this core element is better addressed in post-apartheid South Africa than in post-independence Cameroon.

3.4 CHALLENGES CURRENTLY FACED BY THE RULE OF LAW AND CONSTITUTIONALISM IN SOUTH AFRICA

The above revelations regarding post-apartheid jurisprudence show that there has been ongoing and progressive transformation of the constitutional environment in South Africa. However, this is not an attempt to affirm that there are no flaws in its constitutional system. Indeed, there are a number of instances that depict that constitutionalism and the rule of law have been flouted in post-apartheid South Africa. There are instances that depict constitutional flaws and others instances that depict that the rule of law in terms of human rights violations is witnessed. Such examples will be examined in this section.

³⁰⁸Sec 190 (1) (a)(b)(c)

There are instances of executive flouting of the rule of law in post-apartheid South Africa. A handful of instances reveal that in post-apartheid South Africa, notwithstanding its transformative constitution and respect for the rule of law, the executive has flouted the rule of law flagrantly, notably in refusing to hand over the “spy tapes” to the applicant, after the court had ruled in that regard, and to mention a few others, the Guptagate and Nkandlagate sagas, and the Marikana massacre.

In the court ruling on the spy tapes, Zuma’s lawyers were recalcitrant and reluctant to hand over the spy tapes to the applicant. However, in a 2014 ruling in the Supreme Court of Appeal where the matter was appealed, it was ruled that the National Prosecuting Authority should comply with the previous order following a Democratic Alliance application that requested the NPA to release the so called spy tapes within five days.³⁰⁹ The DA had applied to the court for the handover of the spy tapes for the purpose of ascertaining whether or not the recordings and other documents motivated the dropping of criminal charges against Zuma shortly before he became president in 2009.³¹⁰ Zuma’s lawyers’ reason for their failure to deliver the tapes to applicant in the first appeal case was because the present dispute was due to them “not being timeously forthcoming with a final position on the disclosure of the tapes or the transcripts”.³¹¹ This is an instance of flagrantly obstructing the course of justice. Nobody in a democracy has the right to defy the ruling of a judiciary that is an independent institution and a state power. This scenario reveals that despite South Africa’s post-apartheid transformative constitutionalism, an instance such as this leaves much to be desired regarding the rule of law in post-apartheid South Africa. Another instance where the executive is guilty of flouting the rule of law is in the Guptagate affair. This case reveals a lack of accountability of the executive, threat to the state, and social instability.³¹² The Guptagate case shows that the South African Parliament is toothless. Observers have since argued that institutions such as Parliament (and others) that are supposed to serve as a check against administrative abuse are headed by sycophants who have an extraordinary mandate to shield powerful politicians from accountability.³¹³ This institution creates laws and regulations to criminalise accountability, such as the Secrecy Bill, thereby instilling a culture of fear in the citizens and perpetrating the past in order to deal with matters of the present.³¹⁴

³⁰⁹B Ndenze & Sapa “Court ruling on ‘spy tape’ a setback for Zuma” (2014) *Pretoria News* 1.

³¹⁰Above.

³¹¹Above.

³¹²S Zibi “Guptas brothers are merely a symptom, not the problem” (2013) *Business Day* 11.

³¹³Above.

³¹⁴Above.

In a constitutional democracy such as South Africa, executive excesses as seen in the Guptagate saga are unacceptable. The Guptagate saga involved a commercial plane that landed at the Waterkloof Air Force Base, a national keypoint, in April 2013. The plane was carrying guests who were attending a Gupta family wedding in South Africa. Even though the rich Gupta family are long-time family friends of President Jacob Zuma, the president denied the accusation that he gave the permission for their landing.³¹⁵ This instance is a manifestation of lack of accountability, which is a component of constitutionalism and the flouting of the rule of law.

No one is responsible for the act, as the event suggests, yet in a constitutional state someone must always be responsible for acts orchestrated in outright contravention of the law. The Guptagate saga was about violation of the rule of law in South Africa. The law does not allow business planes to land at a military air base, and more seriously, without prior notification. It was embarrassing that neither President Zuma nor any member of his cabinet or even the military air base community acknowledged granting permission for the plane to land there. The question then is, did the plane decide to land on its own accord? Let us assume that were the case, then the lives of more than 50 million South Africans and foreign nationals living in South Africa are in danger, definite evidence of the failure of the rule of law.

The Nkandlagate affair is another instance of lack of constitutionalism and the breach of the rule of law. This case reveals executive corruption and consumption in South Africa referring to President Zuma's homestead in Nkandla, Kwazulu Natal. Public Protector Thuli Madonsela dubs this project "licence to loot".³¹⁶ What makes the Nkandlagate matter an assault on constitutionalism and the rule of law in South Africa is not so much about the corruption it represents, as much as President Zuma and the ANC being recalcitrant to submit and enforce the damning findings of an independent constitutional institution, the office of the public protector. It is unacceptable that the office of the public protector, a constitutional institution powered by Section 182 of the South African constitution, outlines a number of remedies to be carried out by President Zuma and he ignores the remedies proposed.³¹⁷

The president's conduct suggests that since the decisions of the public protector are not as binding as those of the courts of law, he has the latitude to obey or ignore the remedies she proposed. However, Karthy Govender has clarified that even though the public protector's findings were

³¹⁵

³¹⁶X Mangu "Let Nkandla stand as a symbol of corruption" (2014) *Sowetan* 11.

³¹⁷C Paton "Madonsela sticks to guns over Nkandla: ANC must respect constitution" (2014) *Business Day* 9.

“not the same as a court of law, it does not mean that they are without force or effect”.³¹⁸ President Zuma will be violating the constitution if he neither accepts the remedies proposed and acts upon them, nor takes the findings on review.³¹⁹ Section 181 (3) of the South African constitution instructs other state organs to assist and protect independent institutions to ensure their independence, impartiality, dignity, and effectiveness. According to President Zuma, his cronies, and the ANC generally, the public protector was a populist and behaved as though the office of the public protector is above the constitution. This reaction from the ANC came after the public protector sent a letter to the President of the Republic, as the owner of the Nkandla homestead, expressing dissatisfaction with the president’s response to her report on the taxpayer-funded upgrades done on his Nkandla homestead.³²⁰ These utterances prompted the public protector to respond that her office was only answerable to parliament and not senior government officials. The public protector said her job was not to make any public actor her personal project, but rather “to be consistent and follow the rule of law”.³²¹ Essentially, the ANC and President Zuma’s outright disregard for a constitutional institution exemplifies a failure in constitutionalism and a breakdown in the rule of law in post-apartheid South Africa.

After the Marikana massacre, President Zuma was interviewed on television and asked whether the rule of law existed in South Africa. President Zuma quickly responded in the affirmative, adding that a commission of inquiry was appointed to look into the Marikana issue immediately after the tragedy occurred. What President Jacob Zuma was ignorant about regarding commissions of inquiry and the rule of law, is that the appointment of a commission of inquiry is not evidence of political goodwill to establish and uphold the rule of law. A brief inquiry into commissions of inquiry shows that they are institutions found mostly in Commonwealth countries and are ad hoc investigations initiated by the head of state.³²² Four reasons are advanced to explain why commissions of enquiry are appointed, which, as will be seen, have nothing to do with the upholding of the rule of law.

Firstly, commissions of inquiry are established to help the president avoid responsibility for a tough decision. Political leaders who want to evade defending hard policy choices from his electorate can pass responsibility to an expert in the subject and a third party.³²³ A commission of

³¹⁸ Above.

³¹⁹ Above.

³²⁰ T Monama “Rein in ANC hooligans: Thuli, unfazed by attacks, vows to do job without fear or favour” (2014) *Pretoria News* 1.

³²¹ Above.

³²² A Butler “Presidential inquiries not intended to find the truth” (2013) *Business Day* 11.

³²³ Above.

inquiry will equally assist a political leader to buttress his support and an out of court credibility for his past successful decisions.³²⁴

Secondly, the commissions of inquiry help to attenuate public emotions on the fresh wrongs committed by government. Previous studies have revealed that human beings are unable to sustain interest in something for long, irrespective of the deplorable nature of the act, such as human rights violations. Staying judgment gives the guilty or accused parties time to concoct their stories. Findings may be elaborated in legal jargon and published in huge volume sets in order to render them inaccessible. By the time the report is released, public emotion is invariably likely to have subsided.³²⁵

Thirdly, a commission of inquiry is appointed to disperse rather than attribute responsibility for the massacre.³²⁶ With regard to causation in the law, old background conditions are not relevant. Instead, free, informed, and voluntary actions that served to precipitate the occurrence of the event in question are evoked, notwithstanding accidents occurring at other moments.³²⁷ Put differently, what South African citizens are more interested in knowing is who took the informed and voluntary actions that led to the grave and inhumane treatment or massacre that occurred in Marikana? Yet, what a commission of inquiry effectively does is simply to bring to the fore general background conditions.³²⁸ This means that the hunt for actors culpable for crimes against humanity is transformed and substituted into a general socio-logical and historical investigation into all the unaccountable conditions that culminated in the massacre that occurred.³²⁹

The final reason for establishing commissions of inquiry could be to attack political enemies. The Serti Commission of Inquiry into allegations of fraud and corruption could account for such an inquiry.³³⁰ Terms of reference direct undue attention to relatively unimportant issues. The attention could rather be based on whether the arms are being used and whether offsets have been realised? Yet, the issue to be tackled should have been about fraud and corruption that was uncovered. This commission's search for "improper influence" in the award of contracts may only go as far as confirming that a "consultant" – in this case the former minister of defence, Joe Modise who advised international arms companies, made significant financial gain for doing so. Such an outcome may not benefit anyone because the late Joe Modise cannot answer questions

³²⁴ Above.

³²⁵ Above.

³²⁶ A Butler "How to turn a massacre into a mere tragedy" (2012) *Business Day* 11.

³²⁷ Butler as above 11.

³²⁸ Above.

³²⁹ Above.

³³⁰ Above.

and as a result, culpability might attributed to him because a dead person cannot justify and clarify a situation.³³¹

Thus, it is evident from the four points raised that President Zuma was either ignorant about the operation of the rule of law, or as a politician he knew the implication of setting up inquiry commissions and hoped that the prompt establishment of such commissions would actually obfuscate and shroud government's desire to undermine the rule of law. In reality, the apocalypse that occurred in Marikana reveals a breakdown in the rule of law in post-apartheid South Africa. Non-respect for the constitution led to a structural violation of the rights of the workers in Marikana, which culminated in a violent manifestation in 2012 in the confrontation between the national police force and mineworkers. This manifestation is commonly known as the Marikana tragedy or the Marikana massacre. Failure by government to show commitment in legally resolving this issue, thereby provoking the wrath of the workers, invariably invokes the issue of breakdown in the rule of law in post-apartheid South Africa.

3.5 CONCLUSION

The argument established above affirms that after the fall of the apartheid regime in South Africa there has been a progressive shift in post-apartheid jurisprudence, while its ideology has been transformed from that of authoritarianism to that of democracy, which is reflected in the various institutions set up for the purpose of promoting democracy, and enforcing and protecting human rights that were very often undermined under the apartheid regime. Thus, post-apartheid South Africa has quickly embraced transformative institutions, and this effort has led to the entrenchment of constitutionalism and the rule of law in post-apartheid South Africa regardless of the present constitutional challenges. The establishment of an interim constitution in 1993, whose 'sun' finally set in 1996 when this constitution ushered in a new era, was a demonstration of a rather clean break with apartheid ideology and jurisprudence. Thus, a new era has been typified by transformative institutions and constitutional framework, beginning with the constitution-making process that registered massive participation of all the peoples of South Africa. The new institutions have enabled the enforcement of a transformative jurisprudence that has demonstrated refraining from violation of human rights, accountability and responsibility of state officials and even the citizens.

³³¹ Above.

The next chapter will focus on the rule of law and constitutionalism in post-independence Cameroon for the purpose of ascertaining whether or not its transition from colonialism to post-independence embraced transformation from the colonial ideology and jurisprudence, and then to subsequently compare the two situations and make recommendations in the final chapters.

CHAPTER FOUR

AN EXAMINATION AND EVALUATION OF THE RULE OF LAW AND CONSTITUTIONALISM IN POST-INDEPENDENCE CAMEROON

4.1 INTRODUCTION

This chapter analyses and evaluates the practice of constitutionalism and the rule of law in Cameroon subsequent to independence in 1960, with a view to determining the effects of colonialism in post-independence Cameroon. Even though Cameroon gained independence in 1960 and their sovereignty was restored, this only effectively occurred in principle since in practice there has never been any radical departure from the colonial ideology that exemplifies a clean break with the past. Rather, the departure of the colonialists from Cameroon could be regarded as a transition to yet another form of colonisation known as neo-colonialism, which successfully disempowered ordinary Cameroonians from enjoying the windfall of democracy and continuously widened the rift between the colonised and the coloniser by creating an intermediary power or authority, known as the elites or bourgeoisie who only served the interests of the erstwhile colonial masters of Cameroon, indicating that even with the formal departure and break from colonialism to democracy, this shift is not evident in practice.

The stalemate has allowed the Cameroonians to continue operating under the colonial ideology, and the effects of the continuity of this erstwhile ideology is the maintenance of institutional structures that do not shift from protecting government to protecting the citizenry of Cameroon. Rather, the grip on the protection of government has been tightened at the expense of the citizenry in a democracy. This chapter addresses the following question: What are the effects of colonialism on post-independence Cameroon?

From the effects, the analysis will determine whether or not there has been a shift from the habitual colonial ideological and jurisprudential experiences. A critical review of the evolution of institutional democracy and constitutional structures in Cameroon reveal a timid shift from the colonial constitutional system. Post-independence Cameroon assures continuity of the colonial ideology through the imposition of an imperial presidency, being a legacy inherited from the colonial legal order under the “all-mighty” colonial governors who combined the functions of the

legislature, executive, and judiciary.¹ The protection of rights by every means necessary in a country such as Cameroon, whose constitutional council is stripped of judicial review powers, is indispensable since its record in the use of security powers may not be better than that of its colonial predecessors, and in many instances is worse.² Under such circumstances, constitutional guarantees set out in the preamble may consequently be no more than a nullity.³ Moreover, the constitutional council can only entertain matters referred to it by government.⁴ As earlier indicated, a shift from the colonial past can only be effective if in the current dispensation government does not interfere in matters reserved for another organ. This argument is justified by the fact that the colonial executive cumulated the functions of the legislature, the administration, and the judiciary. Given that constitutional law and administrative law were reasonably underdeveloped during the colonial period, this resulted in colonial law consequently serving as a self-sufficient body of rules attributing unrestrained powers to the officials to reign over the people.⁵ The constitutional dispensation in Cameroon may still resemble colonialism as described below:

Colonial state, as the term signifies, was a creation of the colonial powers for their purposes. As such, it exhibits specific characteristics that are not found in the metropolitan state. These are: (i) an imposition from outside i.e. ready-made and extrinsic to the society in which it exists; (ii) a contrivance meant to administer not citizens but colonial peoples or natives i.e. to administer not subjects but objects; (iii) not accountable to those who are administered but to itself and ultimately to the metropolitan power; (iv) arbitrary use of power and lack of transparency; (v) highly extractive, especially with regard to peasants; and (vi) disregard of all civil liberties in the colony.⁶

¹C Fombad E Nwauche “Africa’s imperial presidents: Immunity, impunity and accountability” (2012) 5 African Journal of Legal Studies 96.

²M Etonga “An imperial presidency: A study of presidential power in Cameroon” in N Kofele-Kale (ed) *An African experiment in nation-building: The bilingual Cameroon Republic since reunification* (1980) 154.

³Above.

⁴Above.

⁵I Shivji “Contradictory perspectives on rights and justice in the context of land tenure reform in Tanzania” in M Mamdani (ed) *Comparative essays on the politics of rights and culture* (2000) 39.

⁶A Mafeje “Democratic governance and new democracy in Africa: agenda for the future” (2002) Prepared for presentation at the African Forum for envisioning Africa, Nairobi at <http://www.uneca.org/itca/governance/Documents/ArchieMafeje2.pdf> in Uwizeyimana (2012) 146. When Cameroon is examined critically, by virtue to some of the secret agreements that France concluded with Cameroon without the knowledge of Cameroonians and that are not constitutionally acknowledged, then it becomes clear that governance is still imposed from outside. Furthermore, the government of Cameroon has mentioned fundamental rights in the constitution. However, not only are the rights relegated to the preamble of the constitution that might render the rights non-justiciable, there equally exists no viable mechanism to promptly sanction and redress the violation of these fundamental rights, irrespective of what Article 65 of the present constitution says. The result is that Cameroonians are still subjects and not citizens as a democracy entails.

A shortcoming highlighted by the above quotation is the issue of the president of the republic not being accountable to the sovereign people of Cameroon but to France the metropolitan power with which Cameroon entered into secret agreements after independence in 1960. These agreements have maintained continuity of the colonial ideology, albeit masking this intention by calling them co-operation agreements. For instance, in 2008 when Cameroonians went on the rampage in disagreement with the president's attempt to amend the constitution to enable him stand for a third term as president, it was France that assisted Cameroon's government with sophisticated weaponry to use in quelling the uprisings.⁷ The president of the republic uses the police as a weapon to oppress and treat Cameroonians arbitrarily.⁸ He flouts the law and is not held accountable given that even the judiciary has been rendered subservient to the executive power of the country.⁹

However the outstanding problematic upon which this thesis is premised is that despite the expectation of states in Africa, and Cameroon in particular, in the post-decolonisation and post-Cold War era not only to adhere to international rights law, but also to reconstruct their domestic political processes to demonstrate a duality of democratic and rights-based constitutional government for the purpose of achieving international legitimacy,¹⁰ the present Cameroonian dispensation in no way reflects this aspiration as earlier demonstrated. The necessity for a shift from the jurisprudence and ideology of the colonial past system to a system that promotes rights and democracy is justified by the particular features of constitutionalism adopted by states in the post-Cold War era.¹¹ These new constitutionalism features or independent institutions are designed to concurrently protect democracy and circumscribe legislative majorities and democratically elected governments.¹² This devolution of powers from the hands of the executive

⁷R Granvaud in J Rousselot "The impact of French influence on the state of democracy and human rights in Cameroon" (2010) 4 *Cameroon Journal on Democracy and Human Rights* 70.

⁸Muna (1993) 14.

⁹The appointment and promotion processes of judges in Cameroon are not transparent. Civil liberties are also most often disregarded in Cameroon. Arbitrary arrests, extra-judicial executions, and media control by the state is common in Cameroon. Furthermore, present available literature seems to align with this assertion since institutions created to function independently in Cameroon are constantly manipulated or rendered subservient to the executive as elaborated above.

¹⁰M Chanock "'Culture' and human rights: Orientalising, Occidentalising and authenticity" as above 34.

¹¹H Klug "Post-colonial collages: Distributions of power and constitutional models – with special reference to South Africa (2003) 18 *International Sociology* 115. This evolution is necessary for the purpose of establishing a demarcation from an erstwhile constitutional dispensation characterized by despotism, arbitrariness, and disenfranchisement of the people, into a new one characterised by democracy and fundamental liberties. In line with this new ideology, which jettisons hegemonic political and constitutional systems such as socialism, apartheid, and colonialism, post-Cold War constitutionalism is characterised by mass adoption of bills of rights, CCs, devolved forms of state authorities, and independent constitutional bodies or institutions.

¹²As above 116.

is indispensable for the purpose of demonstrating a meaningful departure from a tyrannous dispensation, wherein all powers were concentrated in a single organ. This simply means that decisions about who is entitled to what is depoliticised and realigned to a set of legal principles in the new rights dispensation.¹³ The aim of this chapter is to interrogate the various constitutional and democratic institutions in Cameroon and ask to what extent they abide to the rule of law or not. The following aspects are addressed: The constitutional-making process; separation of powers; the constitutional council, judicial review and human rights.

4.2 THE CONSTITUTION-MAKING PROCESS IN POST-INDEPENDENCE CAMEROON

4.2.1 The making of the 1960, 1961, and 1972 constitutions

The UN Trust Territory, known as La Republic du Cameroun under French administration was granted independence in 1960. The constitution-making process of this country failed to properly engage Cameroonians to choose an appropriate institutional arrangement for Cameroon. A committee was established by law No. 59-56 of October 31, 1959 with the mandate of setting up a constitution for the new nation.¹⁴ Decree No. 60-1 bis of 14 January 1960 was later passed to the effect of the organisation of the Constitutional Consultative Committee (CCC). On the same day decree, No. 60-2 of 14 January 1960 was passed authorising government to nominate members of the CCC. While it is accepted that committees draft constitutional rules for numerous countries, for the purpose of ensuring institutional reforms the people usually prefer membership in such a committee to be determined by national elections and not by government.¹⁵ Unfortunately, in the run up to the constitution-making process of the independence constitution, membership of the CCC was determined by the colonial government, the French entrepreneurial and commercial classes, and a small number of local elites.¹⁶ Most importantly, in addition to disregarding the rule of assigning the determination of membership in the committee to the electorate, the Committee

¹³Chanock in Mamdani (ed) (2000) 34. This shift must not be apparent but real, and the reality of the shift can only be evaluated through the available jurisprudence of the present dispensation and the productivity of the independent [constitutional] bodies that support democracy. Apparent independent bodies put up to obfuscate the actual inexistence of such bodies or institutions will therefore not serve any purpose despite their physical existence.

¹⁴J Mbaku “Economic dependence in Cameroon: SAPs and the Bretton Woods institutions” in J Mbaku & J Takougang (eds) *The Leadership Challenge in Africa: Cameroon under Paul Biya* (2004) 417.

¹⁵Above.

¹⁶Above.

went as far as entrusting the designing of Cameroon's first constitution to France.¹⁷ To exacerbate matters, this colonial government, and not the people of the colony, decided and selected the new rules. This was because no elected representatives of the people were selected to represent their views on the committee.¹⁸ Conventional norms demand that for a country's constitution to be developed, it should consist of representatives of the nation's major political parties as determined by national elections¹⁹ Unfortunately, constitution-making in the French administered territory of Cameroon did not allow the UPC, the most significant indigenous political party that also represented a substantial part of local political opinion, to participate in the designing of the constitution.²⁰ As a result, the entire exercise of constitution-making became a top-down exercise that was undemocratic, elite-driven, and a non-participatory process.

The UPC severely opposed continued French rule in the colony and this prompted the French to deny them the opportunity to participate in constitution-making and the decolonisation process. The outcome was that the citizens of this UN Trust Territory under French administration were denied the right to choose their own institutional arrangement.²¹ The UPC was seen as representing the interests and aspirations of the colonised people in the territory who had suffered enormously under the yoke of colonialism. Given that the French were desirous of maintaining its influence over the territory even after independence, on the 13 of July 1955, the colonial government proscribed the UPC party and forced it to go underground.

The colonial government proscribed the UPC for the purpose of subsequently manipulating the conditions for independence and constitution-making in the territory.²² The UPC project of "nation-statism" as Davidson²³ puts it, was inconsistent with the French policy of merely upgrading former colonies to membership in the French Union known as *la plus grande France*.²⁴ This consequently aroused the displeasure of the French colonial administration to summarily proscribe the UPC. Granted, proscribing the UPC that represented the views of the majority of the colonised is incongruent with constitution-making since it expresses the peoples' will by referring to the past exclusively in the context of which the legislated law shall acquire its true meaning.

¹⁷ Above.

¹⁸ J Mbaku "Decolonisation, reunification, and federation in Cameroon" in J Mbaku & J Takougang *The leadership challenge in Africa* (2004) 43.

¹⁹ Above.

²⁰ Above.

²¹ Above.

²² As above 44.

²³ B Davidson *The black man's burden and the cure of the nation-state* (1992) cited.

²⁴ N Awasom "Politics and constitution-making in Francophone Cameroon, 1959-1960 (2002) *Indiana University Press* 49 (4) 7.

This true meaning will therefore be the will of the people, attributed to a people that must, as a matter of fact, pre-exist the granting of that will.²⁵ The non-adherence to this norm simply leads to the conclusion that constitution-making in the Cameroons was a bogus exercise by virtue of the legislated law not being attributed to a people that pre-existed the granting of that will.

The UPC was proscribed, and therefore the final law could only be attributed to a people who were aliens, namely the French colonial government. Thus, the rules adopted by La République du Cameroun at independence were incongruent with proper constitution-making norms and the rules were only a revision of a foreign document.²⁶ It is no doubt that the final document produced by the CCC turned out to be a “thinly disguised version” of the Fifth French Republic’s Constitution of 1958.²⁷ It is thus certain that the final constitution was not a contract freely entered into by the indigenous people’s representatives and was therefore not inclusive enough to accept effective participation by all the people.²⁸ The Cameroonian citizenry were completely disenfranchised in the process, and were not afforded facilities such as language experts and translators to fully enhance their effective participation in designing rules favourable to their values.²⁹ Briefly, constitution-making was monopolised at the conceptual level by a group of elites who were pro-colonial and who collaborated with the French while the anti-colonialists and other politicians opposing the colonial ideology were simply side-lined from the process or marginalised.³⁰

In a referendum later organised after President Ahidjo and his cabinet had examined the CCC’s final draft constitution, the government disputed popular will since majority of the population did not participate because they were still in rebellion. In addition, the French assisted Ahidjo by implementing the rigging framework and the final results were merely a simple fabrication by French officials.³¹ The precipitated referendum on the draft constitution of an independent Cameroon was purposefully done to undermine any possibility of a roundtable discussion involving all political parties as they requested. Ultimately it can be said that such a referendum was carried out in an atmosphere in which the majority of democratic guarantees were avoided.³²

²⁵E Christodoulidis “Constitutional irresolution: Law and the framing of civil society” (2003) 9 (4) *European Law Journal* 424.

²⁶Mbaku (2004) 417.

²⁷Mbaku (2004) 45.

²⁸As above 46.

²⁹Above. Despite protestations of several opposition groups as evidence that the new constitution militated against their opinion and aspirations, what could be qualified as a “copy” of the constitution of the Fifth French Republic was adopted as the fundamental rules to establish the institutions of the new La République du Cameroun.

³⁰Awasom (2002) 5.

³¹As above 23.

³²As above 21.

Therefore, by implication, this referendum possessed no grounds necessary to grant it the constitutional instrument of legitimacy.³³

In 1961 the existing constitution had to be slightly amended in order to absorb Southern Cameroons to form what became known as the Federal Republic of Cameroon. This union of the two Cameroons provided a viable opportunity to reform the existing laws and institutions to fit the realities of the dispensation and also to reflect the views and aspirations of Cameroonians.³⁴

However, the short-sightedness of the Southern Cameroons delegation to the Foumban constitutional conference, in addition to the constraints already placed on the territory by the UN, gave way for Ahidjo's opportunism since he used this opportunity to push for institutional arrangements that gave the opportunity for post-reunification leaders to engage in opportunism.³⁵

As a matter of fact, no attempt was made to give the citizens of both territories, and most especially of the Southern Cameroons, the opportunity to engage in deliberations in the federation. This resulted in extraordinary powers granted to the central government and the federation by the 1961 Constitution.³⁶ It must be noted that the leaders of the Francophone or French Cameroon who formed the majority among the two Cameroons, had a strong desire for a highly centralised unitary state, and as a result, merely regarded the 1961 constitutional arrangements as a transitory phase towards the achievement of this ultimate goal.³⁷

In 1972, Ahidjo announced his intention in the national assembly to transform the federal republic into a unitary state.³⁸ He then summarily arrogated to himself absolute untrammelled powers-*les plein pouvoir*. The Southern Cameroons was shocked by the manner in which Ahidjo used his referendum gimmick to despotically end the federation. The referendum was a farce that left citizens with only a "Yes"³⁹ option.⁴⁰ So in the final analysis, the Cameroonian constitution-

³³As above 20.

³⁴Mbaku (2004) 406.

³⁵Above.

³⁶As above 418. With the central government vested with such enormous powers, Ahidjo sustained a policy adopted by the former French colonial masters in the former French Cameroon that gave all powers to control policy design and its implementation to a group of elites. Ahidjo further used the centralised powers to convert the apparent federation into a dictatorship, placed the territory under a long lasting state of emergency, and personally legislated by decrees.

³⁷P KoningsThe Anglophone struggle for federalism in Cameroon in L Bastia & J Ibrahim *Federalism and decentralization in Africa: The multicultural challenge* (1999) 290.

³⁸As above 303. This decision was inconsistent with Article 47 (1) of the federal constitution that debarred any impairment upon the federal nature of the polity. This clause was inserted for the purpose of assuring the Anglophone or English-speaking Cameroonians that the federal arrangement would not be dissolved The conditions that culminated in the ushering in of the 1972 Constitution were unusual and illegitimate. Firstly, a peaceful revolution was orchestrated by Ahidjo and he overthrew the federal government and abolished both the Federal House of Assembly in Yaounde and the House of Assembly in West Cameroon.

³⁹Meaning "Yes".

⁴⁰Konings (1999) 303

making processes analysed so far are characterised by non-participation of the people, a process monopolised by indigenous urban elites—elites driven, and a non-democratic and non-consultative process.

4.2.2 The making of the 1996 constitution.

In the place of the sovereign national conference, on his own terms President Paul Biya organised what was known as the Tripartite Conference.⁴¹ The outcome of this process became what is commonly referred to as the 1996 amendment to the 1972 constitution.

The amendment was carried out in three stages. The deliberations of the Technical Committee on Constitutional Matters (TCCM) met irregularly between November 1991 and February 1992 and reached a consensus that the constitution's cardinal goals would be the decentralisation of political and administrative power and the entrenchment of fundamental rights.⁴² Due to a number of disagreements regarding the content of the constitution and other related issues, the proceedings of the committee were suspended in February 1992.

The process only resumed and moved to stage two when a new technical committee was established by a presidential decree in 1993, and surprisingly, still with a mandate to draft a new constitution.⁴³ However, this language of “new” constitution soon changed when in November 1994 the president appointed an altogether different committee to study a document published in December, known as “Proposals of the President for the Revision of the Constitution”. So at the third stage of the conference, drafting a “new” constitution was no longer the *raison d'être* of the conference, but merely a revision of the 1972 constitution and worse still, based on a proposal by the president.⁴⁴ This sudden awkward turn of events elicited spectacular resignations from the committee, including prominent Anglophone members. The committee still went ahead and submitted a draft to the president who then tabled it before parliament at the eleventh hour in the course of an extraordinary session in November 1995. The entire negotiations of this revised

⁴¹Fombad CM “Cameroon’s troubled democratic transition and the deconstruction of the federalist problematic” in Columbus F (ed) 3 *Politics & Economics of Africa* (2002) 52. The conference took place between October-November 1991 and was essentially comprised of the President’s appointees and operated within a restricted agenda. Heeding to pressure from the delegates, the conference decided to establish a TCCM. Composed of 7 Francophones and 4 Anglophones, the committee was charged with the duty of formulating the outlines of a “new” constitution.

⁴²As above 53.

⁴³Above.

⁴⁴Above.

constitution only took place within the ruling party, the (CPDM).⁴⁵ This bill was later promulgated into law by the president on 18 January 1996 as “Law No. 06 of 18 January 1996 to amend the constitution of 2 June 1972”.⁴⁶ As was the custom in previous constitution-making processes in Cameroon, the 1996 constitution was actually amended by a handful of political elites who took direct instructions from the president instead of the people of Cameroon. Legitimacy of the constitution is quite contentious because the constitution-making process was not open to popular consultation, participation, or evaluation. Therefore, the outcome could not demonstrate anything more progressive than the pre-1996 highly centralised autocratic state system that vested the president with extensive powers and was reinforced with the creation of an “imperial” presidency, whereby the powers of the legislature and the judiciary were considerably reduced.⁴⁷ Worse still, the architects of the constitution introduced new institutions into the constitution that were devoid of any feasibility of their implementation.⁴⁸

4.2.3 Observations of post-independence constitution-making processes in Cameroon

There are two remarkable characteristics of Cameroon’s constitution-making style. Firstly, the specialist body for constitution-making that is supposed to constitute the popular representation of constituencies is not a sovereign body. This specialist body for constitution-making does not have the final say in terms of what goes into the constitution, irrespective of the kind of specialist body, whether it be the CCC or the TCCM. This body merely acts as a debating forum and its decisions serve as mere recommendations that could be rejected by the president and his government.⁴⁹ Secondly, no CC or Supreme Court is given the mandate to certify the constitution. Normally, after the constitution-making body has produced the draft constitution, a specialised court has the duty to ascertain the constitution’s compliance with pre-determined principles, namely the rule of law and constitutionalism. It is only after the court’s certification process that the constitution can be adopted in parliament or through a referendum, and promulgation follows thereafter. This leaves any observer with the impression that the constitutions lack legitimacy and legality in the instance where parliamentarians of the opposition party boycotted the adoption of the constitution in parliament.

⁴⁵V Ngoh “Biya and the transition to democracy” in J Mbaku & J Takougang (eds) *The Leadership Challenge in Africa: Cameroon under Paul Biya* (2004) 442.

⁴⁶Fombad (2002) 53.

⁴⁷As above 54.

⁴⁸As above 55.

⁴⁹Awasom (2002) 17.

In the various instances of constitution-making in Cameroon, to wit, that of 1960, 1961, 1972, 1996, and 2008, only two instances are worthy of being referred to as constitution-making processes, namely the 1960 and 1996 constitution-making processes. My reason for classifying them as such is prompted by the fact that these two periods represented two significant periods in history and not just domestic transformation. Cameroon's first constitution-making process in 1960 marked the beginning of decolonisation in Africa and elsewhere. Thus there was a need for a new constitution to govern the newly independent polities. Furthermore, 1961 and 1972 were not really constitution-making processes as such, but essentially constitutional amendments to enable the polity shift from a model of a state into a new one. This was the case with the federal state in 1961 and the unitary state in 1972. In the 1990s, another international or historical event known as the Constitutional Right Revolution occurred and was caused by the collapse of the Berlin wall and the end of communism. This eventuality pressured states to amend or abrogate previous constitutions and engage in new constitution-making processes. This revolution is what Huntington⁵⁰ commonly calls the "third wave of democratization". Cameroon's TCCM was primarily mandated to draft a new constitution as a reality of the effect of the "third wave of democratization".

The subsequent outcome of the constitution-making process was therefore inconsistent with the historical realities of the time. The 2008 amendment was simply a subterfuge by the current Biya government, with the selfish intention of eliminating the presidential term limit to give Biya the opportunity to contest another presidential election. The fact that the entire Cameroonian populace went on the rampage after this proposal was made public is evidence of popular disapproval of the proposal or bill. Nevertheless, government went ahead and passed the bill in parliament and it was adopted. The resultant Article from the amendment can only be said to suffer from illegitimacy. If popular sovereignty assumes that all law-making authority ultimately vests in the people themselves⁵¹ and defines the *raison d'être* of the rule of law and constitutionalism, then all Cameroonian constitutions are illegitimate by implication given that the people have never participated in any of the processes.

Popular sovereignty has a dual role in that the people give legitimacy to the constitution through consultation and participation in a constitutional process, and the process and concepts are geared towards the protection and preservation of the people themselves.

⁵⁰S Huntington *The third wave: democratization in the late twentieth century* (1991) 21.

⁵¹Vile J *The constitutional amending process in American political thought* (1992) 14.

4.3 A CRITICAL EXAMINATION OF THE INSTITUTIONAL FRAMEWORK OF THE RULE OF LAW AND CONSTITUTIONALISM IN CAMEROON

The importance of the evaluation of the constitution so built is informed by the need to ascertain the degree of observance of the rule of law and constitutionalism in Cameroon in light of the separation of powers, the CC, the Bill of Rights, judicial review, special national institutions, and civil society (political parties and NGO's). It can be argued that civil society in Cameroon is generally weak because most Cameroonians have to depend on government for their survival or for their independence. Put differently, political parties are often co-opted by government to work in their favour, or to serve as their allies in parliament for the purpose of achieving a crushing majority threshold. The National Union for Democracy and Progress (NUDP or UNDP) emerged as the major opposition party after the 1992 parliamentary elections with 68 seats; the UPC, Cameroon's oldest political party obtained 18 seats; the Mouvement pour la Défense de la République (MDR) obtained only 6 seats; and the ruling Cameroon's People Democratic Union (CPDM) won 78 seats. However, through political manipulation, the CPDM incorporated the UPC and MDR and the break-away faction of the NUDP/UNDP into the government.⁵² This kind of union can give the ruling party a super majority in parliament and empower government to make policies unfriendly to the Cameroonian citizenry. Trade unions are not independent and academic interest groups have been weakened since the new rising Cameroonian trend of "politicians by decree".⁵³ "Organic intellectuals"⁵⁴ and civil administrators are appointed to senior positions in government by the president in order to silence their voices, especially in instances where they are outspoken or radical.

4.3.1 The separation of powers in Cameroon: Independent powers or an 'imperial and absolutist presidency'?

⁵²J Forje "Building a vibrant state-civil society in Cameroon, facing the challenges of the new millennium" (1999) Bulletin de L'APAD <http://apad.revues.org/461>

⁵³D Eyoh *Ethnicity and democracy in Africa* in B Berman in D Eyoh & V Kymlicka (eds) (2004) 100.

⁵⁴I call them organic intellectuals because their intellectualism is not aligned with the activities they render to government. Once appointed as ministers, they abandon their radical stance against government autocracy, arbitrariness, and corruption, and rather adopt government's own project that consists in expanding their own wealth at the expense of the masses. This is certainly not the role of an intellectual in fledgling democracies such as those in Africa. Their roles should be to serve as torch bearers by taking the side of the people and pointing out to them what wrong government is doing, since it's assumed that close to three quarters of Africa's population is predominantly illiterate.

Separation of powers is clearly entrenched in the Cameroon's 1996 Constitution.⁵⁵ In this section, the various post-colonial constitutions are analysed with the hope of demonstrating that the passage of French colonial ideology through the various Cameroonian constitutions, including that of 1996, has turned the chief executive into an imperial president who for all intents and purposes, has no restraint on the use of power.

In the first part of this section, the regime of government adopted by the present constitution or the model of separation of powers in Cameroon under the 1996 Constitution is defined, then other powers related to separation of powers in Cameroon and the degree of power the president exercises is examined, and lastly the accountability of the president and whether or not it promotes the rule of law and constitutionalism is discussed.

4.3.1.1 Semi-presidentialism and presidential powers in Cameroon.

The position of a prime minister was first introduced in the Cameroon Constitution of 1960⁵⁶ thus making it a semi-presidential regime. This constitution took its cue from the French Constitution of 1958 and replicated 48 Articles from the French Constitution verbatim,⁵⁷ out of a total of 52 Articles contained in the 1960 constitution. The point of divergence between the French semi-presidential regime, which is an ideal in this regard, and that of Cameroon is that while under the French Fifth Republic the president is established with significant executive powers and coordinates, the integrity and subsistence of the state and significant power to execute the law is vested in a prime minister.⁵⁸ In the case of Cameroon, the Constitution of 1960 simply says that the president appoints the prime minister and dismisses him,⁵⁹ and that the prime minister proposes other members of government to be appointed.⁶⁰ This state of events suggests a relationship of delegation of powers between president and prime minister in the case of Cameroon prime minister as opposed to autonomy in the case of French semi-presidentialism.⁶¹

⁵⁵ Art 37 (2) Cons of 1996. The previous constitutions starting from 1960 right up to 1972 did not entrench separation of powers since the judiciary was not considered a 'power', but an 'authority' under the executive power.

⁵⁶ Art 14 Cons of Cameroon 1960

⁵⁷ Awasom (2002) 24.

⁵⁸ Etonga in Kofele-Kale (1980) 135.

⁵⁹ Art 14 Cons of Cameroon 1960

⁶⁰ Art 14 (1) *Ibid.*

⁶¹ K McQuire "President prime minister relations, party systems, and democratic stability in semi-presidential regimes: Comparing the French and Russian models" (2012) 47 *Texas International Law Journal* 439. The Prime-minister is accountable solely to parliament and not to the president. When the president and the prime minister are cohabiting, the powers of the prime minister increase. In Cameroon, the prime minister is accountable to both

The Constitution of 1961 converted the state into a federal state and a monocephalous executive.⁶² In 1972 the state was again reconverted into a unitary state, and the post of prime minister was reintroduced under the same terms as in 1960.⁶³

The present Constitution of 1996 also follows the same trend.⁶⁴ A study of the semi-presidentialist system in Cameroon reveals that compared to other ideal jurisdictions of semi-presidentialism in the world such as France and Russia, Cameroon is more of an apparent semi-presidential regime than a real one, and is more aligned to presidentialism than it professes to be. For instance, one peculiarity about the French semi-presidential system is that even though the president can appoint and dismiss the prime minister,⁶⁵ the president and the prime minister may not be members of the same political party, and during this period of cohabitation the president is unable to dismiss the prime minister. This void actually fosters democratic stability within the system.⁶⁶ This serves as a check and balance of power between the president and prime minister, and as a result curbs the stalemate of monopoly of power. This degree of cohabitation and autonomy in France is in opposition to what occurs in Cameroon, where the prime minister must come from the president's party, and must, of necessity, be subordinate to him.

The observation above depicts Cameroon as more of a hyper presidential regime than the semi-presidential regime it apparently incarnates.⁶⁷ In other words, the absolute presidential semi-presidential regime of Cameroon makes a mockery of the *raison d'être* of such a system, which exists for the purpose of enhancing the separation of powers and to avoid the over-concentration of powers in the hands of a single executive instead of being diffused in the hands of executive members. It follows that the real essence for a semi-presidential system lies in the desire to curb the omnipotence of parliament or that of the president. This explains why a semi-presidential regime is composed of both features of presidential and parliamentary systems and not just a

president and parliament. Therefore, the Cameroonian prime minister is weak to serve as a check to presidential power. The appointment of Jacques Chirac by François Mitterrand in 1986 marked the first period of cohabitation under the Fifth French Republic. His appointment could be attributed more to the satisfaction of parliamentary majority than the need to complement Mitterrand's own party.

⁶²M Togne 'La revision de la constitution du 18 Janvier 1996' (2013) 6. http://www.googl...kgf2mj2_EKNX2qQ See also J Juergensmeyer "African presidentialism: A comparison of the 'executive' under the constitutions of the federation of Nigeria, the federal republics of Congo and Cameroon, and the republics of Ghana, Chad, Congo and the Entente" (1964) 8 *Journal of African Law* 171.

⁶³Art 8 Cons of Cameroon of 1972.

⁶⁴Art 10 Cons of Cameroon of 1996.

⁶⁵Art 8 Cons of the Fifth French Rep. However, it must be noted that even though the president's dismissal of the prime minister is not formal, the constitution does not prevent the president from putting pressure to bear on the prime minister to tender the resignation of his government. (McQuire (2012) fn 111 at 440).

⁶⁶As above 439.

⁶⁷S Choudhry & R Stacey "Semi-presidentialism as a form of government: Lessons for Tunisia" (2013) The Center for Constitutional Transitions at NYU Law 1.

single regime.⁶⁸ A single regime would naturally become powerful. In the case of Cameroon where the prime minister is responsible before both the president and parliament, known as president-parliamentary regime,⁶⁹ separation of powers is not effective because the prime minister is weak. Under a normal functioning semi-presidential regime, the president controls the prime minister and the prime-minster also controls the president when there is cohabitation.⁷⁰ However, in Cameroon such a control is not evident, and the president may become too powerful to establish a culture of personal rule and neopatrimonialism.⁷¹ This would become dangerous since the president could capture all power apparatus and autocracy, and absolutism and arbitrariness would be the outcome, negating the rule of law and constitutionalism in Cameroon.

A. Presidentialism and the degree of presidential powers

The present presidential powers in Cameroon grew out of the Constitution of 1960. This constitution was modelled on the Fifth French Republic Constitution's booklet. Out of the 52 Articles of the 1960 Constitution, 48 were copied directly from the French Constitution. It is reiterated that the first independence president, Ahmadou Ahidjo, wanted the Legislative Assembly to grant him exceptional powers to draft a new constitution for the territory.⁷² The request for emergency powers originated from Charles De Gaulle who requested emergency powers from the French parliament during a period when the security of the state was threatened. An overwhelming majority of deputies at the Legislative Assembly endorsed the granting of emergency powers to Ahidjo for a specific period of time, and most especially to supervise the drafting of a constitution.⁷³ Ahidjo took advantage of legislative and executive powers in a state devoid of institutions, and made a souvenir for himself by suggesting an enigmatic constitutional design for Cameroon during such a historic period. It will be recalled that the Fifth French Republic's Constitution was drawn up at a time when France was confronted with overwhelming political crises, as previously mentioned. In order to address the situation, De Gaulle asked for emergency powers from the parliament, and drew a constitution that attributed unbelievable

⁶⁸As above 4.

⁶⁹As above 7.

⁷⁰McQuire (2012) 439.

⁷¹M Bratton & N Van de Walle, "Neopatrimonial Regimes and Political Transitions in Africa" (1994) 46(4) *World Politics* 453.

⁷²Awasom (2002) 12.

⁷³Above.

presidential powers to him to put an end to the political instability. Generally these unrestrained presidential powers in France are known as *raison d'état*.⁷⁴ Therefore, Cameroon was bequeathed this legacy, given that the 1960 Constitution had reproduced 48 Articles from this constitution and the constitutional engineer ensured that all liberal and democratic provisions were reviewed and replaced with authoritarian and anti-democratic ones.⁷⁵ These repressive laws served as the genesis of the authoritarian machinery introduced by Ahidjo into Cameroon. It is quite unbelievable to know that the emergency legislation had not been repealed by 1982 when Ahidjo's tenure ended.⁷⁶ The regime equally survived Paul Biya's tenure and was only repealed almost 10 years later in 1991.⁷⁷ The 1960 Constitution therefore laid the foundation for sweeping presidential powers since the spirit of the 1960 Constitution ran through the 1961, 1972, and 1996 constitutions uninterrupted.

i. Presidential control of government, administrative services and others

The constitutions of 1960, 1972 and 1996 all provide for the president to appoint a prime minister on whose proposal a cabinet shall be formed.⁷⁸ The prime minister being the head of government does not really have any independent powers of his own, but only delegated powers from the president to carry out a governmental plan also delegated to him.⁷⁹ The wording of Article 10 (3) clearly suggests that the prime minister has no autonomy to control any governmental plan on his own since he is delegated with the same authority as any other member of government to whom the president gives that privilege. Thus, the president's powers extend to the control of government and the civil service. The president defines the nation's policy⁸⁰ and the prime minister and his government, who are responsible before the national assembly, can only direct the action of that policy.⁸¹ The president must stand in for the state in all domains of public life in

⁷⁴Otherwise known as "reason of state" is a concept developed by Cicéron that suggests that a state can legally justify its reason for violating the law if the survival of the legal order itself is in jeopardy (<http://forum.wordreference.com/showthread.php?t=1427283> accessed 28/01/2015).

⁷⁵Awasom (2002) 24.

⁷⁶As above 10.

⁷⁷Above.

⁷⁸Cameroon constitutions 1960-art 14 & 14 (1), 1972-art 8, 1996-art 10 (1).

⁷⁹Art 10 (1) & (2) of the Constitution of Cameroon, 1996.

⁸⁰Art 11 above.

⁸¹Art 12 (1) above.

Cameroon.⁸² The president must represent national unity. He is obliged to ensure respect for the Constitution and through his arbitration he should ensure the proper functioning of public authorities, and will equally serve as the guarantor of the independence of the nation.⁸³ In fact, the prime minister and his government really have no independent task to accomplish but are solely dependent on the president for their survival. Article 10 of the Constitution of 1996 has actually rendered the prime minister and his government subordinate to the president and their role is more one of compliance with a specific model, in this case, that of France, but unlike the French prime minister, it does not give the Cameroonian prime minister and his government the power to implement government's plan of action.⁸⁴ To show the extent to which the Cameroonian president has been rendered despotic by the constitution, one can examine presidential consultations with cabinet that are for most part rather individual consultations with ministers and rare cabinet meetings.⁸⁵ This nature of consultation fails to accomplish the *raison d'être* for the consultation, which is to fetter any attempt to assume arbitrary or authoritative powers.⁸⁶ It follows that the constitution's failure to address the issue of the president being subjected to cabinet advice and guidance or criticism is a clear breakdown in the rule of law and constitutionalism in Cameroon.⁸⁷

The president also controls the civil service by setting up and organising the administrative service of the state.⁸⁸ He makes appointments to the civil and military posts of the state⁸⁹ and equally accredits ambassadors and other diplomatic missions⁹⁰ and serves as the head of the armed forces.⁹¹ As noted earlier, such amount of power vested in the hands of an individual could be a recipe for tyranny and neopatrimonial rule.⁹² The president controls both the government and administrative services and renders all of these services subservient to him. Certainly the constitutional attribution of such sweeping powers leads to disregard for the rule of law and is in conflict with the requirements of constitutionalism, because the powers of the president are too far-reaching since he appoints almost everyone and has the power to dismiss them at will,

⁸²Art 8 (1) above.

⁸³Art 5 (2)

⁸⁴Art 21 of the constitution of the Fifth French Republic. The French prime minister has the power to ensure the implementation of laws, and by virtue of Art 13 he also exercises the power to make regulations amongst other functions.

⁸⁵Etonga in Kofele-Kale (ed) (1980) 136.

⁸⁶Above.

⁸⁷Above.

⁸⁸Art 8 (9) Cameroon Cons of 1996.

⁸⁹Art 8 (10) above.

⁹⁰Art 8 (4) above.

⁹¹Art 8 (2) above.

⁹²Bratton & Van de Walle (1994) 453.

including members of the judiciary.⁹³ The lack of security of tenure in the civil service will certainly influence those have been appointed to such positions to maintain good relationships with president so that he will maintain them. Such an attitude breeds disregard for the rule of law since the appointee might simply commit unethical acts if they maintain the president's favour. Bayart puts it thus: "the mouth which eats does not speak"⁹⁴ and "goats eat where they are tethered."⁹⁵ Additionally, the president has the discretion to implement provisions for the de-concentration of powers; he decides when the local authorities will be functional, determines their powers, and has the discretion to dissolve local authorities and dismiss its officials.⁹⁶ One thing is certain, if the whole government and civil service cannot check the president by virtue of his neopatrimonial rule, then the president is left with untrammelled powers since he is no longer restrained by any institution or organ. In such a situation, the rule of law and constitutionalism will be set aside in preference for the "rule of president".⁹⁷ Indeed, the Cameroonian Constitution gives more attention to presidentialism than to constitutionalism.

Under the civil service, neopatrimonialism is quite common and this could infringe on the rule of law, especially when police officers who are subservient to the executive have to execute court orders. Section 11 of the Cameroonian Penal Code requires the police to assist bailiffs and process servers in the enforcement of court judgments. However, where the court judgment requires them to execute any judgment against the executive or other senior police colleagues, it should not be carried out by the junior police officer or any other police officer for the following reasons: Firstly, according to Article 3 (1) of Presidential Decree No 2001/065 of March 2001 on the Special Status of Civil Servants in the service of National Security, the police are subordinate to the president of the republic, who is their commander in chief.⁹⁸ The president is in charge of their appointment promotion, controls and disciplines through the Delegate General of Police, and therefore their survival on the job depends on these two executive officials, thereby significantly compromising the discharge of their duties.⁹⁹

⁹³J Mbaku "The separation of powers, constitutionalism and governance in Africa: The case of modern Cameroon" http://works.bepress.com/john_mbaku/7 (2013) (accessed on 25/01/2015) 43.

⁹⁴J-F Bayart *The state in Africa: The politics of the belly* (2009) 188.

⁹⁵As above 235.

⁹⁶Fombad "Cameroon introductory notes" (2013) 8.

⁹⁷I refer to the rule of president here as an estranged version of the rule of law. It is no longer the law ruling but the president and his volition.

⁹⁸E Eban "Criminal liability of the police in Cameroon: Prospects and challenges" (2012) 5 *African Journal of Criminology and Justice Studies* 141.

⁹⁹Above.

The police officers will almost always try to take sides with the executive in tasks they carry out in order to secure their jobs.¹⁰⁰ By implication, the mandate of the Cameroonian police, which is to safeguard the political system, has been substituted with that of protecting a specific privileged class.¹⁰¹ The Cameroonian minister of justice decides which cases are to be prosecuted and which ones are not to be prosecuted.¹⁰² This subordination of a public service to the executive encourages flagrant violations of the rule of law and constitutionalism in Cameroon, as shown in the Chi Daniel case.¹⁰³

ii *The President controls the legislature and the legislative initiative*

The sovereignty of parliament can only truly be the sovereignty of the executive when parliament is not independent of the executive.¹⁰⁴ Even though the final executive policy may be legislated into law in order to enhance governmental efficiency and effectiveness, and therefore directing the legislative initiative to the executive, the binding law on the community needs to be independent of the executive.¹⁰⁵ But it must be noted that with regard to the temptations inherent in the possession of power by the executive, it is always advisable that a strong and independent legislature exists to counter against such temptations. However, Lee describes the Cameroonian parliament as “a passive and decorative organ” that serves as a rubber-stamp to executive decisions.¹⁰⁶ The Constitution of 1960 gives the president powers to promulgate laws within fifteen days after being tabled before the president by the president of the national assembly.¹⁰⁷

¹⁰⁰ Above.

¹⁰¹ As above 134. This privileged class being the members of the executive branch and their cohorts. (Highly connected politicians of the ruling party in the central committee and politbureau, etc)

¹⁰² Ministerial Circular No. 11 of 16/4/1962. The minister of justice issued a circular instructing all state prosecutors to refer to the minister in all matters of great importance, such as state security, police and policing, the suppression of subversive activities, and matters involving law officers, including those with status of law officers. Therefore the minister has absolute discretion to decide which matter is fitting for prosecution or not, even when there is overwhelming evidence for prosecution, he may not prosecute if the matter is against executive interest. This is demonstrated in *Peter Baseh & 9 others v. The Commissioner of BMM Bamenda, Aminou Buba Gagere*. The judge had alleged he committed a number of offences but even after several submission against him, he refused to obey a court summons and did not appear in court because the order never came from the minister of justice, and in the end, he was never prosecuted. Another case in point where the police commissioner was not prosecuted was the case of *Chi Daniel Awasum v. Abuengmo John Amuh Appeal No. BCA/7/1997* unreported. (Eban (2012) 134-135).

¹⁰³ Above.

¹⁰⁴ Etonga in Kofele-Kale (ed) (1980) 146.

¹⁰⁵ Above.

¹⁰⁶ Above.

¹⁰⁷ Art 34 of the Cameroon Cons of 1960.

The Federal Constitution of 1961 gives the president powers to initiate legislation¹⁰⁸ and powers to promulgate laws enacted by the Federal national assembly.¹⁰⁹ Furthermore, the Constitution of the United Republic of Cameroon of 1972 authorises the president to enact laws, and¹¹⁰ exercise statutory authority.¹¹¹ The national assembly may equally empower the president of the republic to legislate through ordinances for a short period and for specific purposes,¹¹² and the president of the republic shall promulgate laws passed within fifteen days within a specific period.¹¹³ Finally, in the Constitution of 1996, the power to legislate is vested in the president of the republic in the various articles: the president of the republic shall enact laws as stipulated by Article 31;¹¹⁴ the president shall exercise statutory authority;¹¹⁵ matters not reserved to the legislative power shall be left under the jurisdiction of the authority empowered to deal with rules and regulations;¹¹⁶ parliament may empower the president of the republic to legislate by means of ordinances for just a limited period of time and for specific purposes;¹¹⁷ and the president of the republic shall promulgate laws passed by parliament within fifteen days from the day he received the laws from parliament.¹¹⁸

a. Legislative power

The various Cameroonian constitutions have demonstrated the controversial manner of operation of the constitution through the manner in which national sovereignty is exercised. Article 2 (1) of both the Constitution of 1972 and the present one of 1996 are to the effect that no one person can arrogate national sovereignty to himself. However, Etonga notes that the sovereignty of parliament demands that parliament should have exclusive rights over the exclusive authority to legislate, and that no additional body can legislate except by parliament's authority and with its consent.¹¹⁹

¹⁰⁸ Art 23 of the Cameroon Cons of 1961.

¹⁰⁹ Art 31 of the Cameroon Cons of 1961.

¹¹⁰ Art 9 (8) of the Cameroon Cons of 1972.

¹¹¹ Art 9 (9), above.

¹¹² Art 21, above.

¹¹³ Art 29, above.

¹¹⁴ Art 8 (5) of the Cameroon Cons of 1996.

¹¹⁵ Art 8 (8), above.

¹¹⁶ Art 27, above.

¹¹⁷ Art 28 (1), above.

¹¹⁸ Art 31 (1), above.

¹¹⁹ Etonga in Kofele-Kale (ed) (1980) 147.

The Cameroonian president has inherent law-making powers as evidenced by Article 8 (8),¹²⁰ which states that the president shall exercise statutory authority. The generally accepted principle of administrative law is that the administration is vested with inherent authority to enact rules and regulations possessing the force of law. Thus, this administrative principle has simply been reinforced by a constitutional provision, making the president a law-making power.¹²¹ One explanation for attributing certain legislative powers to the president, and therefore dismissing the argument that the legislative power is a sole repository of the legislative power, is grounded in the question of transitional legislation after a new constitution has been adopted.¹²² A new constitution elicits the adaptation of existing laws to the new constitution. In order to easily achieve this endeavour, in Cameroon it is considered convenient to grant this power to the president, given that by the very nature of such adaptations, they are often broad and require the entire body of existing laws.¹²³

Furthermore, the president has the powers to dissolve parliament. The constitution gives the president powers to dissolve parliament under given circumstances.¹²⁴ The wording of this article empowers the president to use his discretion to dissolve parliament according to his own volition.¹²⁵ Article 15 (4) empowers the president of the republic to request the national assembly, by law, in a situation of “serious crises” to prolong or simply curtail its term of office. In the case where the term of office is curtailed, it could be equated to dissolution but for the fact that the conditions for meeting this threshold are a bit more demanding.¹²⁶

Fombad argues that the failure to delineate what ‘serious crises’ means in addition to this Article giving room for the president to use his discretion in certain circumstances to dissolve the national assembly makes leeway for abuse of the mechanism.¹²⁷ He argues further that even though the mechanism of dissolving the national assembly by the president of the republic may be at odds with the basic tenets of representative democracy, it functions in this manner in the French

¹²⁰Constitution of 1996.

¹²¹Etonga in Kofele-Kale (ed) (1980) 148.

¹²²As above 149.

¹²³Above.

¹²⁴Art 8 (12) says the president of the Republic may, if necessary and after consultation with the government, the bureau of the national assembly, and senate, dissolve the national assembly. The election of a new assembly shall take place in accordance with the provisions of Art 15 (4).

¹²⁵Fombad (2012) 126.

¹²⁶Above.

¹²⁷Above.

constitutional system, which model Cameroon has adopted. Where the president loses his majority in parliament, this mechanism can be used as a means to regain parliamentary majority.¹²⁸ In Africa, Mamadou Tanja of Niger could not achieve the parliamentary majority in 2009 that would allow him to amend the constitution in order to run for a third term as president of the Republic of Niger. As a result, he decided to dissolve parliament in order to regain majority in parliament.¹²⁹

Lastly, the president of the republic is not accountable for acts he committed while in office even after he leaves office, and he cannot be impeached by parliament because the ruling party has a crushing majority of 152 out of 180 parliamentarians in parliament.¹³⁰ Article 53 (3) has made a mockery of the rule of law and constitutionalism in Cameroon. First, Article 53 (1) starts by enumerating the crimes that will render the president liable for prosecution, which include crimes under Articles 10 and 12.¹³¹ Article 53 (2) outlines the circumstances under which, and who are competent to indict the president.¹³² As if the president of the republic were no longer the person spoken of in Article 53 (1) & (2), Article 53 (3) then says that acts committed by the president of the republic in pursuance of Articles 5, 8, 9, and 10 above, shall be covered by immunity and he shall not be accountable for them after the exercise of his functions. If the president cannot be prosecuted for any reason whatsoever, then the president is above the law, and this negates both the rule of law and constitutionalism in that, firstly, the law means nothing to the president and he can flout the law as he pleases and no punitive measures will ensue against him; and secondly, it means the powers attributed to the president are unconstitutional and in conflict with constitutionalism since the latter aims at reducing the powers of the president to render him/her responsible and accountable to the people.

Another main issue is that the so called High Court of Justice is sham. This court was only constituted for the purpose of distracting attention from the president and his excessive powers. In reality, this court does not exist anywhere in Cameroon.¹³³ So the constitutional engineer knew

¹²⁸ Above.

¹²⁹ BBC News “Niger leader dissolves parliament” <<http://news.bbc.co.uk/1/hi/world/africa/8067831.stm> UK, 26 May 2009 (accessed 29 January 2015).

¹³⁰ BBC News Africa “Big win for Cameroon’s ruling party” *news.bbc.co.uk/2/hi/Africa/6913281.stm* (accessed 5/02/2015).

¹³¹ Cons of the Republic of Cameroon, 1996.

¹³² Four-fifths majority of the members of the national assembly and the senate.

¹³³ Togne (2013) 29.

that the president would never be prosecuted because this court exists only in the constitution and nowhere else.

Monfon argues that it is out of order and even impossible to speak of high treason against the head of state, a plot against state security by the head of government and his cabinet and other persons in high authority in Cameroon in the absence of a practical High Court of Justice.¹³⁴ In his opinion, a fictitious and invisible institution such as the High Court of Justice is really not supposed to have any place in the Constitution. In other words, the constitution has cloaked the impossibility of prosecuting the President of Cameroon in a constitutional provision that is more nominal in its designed mandate than the reality it can, or seeks to achieve.

Impeachment of the president is an impossibility since the president's ruling party has a crushing majority in parliament and Article 53 (2) provides that only four-fifth of the members of both houses of parliament can actually indict the president for committing any of the acts enumerated in Article 53 (1). This leaves the president a free man since the High Court of Justice cannot prosecute him, and neither can he be impeached by parliament.

b. Legislative Initiative

Even though theoretically every member of parliament can table bills, motions, and questions in parliament quite independent of the executive, the reality is that in practice, matters concerning the raising and expenditure of public funds is mostly initiated by government through the president.¹³⁵ The purpose for allowing the executive the right of initiation of bills is to give them an intimate connection with government, given that good and orderly government requires that those who administer should propose national expenditures and how the money needed can be raised.¹³⁶ Additionally, a lot of matters for parliament's consideration arise out of the administration of the departments and other state institutions, and only someone concerned with

¹³⁴Above.

¹³⁵Etonga in Kofele-Kale (ed) (1980) 150.

¹³⁶Above.

the management of such matters or who has expertise in such matter can address them. This explains the reason why government, through the president, is best suited to initiate such bills.¹³⁷

Etonga argues that the person or institution initiating the bill in parliament is immaterial. What should be focused on is whether or not the institution charged with the responsibility of scrutinising the bill discharged functions properly. Unfortunately, in discharging this duty, the Cameroonian National Assembly has vividly demonstrated its lack of effectiveness and lack of independence as an institution created to be independent.¹³⁸

Article 63 (1)¹³⁹ states that amendments to the constitution may be proposed by the president of the republic or by parliament. However, the wording of Articles 63 (2) and (3) makes the rules more stringent for parliament to be able to comply with for the purposes of amendments.¹⁴⁰ Conclusively, the president of the republic is left to almost be the exclusive authority capable of initiating bills in parliament. As Niccolo Machiavelli opines:

Even wise men find it difficult to persuade others of the need for alterations, while leaders capable of initiating major changes may be uninterested in the public good.¹⁴¹

This view could be judged in light of two recently passed bills in the Cameroon National Assembly, namely the 2008 bill to amend specific portions of the 1996 Constitution and the 2014 Bill on Terrorism.

Given that Article 63 (2) and (3) have made it difficult, if not impossible, for any private bills to be initiated in parliament, the president, who solely has the option to initiate bills in parliament, has more often than not used this right or opportunity to legitimate his ulterior plans that have no public good interest as pointed out by Machiavelli. For instance, President Biya made an illegitimate and unconstitutional amendment to the constitution in 2008 to permit himself another presidential term in 2011. This was not well received by the citizenry who responded with

¹³⁷As above 151.

¹³⁸Above.

¹³⁹Cons of the Republic of Cameroon 1996.

¹⁴⁰Article 63 (2) any proposed amendment made by a Member of parliament shall be signed by at least one-third of the members of either House. And 63 (3) parliament shall meet in congress when called upon to examine a draft or proposed amendment. The amendment shall be adopted by an absolute majority of the Members of parliament. The president of the republic may request a second reading; in which case the amendment shall be adopted by a two-third majority of the Members of parliament.

¹⁴¹Vile (1992) 6.

disapproval and sporadic protests in February 2008.¹⁴² Indeed, Article 63 (1) of the constitution gives the president powers to propose amendments to the constitution. Relying on this article, Biya introduced the 2008 amendment to the Constitution to manipulate another term of office for himself.¹⁴³ The most controversial part of the 2008 amendment is that Article 6 (2) appoints him president for life and grants him immunity from prosecution for acts committed during his mandate as president.¹⁴⁴ The content of the amendment caused the anger of aggrieved Cameroonians to spill over and they went on the rampage in 2008.¹⁴⁵

Moreover, with respect to the recent unrest orchestrated in Cameroon by the Nigerian Islamist militia group, Boko Haram, government has taken cover behind this unfortunate eventuality to initiate a bill in parliament that appears to purge incursions related to the Islamist militia, while in reality the bill seriously threatens and compromises civil liberties and fundamental rights, and the death penalty and marshal law have resurfaced in Cameroon. The draft law stipulates that the judgment of culprits must take place in military courts. This decision is in conflict with the tenor of *Ex parte Milligan*¹⁴⁶ where the majority denied the authorisation for a military court to try civilians whether by congress or the president, unless civil courts have ceased to exist by virtue of the existence of an armed conflict.¹⁴⁷ This draft law on anti-terrorism has alarmed all sections of Cameroonian society including civil society, trade unions, church ministers, political actors, and even interest groups who have criticised the law.

Any person who carries out activities that can incite popular revolt or cause any interruption of the usual functioning of the country is intimidated by the draft law that threatens the death penalty.¹⁴⁸ One political leader, the lone female leader in Cameroon aired her views regarding this draft law as follows:

¹⁴²Musa T “Cameroon activists say riots kill more than 100”, <http://www.reuters.com/article/worldnews/idUSL0521513220080305?pageNumber=2&virtualBrandChannel=0> (accessed 17/02/2015).

¹⁴³African Press International “daily online news channel” <http://africanpress.wordpress.com/2008/02/24/crackdown-in-cameroon-constitution-amendment-opposed>(accessed 10/05/2013) .

¹⁴⁴The Constitution of Cameroon, 1996 art 53 (3).

¹⁴⁵Above.

¹⁴⁶1886 in the United States of America.

¹⁴⁷Etonga Kofele-Kale (ed) (1980) 153.

¹⁴⁸N Chimtom Inter Press Service: News Agency “Cameroon’s Anti-Terrorism Law – Reversal of Human Freedoms” (2014) www.ipsnews.net/2014/.../cameroons-anti-terrorism-law-reversal-of-human-freedoms/ (accessed 15/02/2015).

The government is taking us back to the worst days of the most barbaric dictatorship... This law is manifestly against the fundamental liberties and rights of the Cameroonian people... In the guise of fighting terrorism, the government's real intent is to stifle political dissent.

This [anti-terrorism] law is manifestly against the fundamental liberties and rights of the Cameroonian people ... In the guise of fighting terrorism, the government's real intent is to stifle political dissent – KahWallah, leader of the Cameroon's People Party.¹⁴⁹

Another political leader and former minister of cabinet, Maurice Kamto, says that the draft law is merely a response to the recent popular uprisings that took place in Burkina Faso that culminated in the overthrow of the then president, Blaise Compaoré on October 31st 2015, after 27 years in office.¹⁵⁰ In his opinion, the primary aim of the draft law was not to tackle terrorism as it claims to do, but to improvise a bulwark against any future overthrow of his regime through popular uprisings. Thus, this draft law will entrench President Paul Biya's regime against any popular revolt such as that which occurred in Burkina Faso. It is quite clear from the arguments that propose that the legislative powers granted to the President of Cameroon have resulted in the rule of law and constitutionalism being swept under the carpet in favour of furthering the practice of presidentialism. Both the 2008 amendment to the constitution and the 2014 draft law on anti-terrorism reflect the views of a president who desires to rule without any pre-existing laws or out of the law, and has no control or restraint on his powers. This draft law gives the general impression that Cameroon is returning to exercising the draconic law on subversion of 1962.¹⁵¹

c. Presidential powers to decree and the emergency law in Cameroon

Article 20 (1) and (2),¹⁵² Article 15 (1) and (2),¹⁵³ Article 11 (1) and (2)¹⁵⁴ and Article 9 (1) and (2)¹⁵⁵ all address the issue of presidential powers to decree. Article 9 (1) and (2) state that:

(1) The president of the republic may, where the circumstances so warrant, declare by decree a state of emergency, which shall confer upon him such special powers as may be provided for by law.

¹⁴⁹ Above.

¹⁵⁰ Above.

¹⁵¹ Ordinance 62/OF/18 of 12 March 1962 addressing the issue of repression of subversion.

¹⁵² Cons of the Republic of Cameroon, 1960.

¹⁵³ Cons of the Republic of Cameroon, 1961.

¹⁵⁴ Cons of the Republic of Cameroon, 1972.

¹⁵⁵ Cons of the Republic of Cameroon, 1996.

(2) In the event of a serious threat to the nation's territorial integrity or to its existence, its independence or institutions, the president of the republic may declare a state of siege by decree, and take any measures he may deem necessary. He shall inform the nation of his decision by message.

Two outstanding issues in Article 9 are the fact that the president is attributed untrammelled and unreviewable powers under an emergency circumstance, and that the president has discretionary powers, since he can decree a state of siege by decree and “take any measures as he may deem fit.” In other words, the president shall not be subjected to the ruling of the judiciary or any decisions taken by parliament, but shall be the sole arbiter to determine which measures are best suited to the situation at hand. An- Na'im argues that in a constitution that espouses constitutionalism, whether written or traditional, as in the case of the English constitution, the primordial objective must be to emphasise the upholding of the rule of law, enforcing effective limitations on government powers, and the protection of human rights.¹⁵⁶

The present Cameroonian constitution may not have entrenched an unconstitutional provision in this regard, but such a provision may be unconstitutional where it does not clearly stipulate that even after the decree for a state of siege has been passed, the president still has to submit to judicial review and parliamentary audit of the use of power. The constitution fails in this regard since its silence on the duty of the judiciary and parliament simply suggests that presidential powers during a state of emergency are tantamount to a ‘blank check’. Thus, in addition to the president having extensive powers to legislate, as in the past, he can equally rule by decree.¹⁵⁷ Even though this position attracts a rival view based on the jurisprudence of the French case of *Rubin de Servens* it is also enforceable in Cameroon as is evident in the case of *Kouang Guillaume Charles contre Etat du Cameroun jugement N°66 ADD/CS/CA du 31 Mai 1979 on presidential powers in times of emergency*.

Article 53 of the constitution absolves the president for acts in relation to Article 9 of the constitution on the state of siege and Ordinance No. 72/6 of 26 August 1972 on the organisation of Supreme Court which reads:

No court or tribunal is entitled to rule on acts of state.

¹⁵⁶A An-Na'im *African constitutionalism and the role of Islam* (2006) 3.

¹⁵⁷C Fombad “Cameroon’s constitutional conundrum” in *Ethnicity, human rights and constitutionalism in Africa* (2008) 135. Nairobi: The Kenyan Section of the International Commission of Jurists.

However, it is still contestable that a state of emergency in Cameroon must be supervised by parliament and the judiciary at all costs if citizenry human rights are to be safeguarded. Two reasons validate this argument.

Firstly, the conditions that led to the drafting of the constitution of the Fifth French Republic of 1958, which happened as a result of the uprisings in Algeria leading to a war of independence from France, was France's motivation to implement stringent majors against any such future occurrences. This incidence led to the drafting of the Fifth French Constitution of 1958, which was largely written to accommodate the personality and political views of President De Gaulle and in context of the afore mentioned Algerian uprisings and constitutional crises that brought De Gaulle to power.¹⁵⁸ However, the situation in Cameroon at independence and circumstances surrounding the drafting of the Cameroonian independence constitution did not in any way match those that existed in France in 1958¹⁵⁹ and therefore cannot be advanced as a reason to explain why in Cameroon, as in France, the act of declaration of a state of emergency or a state of siege amounts to a category of acts, namely acts of state, which are certainly above the court's competence.

These acts are labelled political acts and as such are vested with political immunity, explaining why judges are not allowed to review them. Secondly, it is true that in France such acts are above any court to rule on due to their political nature, but the French Constitution of 1958 is also careful to institute guarantees against human rights abuses in the event of a state of emergency.¹⁶⁰ This is not the case with Cameroon, where in the process of importing and copying from this French Constitution of 1958, care was taken by the Cameroonian government to eliminate all the liberal and democratic clauses of that constitution and replace the same with authoritarian clauses.¹⁶¹ Given these circumstances examined above, it is clear that if the state of emergency were to be applied in Cameroon in the same way as it is applied in France as per the *Rubin de Servens* case, then the executive would definitely ride roughshod on citizenry human rights in Cameroon as the president is aware that no court has the competence to look into such matters. Furthermore, the *raison d'être* for the emergency law is misconstrued in Cameroon by those who apply it, given that they use it as a solution to target any opposition to the regime.¹⁶²

¹⁵⁸V Le Vine *The Cameroons from mandate to independence* (1964) 227.

¹⁵⁹Above.

¹⁶⁰N Awasum "Politics and constitution-making in Francophone Cameroon, 1959-1960 (2002) 49 *Africa Today* 24

¹⁶¹Above.

¹⁶²Fombad C "Cameroon's emergency powers: A recipe for constitutional dictatorship?" (2004) 10 (2) *East African Journal of Peace & Human Rights* 274-93 at 274.

During most of the period when the emergency law was enforced, there was constant disregard for the rule of law and recurrent human rights violations extending from 1958 when the first state of emergency was implemented until 1992.¹⁶³ However, it should be understood that focus on stress situations will reveal that in confronting certain contemporary threats, the reinforcement of constitutional rights and not their restriction in the search for maximum security would be best poised in a number of circumstances to protect and strengthen democracy.¹⁶⁴ In other words, the state of emergency is not synonymous with discretionary and prerogative powers for the public good without reference to the law, or sometimes even against the law.¹⁶⁵

The duty of the executive to act within the law, even in times of emergency, was reiterated by Justice Day O'Connor, who stated a "state of war is not a blank check for the President" after George Bush had asserted that he had unchecked and unilateral authority to indefinitely lock up any person he declared an "enemy combatant" in the "global war on terrorism".¹⁶⁶

With such a notion of unchecked powers in the minds of the executive, it is challenging to evoke the argument or theory that judges, as exponents of morality, may strike down acts of parliament.¹⁶⁷

Two reasons account for the disregard of the rule of law and constitutionalism in times of a state of emergency in Cameroon. Firstly, the Constitution of Cameroon has emasculated the powers of the legislature and the judiciary and rid them of any influence to judge or evaluate the validity of the declaration of a state of emergency.¹⁶⁸ The process of defining the scope of the emergency control over the constitutionality of laws for judicial review is implemented by a quasi-judicial organ, the constitutional council, before which matters can only be brought by a restricted group of people.¹⁶⁹ These restricted groups of people are even further circuitously reduced to one person, and this person happens to be the same person in whose hands the power to use the emergency law without supervision is granted.¹⁷⁰ It would therefore be illogical to believe that

¹⁶³ Above.

¹⁶⁴ Rosenfeld M "Should constitutional democracies redefine emergencies and the legal regimes suitable for them?" in Sarat A (ed) *Sovereignty, Emergency, Legality* (2010) 240.

¹⁶⁵ Sarat A "Introduction: Toward new conceptions of the relationship of law and sovereignty under conditions of emergency" in Sarat A (ed) *Sovereignty, Emergency, Legality* (2010) 1.

¹⁶⁶ Above.

¹⁶⁷ D Dyzenhaus *The constitution of law: Legality in a time of emergency* (2006) 54.

¹⁶⁸ C Fombad "Cameroon's emergency powers: A recipe for constitutional dictatorship?" (2004) 10 (2) *East African Journal of Peace & Human Rights* 274-93 at 288.

¹⁶⁹ As above 289.

¹⁷⁰ Above.

they will challenge the unethical acts they themselves have committed.¹⁷¹ Secondly, the Cameroonian legal system has been heavily influenced by the French legal system, where two distinct court jurisdictions exist.¹⁷² A jurisdiction of ordinary courts exists and deals with civil and criminal matters, while a separate system exists exclusively for administrative matters¹⁷³ and falls under the jurisdiction of the *conseil d'état*, which is exercised by the administrative bench of the Supreme Court.¹⁷⁴

The Supreme Court itself is far from being an independent body, but one that acts as an agent of the incumbent government in Yaounde.¹⁷⁵ This stratification implies that judicial review cannot be exercised because as it is understood under the doctrine of *voie des faits*, even in the face of blatant administrative excesses, these cannot be subjected to the jurisdiction of the ordinary courts.¹⁷⁶ The independent judiciary is consciously referred to above for the sake of implementing judicial review for the purpose of upholding the rule of law, because between 1959 and 1970 judges had become agents and justifiers of the repressive regime.¹⁷⁷ A state of emergency was used by the first independence President Ahmadu Ahidjo to fight his political opponents when he passed the draconian legislation labelled Ordinance 62/OF/18 of 12 March, 1962, regarding the 'repression of subversion'.¹⁷⁸ He has made it equally evident in laws and decrees since then that judgments passed by tribunals touching on the repression of subversion were not subject to appeal by those condemned.¹⁷⁹ He employed repressive weapons such as *service de documentation* (SEDOC), *Brigades Mixtes Mobiles* (BMM), and *Service de documentation extérieure et de contre-espionnage* (SDECE) to silence opposition.¹⁸⁰

In conclusion, the Constitution of 1996 has clearly set out the instances under which the president can make decrees. Articles 27 and 28 give the president powers to legislate rules and regulations and parliament may also empower him to legislate in its place whenever the need arises. It should be noted that under Article 26, the various matters referring to parliamentary competence have been carefully outlined. This signifies that any other activity or matter not enumerated in Article

¹⁷¹ Above.

¹⁷² Above.

¹⁷³ Above.

¹⁷⁴ M Yanou "The local courts, decentralisation and good governance: The case of the English speaking provinces of Cameroon" (2009) 13 (5) *International Journal of Human Rights* 689-96 at 694.

¹⁷⁵ As above 693.

¹⁷⁶ As above 695.

¹⁷⁷ A Eyinga "Government by state of emergency" in Joseph R *Gaullist Africa: Cameroon under Ahmadu Ahidjo* (1978) 102.

¹⁷⁸ As above 103.

¹⁷⁹ As above 104.

¹⁸⁰ As above 107.

26 falls outside the powers of parliament, and certainly that gap for non-legislated issues under that article is bridged by the president who may legislate by way of decree. The effect of the constitution allowing the president to legislate by way of issuing rules and regulations is evident in Article 27,¹⁸¹ which makes a presidential decree equal to a legislative statute.¹⁸² Even though Article 27 clearly says that matters not reserved to the legislative power shall come under the jurisdiction of the authority empowered to issue rules and regulations, Wakai questions why such matters would be left to the executive, given that under the doctrine of the separation of powers the legislature makes laws, the executive executes, and the judiciary interprets. The authority of the legislature would be temporally assumed or assigned to the executive in a situation where political crises exist in the country. However, Wakai argues that Cameroon has known no political crises since the advent of independence.¹⁸³ Why then would some matters “not reserved to the legislative power” come under the jurisdiction of the executive, which of course issues rules and regulations? What kind of matter does the constitution refer to in this article? The constitution obscures the meaning of what it refers to in this article and this rather easily draws anyone to simply interpret that the executive is being unnecessarily over-empowered, in the absence of any clarity to this article.

Therefore, it can be said that like parliament, the president is comparable to a law-making body. The powers of the Cameroonian president are enormous and cross-cutting. It is clear that the president has imperial powers and these powers create an impasse in the observation and upholding of the rule of law and constitutionalism in Cameroon. With lack of the rule of law and constitutionalism in Cameroon, the result has been the absence of reciprocal controls between the three governmental powers, namely the legislative, executive, and judiciary, and no mutual restraint since the presidency has become an imperial power. In the final analysis, in Cameroon, the chief executive has in practice usurped much of the powers belonging to the other two state organs and left the judiciary marginalised and parliament rationalised.¹⁸⁴

¹⁸¹Cons of the Rep of Cameroon, 1996.

¹⁸²Fombad (2012) 68.

¹⁸³N Wakai *Under the broken scale of justice: The law and my times* (2009) 95.

¹⁸⁴G Bongyu “Democracy in Cameroon during the monolithic period: A contradiction” (2008) 2 *Cameroon Journal on Democracy and Human Rights* 11.

4.3.1.2 Parliament in Cameroon: A rationalised and subordinated legislature

It is difficult to determine whether a legislature such as that of Cameroon enjoys any independence or separation from the executive that can strengthen the rule of law and constitutionalism when the president of the republic is vested¹⁸⁵ with an unreciprocal right to be involved in the legislature's activities by way of ordinances.¹⁸⁶ Where an executive enjoys the legal right to state sovereignty, as attributed to him by Article 28(1), it undeniably poses great danger to the rule of law and democracy in a country.¹⁸⁷ Etonga affirms that for the purpose of effectiveness in government's control of its policy, it should be allowed legislative initiative. Even though he proposes that the policy legislated into law needs to be independent and separated from the executive, this view may not be feasible in Cameroon since the president is imperial and cuts across all three governmental powers. In light of this, it then becomes difficult for a constitution, no matter how entrenched, to counter the temptations of power with respect to the executive, unless an independent legislature exists that can stand against such temptation.¹⁸⁸ This is such a difficult thing to realise in Cameroon because the Cameroonian parliament is passive and exists entirely to rubber-stamp executive decisions,¹⁸⁹ and in Cameroon it is commonly referred to as "Yessi", "house of registration," and "hand clappers".¹⁹⁰ Parliamentary and extra-parliamentary factors explain why the Cameroonian parliament is so weak. Additionally, in presidentialist regimes the executive is generally attributed a lot of importance coupled with vigour, while parliament is relegated to consecrating executive decisions.¹⁹¹

Under such compromised conditions it is difficult for parliament to assume its position as a check to the executive power. This accounts for the reason why out of 505 laws promulgated between 1960 when Cameroon had independence and 1979, only 8 bills were private member bills while more than 497 were government bills.¹⁹² However, it is important that whoever initiates the bills, be it government or others, and no matter how many presidential bills have been promulgated, the bottom line should be thorough examination and discussion of the legislation in the assembly. Unfortunately, in discharging this duty the Cameroonian National Assembly is perceived to be

¹⁸⁵ Art 21, unitary Cons of Cam, 1972 & Art 28(1) Cons of the Rep of Cam, 1996.

¹⁸⁶ Bongyu (2008) 11.

¹⁸⁷ Etonga in Kofele-Kale (ed) (1980) 146.

¹⁸⁸ Above.

¹⁸⁹ Above.

¹⁹⁰ Bongyu (2008) 11.

¹⁹¹ Above.

¹⁹² As above 12.

dependent upon the executive and show no sense of effectiveness.¹⁹³ The ineffectiveness and executive-mindedness of the national assembly or parliament is reflected in the 2008 amendment to the constitution. In approving this revision, the national assembly revised Article 6(2), which maintained the seven-year tenure for the president but removed the two-term limit.¹⁹⁴ At this juncture, one can certainly ask the question, was there no contestation by the opposition parties to the approval of this bill, given that the bill was against the wishes of the people since the ruling party's crushing majority in parliament is merely attributed to a super majority obtained through elections rigging? The simple answer is that Article 47(3)¹⁹⁵ does not make provision for judicial review. It simply provides for *a priori* review that makes no difference in this case. The existence of a constitutional council vested with the powers of judicial review would have been competent to rule over such a dispute and to decide whether to refer back the bill to parliament for the review of the contested portions, or simply declare it unconstitutional if it deemed it necessary in terms of a citizenry human rights threat. The endorsement of the bill clearly depicts parliament as a body incapable of taking independent decisions.

Finally, even though in principle parliament has an edge over the executive in respect of its control over the executive, in reality parliament is simply an extension of the executive with a cabinet minister on parliamentary issues known as the minister delegate at the presidency in charge of relations with the assembly. Article 34(2) gives parliament the power of censure over government, Article 34(3) audits government by way of oral or written questions, and Article 35(1) audits government's activities through committees of inquiry and Article 16(2)(b) on annual approval of government's budget by parliament.¹⁹⁶ Notwithstanding the parliamentary powers as examined above, in the Cameroon parliament is dominated by the Cameroon People's Democratic Party (CPDM), which is the ruling party and the party of the chief executive and his cabinet.¹⁹⁷ Therefore, the enactment of laws is basically a ritual since the executive is in firm control.¹⁹⁸ How reliable then is the separation of powers in Cameroon? Is the judiciary any different from parliament?

¹⁹³ Etonga in Kofele-Kale (ed) (1980) 151.

¹⁹⁴ Fombad "Cameroon introductory notes" (2013) 14.

¹⁹⁵ Cons of the Rep of Cam, 1996.

¹⁹⁶ Above 17.

¹⁹⁷ The CPDM won 153 seats in parliament out of 180 in the 2007 legislative elections.

¹⁹⁸ Fombad "Cameroon introductory notes" (2013) 17.

4.3.1.3 A marginalised judiciary: The independence of the Cameroonian judiciary as a mere political slogan

This section examines the Cameroonian judiciary and its independence vis-à-vis the other two branches of government, and most especially the executive. For the purpose of clearly understanding the Cameroonian judiciary the following ancillary issues are addressed: the role of judges in the independence of the judiciary; safeguards to ensure independence, such as appointments, advancement, discipline, transfers; the Higher Judicial Council (HJC) as a toothless bulldog; judicial immunity; the judiciary as a branch of government service; and judicial power as a tool in the hands of the executive.

Since Cameroon's independence in 1960 until 1996 when the current constitution was amended, none of the Cameroonian constitutions have recognised the judiciary as a power. The unitary constitution of 1972 recognised the judiciary as an authority and not a power, and its independence was to be assured by the president of the republic.¹⁹⁹ The president of the republic, being a member of the executive branch, simply means that the judiciary was an authority under the executive power. However, in 1996, with the promulgation of the 1996 Constitution amending the 1972 Constitution, the judiciary was recognised as the "judicial power" in principle.²⁰⁰ Article 37(2) states that the judicial power should be independent of the executive and legislative powers. Article 37(3) says that the president of the republic should guarantee the independence of judicial power. He should appoint members of the bench and of the legal department. Ewang, Bongyu, and Buhnuy argue that politicians whose positions are constantly threatened by judicial impartiality cannot honourably uphold such impartiality.²⁰¹ They imply that the president of the Republic of Cameroon, who is a politician, cannot appropriately ensure the independence of the judiciary as Article 37(3) of the constitution requires.

He should be assisted in this task by the HJC, which should give him its opinion on all nominations for the bench, and on disciplinary action against judicial and legal officers. The

¹⁹⁹Cons of the United Rep. of Cam 1972 art 31(1). Part Five of this Constitution of 1972 spoke of the judiciary and not judicial power.

²⁰⁰Constitution of the Republic of Cameroon, 1996 part v. art 37(2) says judicial power shall be exercised by the Supreme Court, courts of appeal, and tribunals.

²⁰¹A Ewang G Bongyu J Buhnuy "The judiciary as the last hope for the protection of democracy and human rights in Cameroon" (2009) 3 *Cameroon Journal of Democracy and Human Rights* 37.

organisation and functioning of the HJC should be defined by law. This provision makes the independence of the Cameroonian judiciary controversial in two ways: first, making the head of the executive a politician, to guarantee the independence of the judiciary, makes the independence of the judiciary questionable and leaves much to be desired in terms of whether or not this can be realised; and secondly, the so-called HJC, which is charged with the duty of assisting the president in the task of the independence of the judiciary, is presided over by the president of the republic himself.²⁰² Even though Article 37(3) says the HJC shall give the president its opinion on all nominations for the bench and disciplinary action against the judicial and legal officers, in reality, due to the president's enormous powers, he may appoint, dismiss and transfer these judges²⁰³ at will, without consulting or seeking the opinion of the HJC, since all the members of the HJC are under his patronage.²⁰⁴ It is unclear then how the independence of the judiciary can be guaranteed by the Cameroonian president. Consequently, there is sufficient reason to conclude that the independence of the Cameroonian judiciary is a travesty. How can judicial power be conventionally accepted as being truly independent? The constitution, laws, and policies of a country should not only encourage the independence of the judiciary through entrenched provisions, but must ensure that such a justice system is truly independent from the other two state powers.²⁰⁵ The independence of the judiciary involves two tenets: judicial power must exist as a power separate from and independent of executive and legislative power; and judicial power should be exercised by the judiciary and must be composed of members separate from and independent of those of the members who compose the executive and legislative powers.²⁰⁶

The independence of the judiciary does not only warrant a negative duty where the executive and legislature stay away from judicial power, but it also imposes a positive duty where the executive

²⁰²Governed by law No. 82-14 of 26 November 1982. The HJC that is composed of (i) a minister of justice or representative who is appointed by the president of the republic and acts as the vice chairman; three members of parliament chosen by the national assembly by secret ballot; one person chosen by virtue of his knowledge by the president of the republic, and such a person must not be a member of parliament, member of judiciary or an auxiliary officer of justice; and three judges chosen by the full bench of the Supreme Court. Fombad (2012) 176-177.

²⁰³Mbaku (2004) 5.

²⁰⁴Bratton & Van de Walle (1994) 453 and Cons of the Rep of Cam 1996, art 8(2).

²⁰⁵M Ndulo "Judicial reform, constitutionalism and the rule of law in Zambia: From a justice system to a just system" (2011) 2 *Zambia Social Science Journal* 6.

²⁰⁶Above. This principle of the independence of the judiciary was emphasised in the South African case of *S v. Mamabolo*.²⁰⁶ Justice Kriegler stated:

"In our constitutional order the judiciary is an independent pillar of the state, constitutionally mandated to exercise the judicial authority of the state fearlessly and impartially under the doctrine of the separation of powers. It stands on an equal footing with the executive and legislature as pillars of the state."

has to support the independence of the judiciary, but not to overpower it.²⁰⁷ In order to properly understand the independence of the Cameroonian judiciary, the following issues will be addresses:

A. Judges in Cameroon

I. Appointment procedure

Article 37(3) of the Cameroonian Constitution provides that judicial appointments shall be made by the head of state. However, the HJC's opinion is taken into consideration.²⁰⁸ There is the provision of lawyers to be appointed as judges in Cameroon, but in practice it is rare because the lawyers feel they have a greater degree of independence than the judiciary, and secondly those who earn well at the bar are not interested in these appointments. Thus, judges are promoted in respect to their promotion and it has become commonplace to classify judges from court to court.²⁰⁹ First-scale appointments comprise magistrates and state counsels or deputy state counsels of the magistrate's court and high court.²¹⁰ Finally, no judicial officer maybe appointed as a substantive holder of a post as president of the court, this stipulation seeks to avoid them having control over a judicial officer senior to them in the promotion list.²¹¹

²⁰⁷ In another South African case *The Executive Council of Western Cape Legislature and Others v. President of South Africa and Others*, the CC challenged legislation that purported to confer powers upon the president to legislate, and by virtue of which President Mandela legislated by proclamations. An application was filed against the legislature to empower the president to legislate, and also challenged the extent of the purported powers to be inconsistent with the constitution. The CC held that legislation enactment was the function of parliament and thus beyond presidential powers, notwithstanding the fact that all political parties in the country upheld presidential competence in the act he carried out. President Mandela immediately publicly declared that by signing the proclamation into law, he was convinced he was vested with the powers to do so, but he however respected the court's decision and urged anyone concerned to do same. This South African jurisprudence is in stark contrast with the situation in Cameroon where the constitution outrightly empowers the president to legislate.

²⁰⁸ Above art 37.

²⁰⁹ C Anyangwe *The magistracy and the bar in Cameroon* (1989) 38. This of course is not conducive for the independence of the judges who might seek to render favourable judgments in matters in connection with the executive to get promotion. Judicial officers are ranked into five groups. These groups are super scale, which comprises the fifth scale, right down to the first scale. All judicial officers in active service are capable of being appointed to judicial posts corresponding to the group or scale to which they belong. A judge in the super scale will hold the post of chief justice, attorney general, or judge at the Supreme Court; or chief justice or president in an appeal court.

²¹⁰ As above 39.

²¹¹ Above.

i. The security of tenure

In Cameroon, the security of tenure is confused because the principle of irremovability is respected more in its infringement than its enforcement. The system generally allows the submission of yearly reports and frequent transfers of judges. To uphold judicial independence, with such irregular and unaccountable transfers, is a mere aspiration.²¹² Usually, in theory the Cameroonian judge is viewed to be protected because Article 5(2) of the Rules and Regulations of the Judicial and Legal Service outlines his protection. This outline notes that the judge is irremovable and is not susceptible to transfer, without his accord, even if it were to be a promotion.²¹³ However, this only remains a theory, because despite the existence of such rules and regulations, the president of the republic has always defied them and transferred or removed judges at will, resulting in the subsequent removal of this provision in the 1982 Rules and Regulations of the Judicial and Legal Service in 1995 following the amendment of the statute of the magistracy an irrelevant act.

In Cameroon, a judge or magistrate may be transferred to remote areas as a legal officer in an attempt to humble the judge for ruling inconsistently with the objectives of the executive.²¹⁴ Hence it is apparent that the system of appointment, promotion, and transfer of Cameroonian judges is one that ensures that judges are at the beck and call or mercy of the executive, and therefore answerable to them. Thus, the Cameroonian judiciary unequivocally lacks independence and “the source of this judicial submissiveness is enshrined in art 37(3) of the constitution”. This argument is further substantiated in the case, *The people v. Nya Henry & 5 others*.²¹⁵ In this case, the defendant was arrested by the executive for galvanising efforts through the SCNC (Southern Cameroon National Congress) for English-speaking Cameroonians to secede from the Republic of Cameroon (French speaking). The ruling magistrate at first instance released the accused on the basis that the state counsel, by recalcitrantly keeping him in custody when he had been released on bail, was in violation of the accused’s fundamental human rights. The executive responded to this by removing the judge from the bench and sending him to the south west province in a remote area to serve as a legal officer. With such treatment meted out to the judge, no pressure

²¹²As above 37.

²¹³As above 28.

²¹⁴As above 41.

²¹⁵(2005) 1CCLR N Enonchong (2003) “Human rights violation by the executive: Complicity of the Cameroonian judiciary” 47 *Journal of African Law* 270.

needs to be placed on other judges to toe the line in subsequent cases related to the executive.²¹⁶ Again, Cameroonian judges are paid like any other civil servant, from the national treasury, unlike in the UK and US where their salaries are voted by parliament. So if a judge has a query with his salary, he simply has to go to the treasury like every other citizen and sort it out.²¹⁷ There is certainly no guarantee of tenure in Cameroon at all.

ii. Judicial immunity

Every judge who takes an oath of office in Cameroon is considered to be responsible only to the law and his own conscience, at least in principle. During his oath-taking ceremony into office, he is required to repeat the following words:

“To render justice impartially to all in accordance with the laws, regulations and customs of the Cameroonian people without fear, favour or malice”.²¹⁸

As Anyangwe has observed, there is no gainsaying that justice will not simply be rendered without fear, favour, or malice to everyone alike on account that the judiciary possesses the judicial sword that renders justice. With the “sword of Damocles dangling over the judges’ head,”²¹⁹ how will the judges avoid partiality? In strict legal theory, the judge is privileged in whatever he/she says while on the bench because he is exclusively responsible to the law and his conscience.²²⁰ However, in the Cameroonian situation, a judge would have to be careful with whatever he/she says, even while on the bench, because he/she might just be exposing himself to legal and political action, including administrative reprisals.²²¹ The judge is exposed to legal action because at least in Francophone Cameroon, the judge can be sued for damages incurred in the course of his official action by means of a procedure known as “*la prise a partie*.”²²² Aside

²¹⁶ Above.

²¹⁷ Anyangwe (1989) 38-39.

²¹⁸ As above 33.

²¹⁹ Above.

²²⁰ The Cameroon Penal Code, sec 306(3).

²²¹ Anyangwe (1989) 33.

²²² Anyangwe (1989) 34. This is merely a judicial procedure in Francophone Cameroon taken to charge a judge for a wrong committed during the course of the discharge of his duty. The equivalence of this word or procedure in English might be non-existent since the Anglophone judicial system is quite different.

from their judicial function in Cameroon, Cameroonian judges also have extra-judicial duties as will be seen below.

a. The judiciary as a branch of the executive

Unlike the classical and conventional understanding of the independence of the judiciary, which requires that for the independence of the judiciary to be properly enforced, the task should be entrusted to the courts, and it should be of utmost importance that judges are not biased in favour of government.²²³ However, in Cameroon the principle is understood and enforced differently, even by judges. It was unbecoming for Marcel Nguini, the then president of the Supreme Court of Cameroon, at the opening of the judiciary year of 1966 to have confidently highlighted that:

The duty of discretion and reserve of the magistrate implies that he should be and remain faithful and loyal to the regime; that this loyalty can be shown in all his actions and behaviour, as regards his judicial function as well as his public and private life.²²⁴

An attempted definition of the independence of the judiciary reveals that the judiciary cannot serve as a branch of the executive because it will lead to justice being neutralised.²²⁵ However, in Cameroon, the judiciary is not independent because it is under the executive or administrative supervision of the ministry of justice, which is an arm of the executive.²²⁶ Unlike independent and most often common law jurisdictions, which regulate the independence of the judiciary by allocating matters of judicial administration to the hands of the chief justice, in Cameroon, the ministry of justice exercises considerable control over matters of the judiciary and the legal department.²²⁷ The presidents of the various courts are duty-bound to file periodic reports regarding the status of the court, calendar types of litigations, and other administrative matters at the court, and he/she can file the report directly or through the competent chief justice.²²⁸ Furthermore, the chief justices of the courts of appeal in Cameroon have a duty of annually

²²³C Larkins “Judicial independence and democratization: A theoretical and conceptual analysis” (1996) 44 *The American Journal of Comparative Law* 608.

²²⁴A Eyinga *Introduction à la politique Camerounaise* (1984) 286.

²²⁵Larkins (1996) “Judicial independence refers to the existence of judges who are not manipulated for political gain, who are impartial toward the parties of a dispute, and who form a judicial branch that has the powers as an institution to regulate the legality of government behavior, enact “neutral” justice, and determine significant constitutional and legal values.”

²²⁶Anyangwe (1989) 36.

²²⁷As above 37.

²²⁸Above.

inspecting the courts within their various provinces, and a report on their findings is forwarded to the minister of justice.²²⁹

Not only does the judiciary depend on the legal department for its budget, the judiciary also depends on the executive for funds, and parliament only approves its expenditure.²³⁰ Based on theory of *Magistrat polyvalent*,²³¹ in Cameroon, a magistrate could be appointed to the legal department and vice versa.²³² Surprisingly, a judge or magistrate in Cameroon, unlike ideal jurisdictions such as the United States or United Kingdom, are removable and also faced with the problem of arbitrary measures from the executive who has to ensure their independence as per Article 37(3) of the Cameroon Constitution, 1996, namely suspension, irregular transfers, and retrogradation.²³³

The minister of justice or his representative usually undertakes a provincial tour during the period of the judicial year, which is October to November, to install the provincial chief justice and *procureurs general* (attorney general) recently appointed or transferred.²³⁴ In the course of this tour he publicly addresses the judges on government policy on the administration of justice, and on what the government expects from them.²³⁵ In Cameroon, classification of judges and their promotion from court to court is the norm, and even though this reality is not conducive to judicial independence,²³⁶ it works well for the executive who use it as a means to humble judges and keep them faithful to the regime. In other words, judges might be executive-minded in most or all their judgments in order to appease the executive and attract classification and promotion for themselves. Promotion proposals and requests for entry into the promotion list are forwarded by the minister of justice to the secretary of the HJC regarding promotion for members of the bench, and another is delivered to the chairman of the promotion board regarding members of the legal department.²³⁷ Having mentioned this, it is appropriate to discuss how the judiciary is not merely a branch of the executive, but also how the executive uses the judiciary to resolve its political battles.

²²⁹ Above.

²³⁰ Ewang Bongyu Buhnyuy (2009) 38.

²³¹ Flexible magistrate as the magistrate in Cameroon does many other extra-legal duties and may also serve in the legal department of the judiciary.

²³² Ewang Bongyu Buhnyuy (2009) 38

²³³ Above.

²³⁴ Anyangwe (1989) 37.

²³⁵ Above.

²³⁶ As above 38.

²³⁷ As above 40.

b. Judicial power as a tool in the hands of the executive: Judges in Cameroon as politicians in robes

In 1962, the then President Ahmadu Ahidjo was desperate to consolidate his rule through the one party system in Cameroon. In order to achieve this objective, he arrested Mbida, Okala, Matip, and Eyidi who were his political opponents and who had formed an opposition front. He pressed four charges against them after a search was conducted in their various houses. Ahidjo ordered that these political opponents were to be arrested under the Ordinance 62-18-OF on the repression of subversion.²³⁸ The charges were “inciting hatred against government, encouraging subversive enterprises, lack of due respect to authorities and dissemination of rumours prejudicial to public authorities”. The court sentenced each of them to two and a half years.²³⁹ When they appealed against their conviction the sentence was increased and each of them was given three years and a CFA25000 (R5000) equivalence of penalty to each and they lost their political rights. “Given Ahidjo’s iron-fisted rule and political climate of the time, the conviction of the accusers was a foregone conclusion.

No judge dares to rule against his Excellency”.²⁴⁰ This was exacerbated by the fact that the president had an interest in this case. The Supreme Court had resorted to quashing the verdict of the Appeal Court, but this decision prompted Ahidjo to dispossess the court by having recourse to a writ of *certiorari* for that purpose, regardless of the fact that he was not empowered by the constitution to do so.²⁴¹ Therefore, there is no such thing as independence of the Cameroonian judiciary, not when a powerful politician is involved.²⁴² Everyone has to act in favour of he who appointed them, as elaborated by President Modibo Keita of Mali:

The judges of the Republic of Mali should not be enticed by the independence of the judiciary, to forget that they are first and foremost, the members of the Sudanese Union ... the Judicial Power in its capacity as a social Institution of the State, has to ultimately respond to the Regime that create it.²⁴³

²³⁸T Asonganyi “Cameroon judicial power: A tool in the hands of executive power!” (2012) finance.groups.yahoo.com/group/campreneur/message/10492012.

²³⁹Anyangwe (1989) 64.

²⁴⁰As above 65.

²⁴¹P Gonidec *African politics* (1981) 219.

²⁴²Cameroonian judges are politicians dressed in legal robes, enabling the executive to achieve its ambition by other means. In this case, it uses the courts to further political tussles. In most autocratic and dictatorial regimes, the judiciary serves like the pond of the regime.

²⁴³C Foumane «L’Indépendance des Juridictions Constitutionnelle en Afrique noire francophone et à Madagascar” 57 *Juris Periodic*. 99. Les juges de la République du Mali ne doivent pas être conduits au nom de l’Indépendance du pouvoir, a perdre de vue qu’il sont d’abords et avant tout les militants de

In 1990, Paul Biya, the successor of Ahidjo, still under Ordinance 62-18-OF ordered the arrest of Yondo Black and others for campaigning for the establishment of multi-party politics. The military court that tried them did so against the provisions of the 1972 Constitution that encourages multi-party democracy in Cameroon.²⁴⁴ The subsequent conviction of these political actors to three years imprisonment was illegal and a violation of their constitutional right. This reveals that the Cameroonian judiciary is a tool in the hands of the executive. The regime has a conduct of crafting laws that on the face of it appear to be benign laws, but in reality are insidious. For example, in 1990, the “liberty laws” were enacted in order to enable the administration to gain overriding dominance over the judiciary. These laws that on the face of it gave the impression to the ordinary citizens that they promoted civil liberties, in reality served as a smoke screen that facilitated the regime’s discriminatory intent, and instead became weapons of oppression. These laws promoted wanton arrests and detention of opposition militants.²⁴⁵ Generally speaking, the Cameroonian judiciary lacks the clout to enforce the separation of powers or protect rights adequately as it occurs in progressive democracies. This has reduced the judiciary to enforcing arbitrary rules set by the executive through its legislators, under the guise of protecting fundamental rights and upholding the rule of law. As Shapiro observed:

In authoritarian regimes, either by compulsion or conviction, judges can independently pursue rule of law in the sense of government obedience to its own rules without acknowledging rights endowed with priority over those rules. In such situations an independent judiciary may not only be an ineffective rights protector against an authoritarian legislator but may even serve as an instrument of rights suppressions legislated by the regime.²⁴⁶

4.4.2 The constitutional council, judicial review, and human rights

The constitutional council, judicial review, and human rights are intrinsically connected. The constitutional council is an innovation in the Cameroon introduced by the Constitution of 1996 by

l’union Soudanais----- le pouvoir Judicaire, comme institution sociale de l’état doit nécessairement être au service du régime qui l’a créé”

²⁴⁴Asonganyi “Cameroon judicial power” (2012).

²⁴⁵Above. Law No. 91/20 of 16 December 1991. Law No. 92/002 of 14 August 1992 on municipal and legislative elections was an inconsistent concept that did not apply accordingly in all regions. The law changed according to the whims and caprices of the administration. Even when the courts were called upon to rule on the stand of the law in the disputed instances, the courts failed dismally to do so.

²⁴⁶M Shapiro *Rule by law: The politics of courts in authoritarian regimes* (2008) 330.

law No. 06 of 18 January 1996 amending the Constitution of 2 June 1972. This newly introduced mechanism is an important development regarding interpretation and application of the present constitution.²⁴⁷ One of the tenets of modern constitutionalism is that there should be an effective and efficient mechanism sanctioning disregard for the letter and spirit of the constitution.²⁴⁸ If this assertion is correct, then the Cameroonian constitutional council, which is disposed of the power of judicial review, makes it a travesty of constitutional democracy in Cameroon. The reason being that Article 47(3) of the constitution does not provide for *a posterior* review of legislative acts if found to be unconstitutional upon application, but rather provides for *a priori* review of acts exclusively. Another issue to be raised is that if the essence of constitutionality is inter alia to protect the ordinary citizens from the unfettered powers of the executive,²⁴⁹ why have ordinary citizens been denied *locus standi* in Article 47(2) before the Council directly?²⁵⁰

Human rights in the constitution of Cameroon are simply exhortative and only buried in the preamble rather than being properly entrenched as a letter of the constitution. However, regardless of such an exhortation in the preamble of the 1996 Constitution, human rights are conclusively non justiciable in the Cameroonian context because while the Constitution of 1996 clearly makes the preamble part and parcel of the constitution in Article 65 the constitution it does not provide a viable mechanism that may promptly sanction the violation of such a provision of a fundamental right, as captured in the preamble.²⁵¹ Even though the Cameroon penal code sanctions the violation of human rights, these may be purely of a civil and political nature. Whereas, in a post-colonial polity such as Cameroon, which experienced untold exploitation from its colonial masters, a post-colonial polity, by virtue of all the resources that the people of Cameroon were robbed of and that consequently impoverished them, only socio-economic rights, and not civil and political rights, can address and redress the deplorable poverty gap created by colonialism. However in Cameroon, socio-economic rights are merely state directive principles without any signs of future commitment to the justiciability of these socio-economic rights in post-independence Cameroon. This makes the inclusion of Article 65 in the 1996 Constitution a

²⁴⁷C Fombad “The new Cameroonian constitutional council in a comparative perspective: Progress or retrogression?” (1998) 42 *Journal of African Law* 172.

²⁴⁸Above.

²⁴⁹As above 173.

²⁵⁰The only individuals capable of referring matters to the constitutional council are: the president of the republic; the President of the national assembly; the president of the senate; one-third of the members of the national assembly; or one-third of the senators.

Presidents of regional executives may refer matters to the constitutional council whenever the interests of their regions are at stake.

²⁵¹C Fombad “Protecting constitutional values in Africa: A comparison of Botswana and Cameroon” (2003) 36 *The Comparative and International Law Journal of Southern Africa* 7.

possible excuse for the executive to avoid criticism, responsibility, or better still, government simply wants to demonstrate its commitment in principle to the United Nations' human rights treaties that it is party to, while in practice the situation remains unaltered, consistent with the past. Thus, this lack of proper protection of human rights clearly shows that the constitutional council, judicial review, and human rights are interconnected. This interconnectedness is founded on the argument that a constitutional council that is empowered with the power of judicial review can strike down an executive legislation that undermines human rights.

4.4.2.1. Constitutional council and judicial review

Even though the Constitution of 1996 made provision for a constitutional council, this institution is not yet operational 18 years after the constitution was promulgated. In anticipation of such a challenge, Article 67 of the constitution vests powers in the existing institutions to continue the job of the institutions still to be established. So the Supreme Court of Cameroon continues to discharge the duties of the constitutional council.

A. The nature and application of judicial review

The Cameroonian Constitution does not provide for judicial review of legislation. Article 46 says the constitutional council shall rule on the constitutionality of laws. Article 47(1)(1) and (2) are more specific about the kind of review envisaged: the constitutionality of laws, treaties, and international agreements; and the constitutionality of the standing orders of the national assembly and the senate “prior to their implementation”.²⁵² No mention is made anywhere in the constitution that review or control²⁵³ can take place after a treaty, laws, international agreements, or bills in general can be controlled for the purpose of constitutionality, after their implementation or promulgation by the executive. Paragraph 3 of the same article gives the constitutional council powers to rule on conflicts of powers between state institutions, between the senate and the

²⁵²My emphasis to show that only abstract *a priori* review is permitted and not concrete *a posteriori* review.

²⁵³Take note that I use “review” and “control” interchangeably to mean the same thing. I say this because judicial review in the strict sense as practiced in America, Germany or South Africa is not available in Cameroon. So if we had to use it in the context of the above named countries, “judicial review” will not be a constitutional law vocabulary in Cameroon.

regions, and between the regions. Article 48(1) vests powers in the constitutional council to ensure regularity in presidential and parliamentary elections and referendum operations. However, this thesis is restricted to examining the provisions of Article 46, 47(1)(1) and (2) that have a bearing on constitutional control of bills.

B. The nature of the reviewing organ

In Francophone Africa, constitutional justice was incorporated in the Supreme Court, and assigned to a particular bench of the court.²⁵⁴ Constitutional justice only began taking root in Africa generally, and, in Cameroon in particular, in the 1990s as a result of the democratic transitions.²⁵⁵ The emergence of constitutional justice had the same significance in Africa as the fall of the Berlin wall had in Europe. The main objective of creating such constitutional jurisdictions in Africa from the early 1990s was to reinforce the rule of law, rights, and democracy in countries experiencing autocratic governance.²⁵⁶

The constitutional mandate of this organ is to protect ordinary citizens from the authoritative powers of the executive, in addition to protecting the legislature and judiciary.²⁵⁷ This organ is a centralised body²⁵⁸ and its rulings are final and binding on all institutions.²⁵⁹ This body does not carry out any proceedings on its own motion.²⁶⁰ The manner in which matters are referred to the Council are laid down by Article 47 of the constitution.²⁶¹ In other Francophone jurisdictions that are former French colonies, such as Benin, the CC of Benin can act *sua sponte* or on its own

²⁵⁴B Kante “Models of constitutional jurisdiction in Francophone West Africa” (2008) 3(2) *JCL* 158.

²⁵⁵Above.

²⁵⁶As above 164.

²⁵⁷Fombad (1998) 173.

²⁵⁸Fombad (2003) 95.

²⁵⁹Constitution of the Republic of Cameroon, 1996. Art 50(1).

²⁶⁰Kutnjem “le droit à la justice au Cameroun (a l’origine de l’accélération de la modernisation du code pénal Camerounais)” Memoire online http://www.memoireonline.com/07/06/177/m_droit-justice-cameroun7.html para 6.

²⁶¹Art 47 (2) matters may be referred to the constitutional council by the president of the republic, the president of the national assembly, the president of the senate, one-third of the members of the national assembly or one-third of the senators.

Art 47 (3) Laws as well as treaties and international agreements may, prior to their enactment, be referred to the constitutional council by the president of the republic, the president of the national assembly, the president of the senate, one-third of the members of the national assembly, one-third of the senators, or the presidents of regional executives pursuant to the provisions of paragraph (2) above.

motion, in what is commonly known as *auto-saisine* action.²⁶² In other words, the courts can unilaterally take an internal order permitting it to initiate a spontaneous process based solely on its conviction of the relevance of such a subject matter.²⁶³

i. Appointments to the constitutional council

Article 51 of the Constitution of 1996 provides how the members of the constitutional council shall be designated:

Three, including the President of the Council, by the President of the Republic;
Three by the President of the National Assembly after consultation with the Bureau;
Three by the President of the Senate after consultation with the Bureau;
Two by the Higher Judicial Council. Besides the eleven members provided for above, former presidents of the Republic shall be *ex officio* members of the Constitutional Council for life. In case of a tie, the President of the Constitutional Council shall have the casting vote.

Appointments to the constitutional council are important variables in determining the proper administration of judicial review by the constitutional council. For instance, Fombad has observed that the Constitution of 1996 circuitously perpetuates the practice of placing the responsibility of determining the constitutionality of laws in Cameroon exclusively in the hands of the appointees of the president of the republic.²⁶⁴ These appointees, who come from diverse professional backgrounds, perfectly understand that although membership of the council is now renewable, their tenacious loyalty to the person who appointed them could result in their promotion to prestigious positions, just as the contrary could cost them their positions, or any other position if their terms come to an end. The creation of space that can breed neopatrimonialism between the president of the republic and the council members severely affects the manner in which judicial review could be applied in Cameroon. If the appointees administer judicial review in a manner in which the president is favoured, then respect for the rule of law and constitutionalism in Cameroon is compromised, and an indication that the unbridled power held by the colonial

²⁶²Y Ngegne “International influences and design of judicial review institutions in Francophone Africa” (2013) 61 *American Journal of Comparative Law* 452.

²⁶³Above.

²⁶⁴Fombad (1998) 177.

administration has survived into the present democratic dispensation since the president has no opposition to his use of power.

ii. Powers and admissibility to the reviewing organ

Most Francophone African countries, including Cameroon, copied the defective French system of preventive control by an organ with restricted constitutional competence.²⁶⁵ The council exercises a quasi-judicial role through preventive review of constitutionality of legislation, which is done strictly before promulgation.²⁶⁶

The organ entertains complaints only from those candidates and political parties that took part in elections (presidential, parliamentary, referendum operations), or any person acting as a government agent at the election.²⁶⁷ The category of people that can challenge the constitutionality of a law before the constitutional council are the president of the republic, the president of the national assembly, the president of the senate, one-third of the members of the national assembly, and one-third of the members of the senate.²⁶⁸ Under Article 47(2) (1) of the constitution, the presidents of regional executives may refer matters to the constitutional council whenever the interests of their regions are at stake. In effect, what this means is that an ordinary Cameroonian citizen does not have the *locus standi* to defend any dispute before the constitutional council. The implication of ruling out the possibility of private individuals having access to the council or capable of challenging the constitutionality of laws is that it reveals the limitations and inefficiencies of the judicial review system in Cameroon.²⁶⁹

iii. Kinds and extent of review

The organ charged with the application of judicial review has two major roles to carry out, namely to review the constitutionality of law²⁷⁰ and an institutional regulation task.²⁷¹ The type of

²⁶⁵As above 180.

²⁶⁶Art 46 Constitution of the Republic of Cameroon, 1996.

²⁶⁷Art 48 (2) above.

²⁶⁸Art 47 (2).

²⁶⁹Fombad (1998) 178.

²⁷⁰Art 46 of the Constitution of the Republic of Cameroon, 1996.

²⁷¹Art 47 (1) para 3 above.

review conducted by the reviewing organ is restrictively abstract *a priori*, and only preventive.²⁷² This review is further broken down into two parts, namely a preventive review of the constitutionality of pre-promulgated law, and a preventive review over the distribution of regular powers between parliament and the executive.²⁷³ The latter form of review is the point of focus in this regard. France's strong influence on its former colonies²⁷⁴ led Cameroon, as one of such colonies, to copy the French system of judicial review. This French review model is more abstract on constitutionality than in a specific outlined context of its execution.²⁷⁵ Cameroon has maintained this restrictive abstract *a priori* and pre-promulgated constitutional control of legislation,²⁷⁶ even though Article 61(1) of the French constitution has introduced the *exception d'inconstitutionnalité*.²⁷⁷

The 2008 constitutional reform in France made provision for a form of *a posteriori* constitutional review of laws in France. This is an innovation in French democracy because France is one of those notorious democracies that do not give courts the power of review of acts of parliament to ascertain whether fundamental rights of citizens were infringed.²⁷⁸

Article 47 outlines two ways in which preventive control of pre-promulgated laws can be carried out. Firstly, in Article 47(1)(1) the control is carried out on statutory laws and international agreement. Secondly, Article 47(1)(2) dictates the control of standing orders of the national assembly and the senate "prior to their implementation". According to Article 47(1) the constitutional council will give the final ruling on these two control measures.

The polemic existing in Cameroon is that the system does not have the *auto-saisine* mechanism and has to depend on a limited group of persons for referral to the constitutional council.²⁷⁹ In civil law jurisdictions, known as monist states, following French constitutional law, a treaty becomes part of the domestic law immediately following ratification.²⁸⁰ Cameroon has a dual or bi-jural legal system consisting of common and civil law, with the civil law system dominating. Given that it is not a domestic bill, it will certainly require going through compulsory

²⁷²Art 47 (1) para 2.

²⁷³Fombad (2003) 95.

²⁷⁴Ngenge (2013) 442.

²⁷⁵M Shapiro "Judicial review in France" (1989) 6 *Journal of Law & Politics* 14.

²⁷⁶Fombad (2003) 95.

²⁷⁷F Fabbrini "Kelsen in Paris: France's Constitutional reform and the introduction of *a posteriori* constitutional review of legislation" (2010) 9 (10) *German Law Journal* 1312.

²⁷⁸Above. 1299. The Balladur commission was charged with the duty to review and propose changes to the institutions of the Fifth Republic. The commission was a special body set up by the then French President Nicolas Sarkozy, and was chaired by the former Prime Minister Edouard Balladur. The various radical changes that were proposed thereafter include inter alia the reforms to the *Conseil Constitutionnel*.

²⁷⁹See generally art 47 (2) of the Constitution of Cameroon, 1996.

²⁸⁰F Viljoen *International human rights law in Africa* (2012) 518.

constitutional control to ensure that it is not inconsistent with the constitution. Be that as it may, Article 47(1)(1) will not necessitate such a scrutiny since it is a domestic bill. Given that the bill is voted in parliament, it is implied that the domestic legislators contemplated the prior constitutionality of such bills before passing it as opposed to international treaty legislators who have little knowledge against what factors constitutionality is measured in domestic jurisdictions. The wave of political unrest across Africa in the 1990s influenced most sub-Saharan African countries to establish specialised institutions of judicial review, not only to review constitutionality, but also to protect and implement fundamental liberties by granting citizens the power of personally referring violations to court.²⁸¹ This vision has simply paled into insignificance given that there is no provision in the Cameroonian Constitution that properly protects citizens' rights in Cameroon, as does Chapter II of the South African Constitution. Three reasons attest to Cameroon's inappropriate protection of human rights, let alone the capacity of a citizen to refer any violations to the constitutional council. Firstly, fundamental rights in the constitution are founded on the obsolete ideology that the state alone creates a favourable environment for rights to be enjoyed, and is also the only actor that may violate such rights.²⁸² Secondly, human rights provisions are couched in the language of aspiration and exhortation, common in preambles. Even though Article 65 of the constitution makes the preamble part of the constitution, John Bell argues, based on Barthélemy's thesis of 1899 that preambles are mere solemn proclamation principles of political morality and promises short of individual enforcement or their realisation.²⁸³ Thirdly, extensive claw-back clauses of the constitution are indicative that citizenry enjoyment of the promised human rights will be based on the willingness of the legislature.²⁸⁴ This conduct of the Cameroon government is dubious, given that it has ratified the main international conventions protecting civil liberties, such as the Universal Declaration of Human Rights, the Charter of the United Nations, African Charter on Human and Peoples' Rights, and other relevant conventions and treaties.²⁸⁵

²⁸¹Ngenge (2013) 450.

²⁸²Fombad "Cameroon introductory notes" (2013) 11.

²⁸³Above.

²⁸⁴Above.

²⁸⁵Fombad (2003) 97.

iv. *Constitutional council review procedure*

According to Article 47(1) of the constitution, the constitutional council is empowered to give a final ruling on the constitutionality of laws, treaties, and international agreements.²⁸⁶ Moreover, Article 47(3)(1) specifies that enactment deadlines will cease to lapse once an instrument has been referred to the constitutional council. However, rulings must be handed down within a 15-day period from when the referral was made, even though such a time limit can be reduced to eight days at the request of the president of the republic.²⁸⁷ Even though the above provisions have been mentioned, it should be noted that Article 52 states that a law shall lay down the organisation and functioning of the constitutional council, and the conditions for referring matters to it as well as the procedure applicable before it. This provision simply attests to the fact that procedures in this regard are yet to be appropriately defined. Finally, Article 50 states that the rulings of the constitutional council should not be subject to appeal. They should be binding on all public, administrative, military, and judicial authorities, as well as, on all natural persons and corporate bodies.

4.5 Human rights in Cameroon

Human rights in Cameroon are not entrenched or given a prominent position in the constitution as is the case with the Constitution of the Republic of South Africa, Chapter II. For reasons of this casual treatment of human rights by the Cameroonian constitution, human rights in this separate section will be considered independent of the judiciary that has the constitutional task of protecting or the custodian of human rights, since human rights are a delicate discuss in a democracy. I support the view of Etonga, who asks if a government such as Cameroon that is characterised by a presidential regime, can really permit the adequate enjoyment of human or fundamental rights.²⁸⁸ Little wonder all fundamental rights are relegated to the preamble, which while affirmed by Article 65 to be part and parcel of the constitution, fails to provide a viable operative mechanism to sanction the violation of these rights claimed to be enshrined in the constitution. Essentially, the failure of the national assembly, which as per Article 26(2) a and b,

²⁸⁶The Constitution of the Republic of Cameroon, 1996.

²⁸⁷Above. art 49.

²⁸⁸Etonga in Kofele-Kale (ed) (1980) 151.

is responsible for the protection of fundamental rights, to entrench a bill of rights into the constitution is inter alia the reason for the disregard of the rule of law and constitutionalism in post-independence Cameroon.

My view in this regard is predicated on the fact that, as Fombad argues, the dominant discourse amongst civil jurists is whether or not stipulations in the preamble create legally binding rights. His answer is not in the affirmative.²⁸⁹ In other words, if the rights are not legally enforceable, it means it is not an infringement to encroach upon them. In this light, the executive can encroach on rights as he desires, since nothing restrains him from doing so. Moreover, in spite of Article 65 declaring that the preamble constitutes part and parcel of the constitution, whilst creating constitutional values and principles, the provisions in the preamble are generally vague and idealistic and have a non-executing character, and the constitution leaves the legislature with huge discretion to determine the realisation of these ideals by creating concrete rights.²⁹⁰ This conduct is what breeds disregard for the rule of law and exemplifies lack of constitutionalism in Cameroon since all Cameroonian citizenry rights are at the mercy of politicians who may attribute them only as gifts. Furthermore, even though the Constitution of 1961 noted that “The Federal Republic of Cameroon ... affirms its adherence to the fundamental freedoms set out in the Universal Declarations of Human Rights”, which suggests that the wording of this declaration will be observed as an integral part of the fundamental law, this is nonetheless still an aspiration, because human rights can only be enforceable when an organ is provided by the constitution to sanction wanton violation of rights. The 1961 Constitution did not meet this requirement, but rather provided in Articles 14, 29(3), 33, and 34²⁹¹ that the Federal Court of Justice is empowered to review (1) a federal law to determine its constitutionality, and (2) a state law to ascertain if it is in violation of the constitution.

In both situations it can only be carried out at the president’s discretionary request.²⁹² These provisions defeat the possibility of any matter being adjudicated, given that the president cannot refer a matter to the court for violations orchestrated by himself. With this state of affairs, the rule of law and constitutionalism exist under stress in Cameroon. However, the 1972 and 1996 constitutions both relegate all fundamental rights as contained in the Universal Declaration of Human Rights, the United Nations Charter, and the African Charter on Human and Peoples’ Rights to the preamble of the various constitutions, and as earlier noted, regardless of Article 65

²⁸⁹Fombad “Cameroon introductory notes” (2013) 9.

²⁹⁰C Fombad *Constitutional law in Cameroon* (2012) 216.

²⁹¹The Federal Constitution of Cameroon of 1961.

²⁹²Enonchong A *Cameroon constitutional law: Federalism in a mixed common-law and civil-law system* (1967) 39.

of the 1996 Constitution, preambles may not be enforceable.²⁹³ Fombad estimates that the language of human rights in the 1996 Constitution, while departed from how it was construed in the 1961 Constitution, makes the preamble in Article 65 part and parcel of the constitution, because Cameroon has ratified all human rights instruments and wants to affirm its commitment to the treaties.²⁹⁴ These fundamental rights and their universality are highlighted in the various treaties as follows:

In the International Covenant on Civil and Political Rights – ICCPR:

Recognizing that these rights derive from the inherent dignity of the human person, recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights, considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms...²⁹⁵

In the Universal Declaration of Human Rights – UDHR:

The General Assembly proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.²⁹⁶

The 2013 Human Rights Country Report by the United States Department of States indicates that the scope of laws covered by the 1996 Constitution is limited, and those limited laws covered are under severe threat and constant repression.²⁹⁷ Security forces constantly abuse and harass journalists. Filmmaker Richard Njimeli produced a film that strongly criticised dictatorship, whereafter he disappeared. When he reappeared nine days later he claimed that he was

²⁹³Fombad “Cameroon introductory notes” (2013) 9.

²⁹⁴Above.

²⁹⁵Preamble ICCPR.

²⁹⁶Preamble UDHR.

²⁹⁷United States Department of State, *2013 Country Reports on Human Rights Practices - Cameroon*, 27 February 2014, available at: <http://www.refworld.org/docid/53284b4a14.html> (accessed 4 February 2015).

inhumanely molested and tortured by well-armed military men.²⁹⁸ Censorship is also exceptional since it requires that all print media comply with the 1990 “liberty laws” on social communication according to which Article 13 requires that all editors in chief must deposit copies of each newspaper edition with the prosecutor’s office for scrutinisation two hours before publication.²⁹⁹ Libel laws also constrain freedom of press and suppress criticisms. The human rights situation in Cameroon will be properly examined below.

A. Rights regime of human rights in Cameroon

The absence of a robust human rights culture and regime in Cameroon has curtailed the possibility of the involvement of Cameroonians in making laws that promote human rights as demonstrated in previous chapters. As a result, laws passed by a regime which does not promote participation and consultation of the people in constitution-making can only deliver laws which serve the interests of the regime exclusively and not that of the people. This kind of environment has been conducive for the enactment of certain irresponsible electoral laws that limit human rights. Even with ELECAM administration of elections in Cameroon, it is widely held that the 2011 elections were flawed and marked by enormous irregularities. In addition, all the members of ELECAM are presidential appointees.³⁰⁰ This greatly limits the citizens or voters’ political right to vote and choose their desired candidate. The absence of a human rights culture in Cameroon has resulted in the crafting of laws that promote excessive executive powers and privileges sanctioned by the constitution. Thus, a call must be made by the people and civil society for a constitutional limitation on presidential terms in Cameroon. Constitutional provisions imposing presidential term limits have been eliminated in numerous African countries.³⁰¹ The removal of the old Article 6 (2) from the Cameroon Constitution of 1996, which provided that the president “shall be eligible for re-election once” to the new one that simply says the president “shall be eligible for re-election”, makes the president a de facto president for life.³⁰² An unlimited term of office is reminiscent of despotism, which reveals the absence of a human

²⁹⁸ Above.

²⁹⁹ Above.

³⁰⁰ United States Department of States above (2013).

³⁰¹ Fombad C “Constitutional reforms and constitutionalism in Africa: Reflections on some current challenges and future prospects” (2011) 59 *Buffalo Law Review* 1007-1085 at 1026.

³⁰² Ross W BBC West Africa correspondent, Cameroon makes way for a king, <http://news.bbc.co.uk/1/hi/world/africa/7341358.stm> (accessed 30/07/2013).

rights culture and this lack of a human rights culture can in turn facilitate the president's violation of human rights.

B. Degree of rights application and effectiveness of complaint mechanisms for human rights violations

The Cameroon constitution applies a limited scope of rights. In its preamble, it makes mention of the right to development, which is a group or solidarity right, but makes no allusion to any other third generation right, such as the right to a clean environment. Thus the rights that this constitution covers are mostly civil and political rights, which are first generation rights. According to the human rights country reports, the majority of the rights violated during 2011, 2012, and 2013 are civil and political rights.³⁰³ Even though this constitution deals almost exclusively with first generation rights, it mentions a number of socio-economic rights also known as second generation rights.³⁰⁴ There are a total of seventeen identified and recognised rights highlighted in the preamble of the constitution.³⁰⁵

The effectiveness of the human rights violations complaint mechanisms in Cameroon will be properly examined by breaking down the mechanisms into ancillary institutions, inter alia ordinary courts and the administrative bench of the Supreme Court. Given the scope of this thesis, only these two institutions will be examined.

i. Ordinary courts

Access to ordinary courts for the purpose of redressing human rights violations and abuses is done through a court of first instance, which is a magistrate's court, and a the matter can be conveyed to a high court if the magistrate's court lacks jurisdiction over the matter. Given that human rights cases most often derive from cases of abuse of power or crime, the cost of their prosecution is

³⁰³Country Reports on Human Rights Practices for 2011 United States Department of State's Bureau of Democracy, Human Rights and Labor, and the Cameroon NGO report on the implementation of the ICCPR (Replies to list of issues CCPR/C/CMR/Q4); United States Department of States above n 325.

³⁰⁴Fombad "Cameroon introductory notes" (2013) 10.

³⁰⁵Above.

mostly incumbent upon the state through their legal department, entrusted with the responsibility of prosecuting the offences for the state.³⁰⁶ In situations where the injured party prefers to pursue a private prosecution including a claim of damages, the cost shall be incumbent on that applicant, at the risk of his complaint being inadmissible for non-payment.³⁰⁷ The prosecutors have the final word to decide which complaints they entertain for prosecution. Victims are advised to take advantage of the legal department's services in order to gain access to the court and also to file claims for damages for the injuries they suffer.³⁰⁸ In treating human rights issues, ordinary courts may have jurisdiction over administrative matters considered to be non-administrative in nature and in matters involving administrative officials. In such a situation, the applicant may make an application for the issue of various prerogative orders including prohibitive injunctions, orders of *mandamus*, and orders of *habeas corpus* to enable him to prohibit, restrain, prevent, or stop the violation of the rights of a citizen.³⁰⁹ Even though decisions handed down by courts against administrative officials have not been consistent, in English-speaking parts of Cameroon where common law is practiced, arbitrary decisions of sub-divisional senior-divisional officers competent in Cameroonian land issues have been overturned.³¹⁰ Such an eventuality is evident in the case of *Divisional Officer Ndop v. Yengkong*.³¹¹ In this case both the High Court and the Court of Appeal in the North West Province of Cameroon reiterated their powers to stop anyone having the legal authority to rule on the question of the rights of persons who applied such a legal standing in an *ultra vires* manner.³¹² It also followed in the case of *The people v. Joseph Dim*³¹³ that the court could not act on mere allegations or suspicion instead of solid facts. So the Bamenda Court of Appeal upheld the decision of the High Court by asking the legal department to grant bail to the accused immediately, and the court distanced itself from this underlying alteration of the fundamental principles of criminal justice.³¹⁴ However in another case, *James A. Akkum v. Tchoussougou Augustine*, the Mezam High Court declined jurisdiction on a matter over the divisional officer's (DO) order for the destruction of a fence made of eucalyptus trees and barbed wire that was constructed on farmland. The court declared the act of the DO to be

³⁰⁶N Nkumbe "The effectiveness of domestic complaint mechanisms in the protection of human rights in Cameroon" (2011) 5 *Cameroon Journal on Democracy and Human Rights* 32.

³⁰⁷Above.

³⁰⁸Above.

³⁰⁹Above.

³¹⁰Above.

³¹¹(1994) CAJ-CLC at 56.

³¹²Nkumbe (2011) 33.

³¹³(2000) ICCLR AT 94-95.

³¹⁴Nkumbe (2011) 33.

administrative. On appeal, the Bamenda Appeal Court pointed out that the DO's arbitrary act elicited the ordinary court's jurisdiction. It followed that the lower court's judgment was set aside and the appellant was awarded damages against the respondent.³¹⁵

However, in other cases administrative officials show contempt for court orders by not respecting them and they manage to get away with it. Nkumbe underlines the fact that the courts' impotence is devastating regarding the disregard of court orders by chief justices and attorney generals who are the heads of the judiciary at the provincial level. These officials act as government's allies in their respective provinces against the disapproval of their acts by the judiciary, as seen in the *Akkum* case above. In the case of *Benjamin Itoe v. Joseph Ncho*,³¹⁶ the Commissioner of the Province and the Attorney General for the North West Province defied a high court order, asking them to release the plaintiff's commercial vehicle after several months. Eventually, the claimant was awarded damages against the defendants (the commissioner of police and the province's attorney general). However, it is unclear whether judgment was later executed because one of the defendants, the attorney general, later held several ministerial positions in government, and in Cameroon it is not a novelty that ministers and senior members of the ruling party, who by extension wield enormous powers, treat the rule of law with total disregard.³¹⁷

ii. *The administrative bench of the Supreme Court*

This court has an exclusive jurisdiction in administrative matters. Nevertheless, the court serves as an executive ally, especially on politically-oriented matters.³¹⁸ In the case *Association of victims of post electoral violence and INTERIGHTS v. Cameroon*³¹⁹ a matter was brought before this administrative court by the above victims, and glaring evidence showed that the Cameroonian government requested that the court declare the submissions of the victims inadmissible. The court sheepishly toed the line in government's favour and only the matter until five years later when they quickly rescheduled the case when it was evident that the matter was before the

³¹⁵As above 34.

³¹⁶No BCA/1/81 (unreported) judgment of 13 July 1981.

³¹⁷Nkumbe (2011) 36.

³¹⁸See the verdict passed by the supreme court after the 1992 presidential elections debacle. The supreme court, the presiding judge, Depanda Mouelle said "Our hands are tied." This was referring to the court's bias and interest in proclaiming the rightful owner of the 1992 presidential election. (F Achobang "Cameroon corruption is a suicidal angel") <http://www.modernghana.com/news/510667/1/cameroon-corruption-is-a-suicide-angel.html>. (accessed 20/03/2015).

³¹⁹Communication No. 272/2003.

African Commission, in order to argue against the non-exhaustion of local remedy.³²⁰ This conduct of the court simply depicts the length to which the court is willing to go for the purpose of upholding administrative caprices at the expense and sacrifice of human rights of Cameroonian citizenry. In a similar case, *Djotoum Henrietta v. State of Cameroon (Ministry of Territorial Administration and Decentralization – MINATD)*, the court's non-compliance to government agencies was revealed. In this case, the action of a government official was found to constitute administrative trespass. However, this administrative court suffers from administrative meddling that compromises the court's integrity. In the Bakweri land claims case before the African Commission, they argued that they would not even approach the domestic courts in order to exhaust local remedies, including the administrative court, because due to extreme executive interference and control over the judiciary, they were not assured of a fair hearing of their case, especially since government was the defendant in the matter and was bent on pushing its privatisation agenda to the limit.³²¹

A. Enforcement of human rights in Cameroon

Human rights cannot be said to be effectively enforced in Cameroon given that most of the cases of human rights violations are orchestrated by government officials and are treated by the administrative bench of the Supreme Court.³²² Enforcement with this court is not evident since this court works as an ally of the executive that violates citizenry rights. In addition, the CC that was created by the 1996 Constitution lacks the power of judicial review, and the citizen, who is always the main victim as well as the beneficiaries of the human rights, is permanently barred from challenging any laws that violate their human rights.³²³

Human rights are one of the variables under the separation of powers that must be respected in order to strengthen the rule of law and constitutionalism in any democratic dispensation. The above observation leads us to conclude that where human rights are constantly limited in a democracy, and no special attention given to its provision in the constitution, a dispensation

³²⁰Nkumbe (2011) 39.

³²¹As above 40.

³²²Law No. 2006-15 of 29 December 2006 Sec 3 provides for lower courts for administrative litigation. The administrative organisation of such courts was left to be determined by the same law but by Sec 4(2). Even though this law is not yet in force, when the courts go functional, they will reduce the backlog of administrative disputes on the supreme court that has been centralised to date.

³²³Fombad "Cameroon introductory notes" (2013) 12.

grounded in constitutionalism will simply turn into a dispensation epitomised by presidentialism. That said, I will now examine another area of the constitution that has not properly been constituted, but which if constituted will assist in diffusing executive powers and thereby enforce the rule of law and constitutionalism in Cameroon.

4.6 Independent and specialised national institutions in Cameroon

Article 14(2) of the Constitution of 1996 states that parliament shall legislate and control government action in Cameroon. Based on this article, parliament has passed laws creating apparent independent and specialised institutions that address specific issues. These institutions, amongst others, in terms of the scope of this thesis include the NHRC and the independent elections governing body, ELECAM. These institutions in Cameroon are administrative and not constitutional bodies.³²⁴ Independent institutions in Cameroon may be nominal because there are no entrenched provisions in the Cameroon Constitution defining their mandate, appointment of members, execution of orders, financial autonomy, and general legal and institutional frameworks. These same institutions in South Africa are constitutionally entrenched and the constitution clearly defines their mandate, appointment of officials, and term of office *inter alia*, in terms of Chapter 9 of the South African Constitution of 1996.³²⁵

³²⁴Report of research visit in Cameroon (2014).

³²⁵These same institutions in South Africa are constitutionally entrenched and the constitution clearly defines their mandate, appointment of officials, and term of office amongst others, in terms of Chapter 9 of the South African Constitution of 1996. In Cameroon, these institutions have to rely on presidential decrees for most of its other activities to go operational. Given that the ruling party, the CPDM has a crushing majority of parliamentarians in parliament and can adopt any law promoting the views and desires of the executive, makes the independence of these institutions questionable. Essentially, the fact that parliament votes the law does not make the law independent, because almost all laws in Cameroon are proposed by the president.³²⁵ By implication, the bill will never fail because parliament is controlled by the executive through its crushing majority. The executive can therefore propose any arbitrary law governing specialised institutions and the bill will go through. Therefore, the aim of this section is to highlight the defectiveness of these institutions and to demonstrate, through recommendations, how the amelioration of these institutions could constrain the executive to uphold the rule of law and constitutionalism in post-independence Cameroon.

4.6.1. National human rights institutions in Cameroon

National human rights institutions are non-judicial bodies of human rights architecture at the domestic level.³²⁶ The aim of establishing these institutions was to shift the monitoring, respect, protect, and fulfil international and regional human rights from government agencies, such as specific ministries for human rights, to independent national institutions that have specific knowledge and expertise on international human rights standards, theories, and practice that can develop national action plans and strategies with established targets and benchmarks.³²⁷ These institutions are most often administrative in nature but lack any judicial or law-making powers. These bodies maybe attached, yet not subordinated to the executive or legislative arms of government.³²⁸ Even though national human rights commissions are always required by law to submit reports to parliament, they still however function independently.³²⁹ These principles were soon after recognised by the UN Commission on Human Rights in the next session and at the Vienna World Conference on Human Rights in June 1993.³³⁰ These principles stipulate that the NHRI's composition and its sphere of competence must be aimed at promoting and protecting human rights, and this must be clearly established by a legislative or constitutional text.

These institutions must be independent from their governments, and must not be subjected to financial control that may lead to the compromise of their independence.³³¹ At regional level, the African Charter on Human and Peoples' Rights in Article 26 compels states parties to use the NHRI as a platform to ensure that charter rights are respected, and Article 62 provides that as part of a state party's reporting obligation, it should be highlighted whether or not these institutions have been established. In addition to the provisions of ACHPR, the African Commission has formulated criteria that the NHRI in Africa must comply with for the purpose of qualifying to apply for observer status with the African Commission.³³²

³²⁶M Nowak "National human rights institutions in Europe: Comparative, European and international perspectives" in J Woters & K Meuwissen (eds) *National Human Rights Institutions in Europe: Comparative, European and international perspective* (2013) 13.

³²⁷Above.

³²⁸P Pinheiro & D Baluarte "National strategies – human rights commissions, ombudsmen and national action plans" (2000) Human Development Report Background Paper 2.

³²⁹Above. An international workshop was held on National Institutions for the Promotion and Protection of Human Rights in Paris from 7 to 9 October 1991. During this workshop principles relating to the status of national institutions were defined and these became known as the "Paris Principles" Nowak (2013) 14.

³³⁰Above.

³³¹As above 15.

³³²See African Commission document DOC/OS (XXVI)/115, distributed at the 26 Ordinary Session of the Commission in Kigali, Rwanda, November 1999.

The common two types of NHRI that exist are national human rights commissions (NHRC) and ombudsman. These two are distinguishable in that while the NHRC is mandated with discrimination and human rights issues perpetuated by individuals, groups, and government, the ombudsman's objective is to protect individuals or citizenry from rights abuses orchestrated by public officials or institutions.³³³ Given the scope and premise of this thesis, this section will simply examine how well-suited these institutions are in carrying out their duty as human rights protectors and ensuring fairness and legality in public administration. This section will also consider whether or not their mandate has so far been able to diffuse executive powers and reinforce the rule of law and constitutionalism in post-independence Cameroon. It must be noted that no ombudsman or public protector exists in Cameroon. Cameroon only has a national human rights commission.

A. *The National Commission for Human Rights and freedoms of Cameroon*

By setting up this new institution by virtue of Law No. 2004/016 of 22 July 2004, the state of Cameroon acknowledged its duty to guarantee the independence of national institutions charged with the mandate of promoting and protecting human rights.³³⁴ Its predecessor, the National Committee on Human Rights and Freedoms set up by Presidential Decree No. 90/1459 of 8 November 1990 was seen to be over-dependent on the executive, and the UN Human Rights Committee persuaded Cameroon to honour its engagement as a state party to the ICCPR by setting up a more independent institution.³³⁵ This institution was not only set up by a presidential decree, its members were equally appointed by the president a year later by Presidential Decree No 90/1459 of 8 November 1990 but its findings are said to have never been published.³³⁶ The presidential appointment of members compromises the mandate of any institution because those members will be answerable to the president who appointed them. The status of the new institution will be examined to determine whether it has experienced any meaningful

³³³Pinheiro & Baluarte (2000) 3.

³³⁴Human Rights Committee (Covenant on Civil and Political Rights) "Consideration of reports submitted by states parties under Article 40 of the covenant – Fourth periodic reports of states parties – Cameroon" (CCPR/C/CMR/4 March 2009) 74.

³³⁵Art 30 of the Law No 2004/016 of 22nd July 2004 to set up the organisation and functioning of the National Commission on Human Rights and Freedoms states that the commission replaces the committee that was set up by a presidential decree.

³³⁶S Dicklitch "Failed democratic transition in Cameroon: A human rights explanation" (2002) *Human Rights Quarterly* 174.

transformation so as to reinforce the rule of law and constitutionalism in post-independence Cameroon.

i. General autonomy of the Commission

National human rights commissions can be instrumental in fostering democracy and the rule of law if they are established under the right legal framework, granted broad powers and functions, and are independent from the legislature and the executive.³³⁷ It is not sufficient to guarantee independence of these institutions by merely entrenching a provision for their existence in the constitution or legislation. It needs to go beyond these two mechanisms and be independent from the control of any public officials, and the authority of these institutions must be promptly respected by everyone.³³⁸

Section 19(2) and (3) provide for the commission's annual report to be submitted to first to the president of the republic, and then to the presidents of the national assembly and the senate. The commission's mid-year report is to be submitted to the prime minister, the minister of justice, and the minister of territorial administration. All these authorities are members of the executive and under the direct patronage of the president of the republic, including the presidents of the national

³³⁷S Gwei "The Cameroon experience in creating and running a National Commission for the Promotion and Protection of Human Rights" in K Hossain L Besselink H Selassie G Selasie E Volke (eds) *Human Rights Commissions and Ombudsman Office: National experiences throughout the world* (2000) 199.

³³⁸Above. The commission does not have any institutional, financial, or individual autonomy. This completely defeats the independence of the institution by virtue of being established through legislation. First of all, as earlier mentioned, this commission does not really differ from the moribund committee that was established through a presidential decree. Inasmuch as the present commission is established through legislation, the ruling party that the president heads has a crushing majority in parliament and is ready to adopt any proposal tabled by the president as almost all bills in parliament are proposed by the president. It is obvious that the bill tabled by the president to legislate for a new commission reflects his interests so that he can easily influence and control the institution. Once this bill is tabled, it is a forgone conclusion that it shall be adopted, given his overwhelming majority. The outcome then is an institution that can easily be controlled by the president. Section 1(3) of the law establishing the commission states that the commission is financially autonomous since its budget is voted by parliament, and not at the request of the president's whims and caprices. However, this parliament rubber-stamped by the president, and will certainly adopt his proposal. The outcome is that the president still controls the commission. Section 6 states that an independent person shall be chosen as the president of the commission and a vice-president, both of which shall be appointed by a residential decree. Section 8 provides that the president, vice-president, and commissioners of the commission shall be appointed for five years and their appointment can be renewed once. It is quite contentious why the law would talk of an independent personality when he is appointed by the president. The sense here is that if the position of the president of the commission can be renewed, he will certainly try to please the president of the republic so that his mandate can be renewed when it expires. As a matter of fact, there will be cooperation amongst all the commissioners to do what will show the president that they are loyal to him so that he reappoints them for a second term. In such a case, one cannot talk of the autonomy or independence of the commission because neopatrimonialistic gestures have taken the lead.

assembly and the senate. There can only be ostensible independence for the commission when its reports are submitted to the very members of the executive who have a high propensity for violating human rights. This fact has completely neutralised the independence of the commission, and anything relating to its independence is an expensive indulgence.

Finally Article 31 states that this present law on the organisation and function of the new commission shall be implemented by a presidential decree. Everything regarding the commission relies on the president. It cannot therefore be said the commission has independence of any kind.

ii. Access to the commission

The commission went operational in 1992 and published its maiden report only nine years later. This was known as the Five Year Activity Report.³³⁹ Within the time covered by the report, the commission received an average of 500 petitions per year. From 2003-2006 it received 2 213 complaints: 434 in 2003; 569 in 2004; 481 in 2005; and 729 in 2006.³⁴⁰ The above calculation reveals that petitions to the commission decreased progressively as the years went by. One of the facts accounting for this reluctance in petitions is inter alia, the fact that the commission's office was centralised in Yaounde, the capital province of Cameroon. Not everyone could access to the commission. It was not until 2003 and 2006 that branches of the commission were opened in the north western and south western regions of Cameroon. Even so, it is doubtful whether or not their activities can reach the divisions and even the sub-divisions of these provinces, where distances are significant and roads might be inaccessible.³⁴¹

iii. Jurisprudence of the commission

Jurisprudence in this case will include findings, their treatment, and the remedy administered. Given that section 19 of Law No. 2004/016 of 22 July 2004 requires that the findings of the commission should be reported to the president of the republic and other executive cohorts, means effective remedies will be dispensed as a favour by the said authorities and not as a right. It is

³³⁹1992-1997 of March 1999.

³⁴⁰Nkumbe (2011) 42.

³⁴¹Above.

conclusively doubtless that the commission's propensity to provide effective remedy is low.³⁴² This can clearly be illustrated in the case of Mrs. S reported in the 2007 Annual Report. Mrs S's son was detained in the Eseka prison where he fell and later died in hospital. The commission later dismissed Mrs. S's allegation that her son died as a result of the negligence of the prison officials and she claimed damages for this. However, after its own investigation, the commission found that the death of the victim resulted from a liver problem that the victim had been suffering from and the commission asked the victim's mother to drop the case.³⁴³ Comparative jurisprudence of other national commissions has proven that states are encouraged to pay damages for violations orchestrated by its officials such as happens in India, but is a rare occurrence in Cameroon.³⁴⁴ The commission prefers to treat cases against the state agents as discrete matters to be settled in a way that satisfies the individual petitioner, instead of treating the matter as a systemic human rights offence committed by the state through its agents.³⁴⁵

Another important issue that hampers the commission's ability to provide sound remedies is that it is not vested with the competence to convey investigated cases to court directly, as is the case with commissions in other jurisdictions such as the Commission on Human Rights and Administrative Justice of Ghana.³⁴⁶ Administrative rather than legal channels carrying out investigations is what has continuously kept the commission's complaint mechanism weak. However, in the case of *Mukong v. Cameroon*,³⁴⁷ the commission laid down a precedent to which reference is made whenever it deals with the right to freedom of expression that the constitution of Cameroon guarantees.

To conclude, given the scope of the Cameroonian NCHRF, it has been illustrated that insofar as the mechanism is a viable tool to uphold and respect the rule of law and constitutionalism in Cameroon, executive hijack and control of the mechanism has rendered it a tool used to absolve the executive from incrimination. The next mechanism under discussion will be ELECAM.

³⁴²As above 46.

³⁴³As above 47.

³⁴⁴Above.

³⁴⁵Above.

³⁴⁶As above 48.

³⁴⁷D Harris Cases and materials on international law (1988) 285. The commission confirmed that Mukong's right to freedom of expression was infringed upon and recommended that government respects that right. This case enabled the commission to lay down guidelines on how government can respect the right to freedom of expression by pointing to Article 19(3) of the International Covenant on Civil and Political Rights that addresses the issue exhaustively.

4.6.2 Elections Cameroon – ELECAM

ELECAM was created in 2006 and law No. 2006/011 of 29 December 2006 was designed to set up and lay down the conditions for the organisation and the functioning of ELECAM. Prior to the birth of ELECAM, there was the ministry of territorial administration and decentralization (MINATD) that was later also replaced by NEO. The Herald Newspaper described NEO as follows:

No one suspected that NEO would simply endorse the abusive elections of MINATD and become its willing accomplice. That is what it since became and does so with great delight. It has never disqualified an election in spite of the many short-comings of organisation.³⁴⁸

The problem with elections as a means to achieving democracy in Cameroon has so far been that the National Elections Observatory (NEO) facilitated the manipulation and distortion of the electoral process³⁴⁹ The Cameroonian government makes a mockery of democracy when the predecessor of NEO, the MINATD created NEO as an elections monitoring body (EMB) in order to give the impression that election management would no longer be exercised by the government. It had to exercise institutional independence, impartiality, and professionalism towards all political parties.³⁵⁰ However, controversy becomes apparent in Section 3 (1) of the NEO code that designated the president of the republic as the exclusive person to appoint its members.³⁵¹ The appointee will certainly be answerable to the president, given that maximum incentives were reserved for the appointees who cooperated with the president.³⁵² This apparent reconversion of the old habits into the new institution simply means that the jettisoning of MINATD, in preference to the NEO, has simply paled into insignificance.³⁵³ This institutional defectiveness, which was caused inter alia by the over-reliance on presidential decrees for almost every act that related to NEO, influenced the call for an independent electoral organ. Thus,

³⁴⁸B Forbin “The height of institutional dysfunction” quoted in C Fombad & A Ewang “Election management bodies and peace-building in Africa: Cameroon’s move from National Election Observatory (NEO) to Elections Cameroon (ELECAM)” Forthcoming 18.

³⁴⁹Fombad CM “Cameroon’s National Elections Observatory and the prospects of constitutional change of government” in Columbus F (ed) *Politics & Economics of Africa* 3 (2002) 85.

³⁵⁰As above 87.

³⁵¹Above 86.

³⁵²Above.

³⁵³As above 85.

ELECAM was established as a means of righting the wrongs of the NEO. However, whether it has lived up to expectations is yet another question to be answered.

A. Mandate and powers of ELECAM

ELECAM's existence is not buttressed by a constitutional provision that entrenches its existence and elicits stringent rules regulating its amendment. By implication, given that it is a law legislated by parliament as an ordinary law, it could be amended even by subterfuge if the president, during an ordinary parliamentary session, desires to push forward any ulterior agenda. The presidential decree appointing the members of ELECAM is one of the enabling decrees required to complement Law No. 2006/011 of 29 December 2006 to set up and lay down the organisation and functioning of elections in Cameroon.³⁵⁴ This law is an ordinary law deliberated and adopted by the national assembly. This law is complemented by other presidential decrees that effectively implemented the organ,³⁵⁵ and another presidential decree that appoints the director general and his deputy.³⁵⁶ Another decree also appoints the chairperson and his vice.³⁵⁷

³⁵⁵Y Nsom "Biya bows to SDF pressure, Decrees on ELECAM" <http://www.cameroonpostline.com/biya-bows-to-sdf-pressure-decrees-on-elecam/> (Accessed 20/03/2015) also see section 42(4).

³⁵⁶Presidential Decree No 2008/470 of 31 December 2008 on the Appointment of Officials of Elections Cameroon

³⁵⁷Presidential Decree No 2008/464 of 30 December 2008 on the Appointment of the President and Vice-president of the Electoral Board of Elections Cameroon. See also Section 8(3) of the ELECAM Law. Section 1(2) of the ELECAM law empowers this organ to be responsible for the organisation, management, and supervision of the electoral operations and referendums. Section 4(1) states that Elections Cameroon shall organise, manage, and supervise elections and referendums and 4(2) states that Elections Cameroon shall be vested with the requisite powers to perform its duties. In this regard ELECAM has been attributed a wider mandate than that which was given to the defunct NEO, and thus NEO and even the MINATD no longer have any significant business with electoral management in Cameroon.

Section 5 of ELECAM law also defines the functioning of the organ. It is specified that this organ shall use the following channels to perform its duties through the following organs – The EB and the general directorate of elections (GDE). Section 6(1) specifically defines the mandate of the EB, which is to ensure compliance with the electoral law of all stakeholders for the purpose of guaranteeing regular, impartial, free, fair transparent, and credible polls. Section 6(1) explains how the EB shall carry out this task: carry out proper scrutinisation during the elections and non-election years; scrutinise candidacies and publish the final list of candidates contesting official public elections; publish presidential, legislative, and senatorial electoral trends; and forward election reports to constitutional council or bodies provided for by the law amongst others. Section 7 states that EB shall adopt the by-laws of Elections Cameroon and hold consultations with administration, political parties, and civil society for the purpose of managing the electoral process.

Section 18 of the law states that the DGE shall be responsible for the organisation and management of the poll under the supervision of the electoral board, and the section empowers a director general as his deputy as appropriate authority to run the general directorate of elections.

However, it is quite ambiguous that even though the duty to manage an election is vested in ELECAM, the last presidential elections of 2011 were called by a presidential decree and not by ELECAM, as the law requires.³⁵⁸

B. Financial autonomy of ELECAM

Section 27 of the ELECAM law states that ELECAM's resources shall be public funds managed in compliance with public accounting rules. Section 30 clarifies that after the EB has submitted their draft budgets to government, it shall consider it and table it before parliament for adoption as part of finance law. This law illustrates that even though ELECAM's budget may be said to be independent by virtue of being voted by parliament, the draft bill for the budget is only tabled before parliament by government after "consideration". Government still has the upper hand to determine the autonomy of the institution. Government might simply take its time in considering the tabling of the bill, and if they perhaps find that it might not fulfil a certain agenda they intend to push forward, government might simply be sluggish or might not act promptly in tabling the bill before parliament. This leaves ELECAM in the same predicament in which NEO usually found itself in terms of lack of finances since government had to cater for their financial needs. Put differently, ELECAM's financial autonomy to properly manage electoral issues in Cameroon may be at the mercy of the executive representing government. Another gap that exists in this same law regarding the financial autonomy of ELECAM is that Section 31 suggests that after the financial bill for ELECAM finances has been passed by parliament, the minister of finance is requested to disburse the funds as a priority state expenditure as set out in the appropriation of the finance law. So far, the implication of these laws is that both before and after the passage of the ELECAM budget in parliament, ELECAM's financial autonomy is still compromised since government needs to consider the draft budget before passage in parliament, and after passage another government agent in the person of the minister of finance still has to disburse the funds after the bill has passed. The minister of finance as an agent of government could still apply dilatory measures in disbursing the amount voted by parliament if they want to delay or display the functioning of the institution. Thus, this means that even with the apparent independence of ELECAM, many factors, including the provision of its functioning budget, could be disrupted by

³⁵⁸W Nkwi "The counting of votes that have never counted: Reading into the 2011 presidential election in Cameroon" (2011) 5 *Cameroon Journal on Democracy and Human Rights* 14.

the government if they believe a certain agenda intended to be carried out with the funds will not be in their interest.

C. Appointment of ELECAM members

The law provides that the members of the Electoral Board shall be twelve members.³⁵⁹ Section 20(1) states that the director general and his deputy shall be appointed by a presidential decree to serve for a period of five years, renewable as appropriate upon consultation with the electoral board. It is commonplace for appointees who seek reappointment to always act in the interests of those who appoint them, so that at the end of their mandate reappointment is sure to happen. In such a situation, this requires a commissioner to act independently because they need a favour from the person who appoints them. Essentially, for this to happen, appointees will naturally need to act in favour of that person who may appoint them since “one good turn deserves another”. Section 8(3) states that the chairperson and vice-chairperson of the electoral board shall be appointed by presidential decree upon the consultation with political parties represented in the national assembly and civil society. However, no provision is annexed to compel the president to properly consult with this body before appointment. The outcome would certainly be an appointment reflective of personal interest, and an outcome that is restrictive and lacking in any degree of transparency, and biased appointments.

The mandate of ELECAM, its appointment of members, and the financial autonomy of the institution do not illustrate any degree of independence and impartiality of the institution. To make matters regarding its independence worse, Section 41 of the laws states that where ELECAM has been properly established as incompetent by the constitutional council, the president of the republic shall, under Article 5 of the constitution, take the requisite corrective measures. This is a dangerous open-ended provision since the president can use whatever method he deems fit to resolve the matter, including unorthodox methods that might only satisfy his ulterior motives at the expense of the electorates. These setbacks render the independence and autonomy of ELECAM, which has replaced MINATD and NEO, questionable. That said, another realm that can serve as a measure to diffuse executive powers will be investigated in order to examine their weaknesses and also to present recommendations in the last chapter of this thesis.

³⁵⁹Section 8(1) of ELECAM Law.

4.7 Civil society in Cameroon

During the colonial era in French Cameroon, the colonial government did not provide a space within which the colonised could express themselves. The continuous application of biased and selfish colonial policies by the French elicited resistance against them such that the indigenous Cameroonians mobilised into groups and associations, laying the foundation for civic and political consciousness that culminated in the request for independence from France.³⁶⁰ Civic and political consciousness in French Cameroon grew out of the struggle between the co-operative movement and trade unionism in French Cameroon. The formation of indigenous labour unions was prompted by the fact that the French colonial administration facilitated the formation of co-operatives amongst French farmers while indigenous farmers were side-lined. This conduct motivated the indigenous farmers to form labour unions and political formations that spearheaded the struggle for independence from France.³⁶¹ However it must be noted that the different colonial policies adopted by the two colonial masters, France and Britain, shaped the emergence of civil society in Cameroon in two opposing directions. While in British Cameroon the adoption of the policy of indirect rule kept the British from direct contact with traditional and cultural values of the people, thereby ensuring a more collaborative approach in their relations, the French policy of assimilation and violent liberation movement, as championed by the UPC gave civil society in French Cameroon a radical outlook.³⁶²

A. Non-governmental organisations

Dicklitch has opined that Cameroon completely lacks strong professional organisations, unions, bar associations, and even human rights movements that can mount pressure on the state to constrain the state to uphold the rule of law and minority rights.³⁶³ However, that said, Mbuagbo and Fru hold that civil society in Cameroon is increasingly seen as an important player in

³⁶⁰As above 353.

³⁶¹Above.

³⁶²As above 356.

³⁶³Dicklitch (2004) 147.

fostering a new democratic ethos and improving the present system of governance, which is tantamount to a constitution without constitutionalism, which can be rectified by strong vibrant and empowered civil society.³⁶⁴ Civil society should be understood as the domain of non-kingship based contractual relations made up of non-governmental organisations, professional associations, interest groups such as credit and development associations, all of which exist independently of state's sovereign special domain, and are capable of bringing pressure to bear on the state.³⁶⁵ Civil societies advance democracy, constrain government to take citizenry interests seriously, restrain government conduct, and engage in civil and political participation. For civil society to attain their goals that mostly centre on rights amongst others, they have the responsibility of erecting institutions sensitive to basic individual and community rights, and citizens themselves must actively participate in the construction of this liberty.³⁶⁶ As a matter of fact, non-governmental organisations have historically served as a limit to state power.³⁶⁷ Given the number of non-governmental organisations existing in Cameroon and the degree of impact made to influence significant democratic governance, Mbuagbo and Fru like Dicklitch, come to the conclusion that the existing discrepancy has marred their relevance.³⁶⁸

B. Political parties in Cameroon

Political parties are important in every democracy since they provide a real challenge to the ruling party if they do not compromise their position as a check and balance to the executive, as has been seen in advanced democracies. The constitution has to recognise certain rights of political parties that would shield the political processes from majoritarian opportunism and manipulation.³⁶⁹ The constitutionalisation of political parties may play a defining role in the functioning of state institutions and limiting the extent to which ordinary legislation may be used to distort political process.³⁷⁰ In Cameroon, the weakness of political parties, especially

³⁶⁴O Muagbo C Fru "Civil society and democratization: The Cameroonian experience" (2003) 18 *Journal of Social Development in Africa* 134.

³⁶⁵Above.

³⁶⁶As above 135.

³⁶⁷Above.

³⁶⁸Above.

³⁶⁹C Fombad "Challenges to constitutionalism and constitutional rights in Africa and the enabling role of political parties: Lessons and prospects from Southern Africa" (2009) 19 *Criminal Law Forum Journal* 15.

³⁷⁰Above.

opposition political parties, has eliminated any hope of political parties serving as checks and balances to executive use of political power. The three main opposition parties in Cameroon are the SDF, UNDP, and UPC. The UNDP and a faction of the UPC joined the CPDM, which is the ruling party, to form a coalition government after the 1997 elections.³⁷¹ Not only are political parties pruned to co-optation in Cameroon as illustrated above, the UNDP and Union Démocratique du *Cameroun* (UDC) equally refused to become part of a new informal alliance of 16 opposition movements (front des alliés pour le changement) simply because it was dominated by SDF.³⁷² These weaknesses have thus compromised the opposition parties' chances of controlling and checking government. The examination of the role of political parties simply confirms that political parties possess the clout to constrain the executive to uphold the rule of law and constitutionalism if they avoid co-optation into the ruling party, and also avoid misunderstanding and disintegration amongst themselves. If this happens, then political parties and civil society in general will serve as a viable mechanism or vehicle to diffuse executive unfettered use of political power.

4.8 EVALUATING THE RULE OF LAW AND CONSTITUTIONALISM IN POST-INDEPENDENCE CAMEROON AGAINST POST-APARTHEID SOUTH AFRICAN IDEALS

4.8.1 *The preamble*

The preamble of the constitution of South Africa is persuasive and gives a logical and historical account of whence South Africa emerged and where it hopes to get to in the future:

We, the people of South Africa, recognise the injustices of our past; honour those who suffered for justice and freedom in our land;... heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; lay the foundation for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;...

³⁷¹Dicklitch (2004) 165. The ruling party has weakened the opposition in two major ways: co-optation and causing disintegration within the opposition itself. SDF which has hitherto been the biggest opposition party in Cameroon experienced a breakaway group known as the Social Democratic Movement (SDM). In 1998 10 out of the 43 SDF parliamentarians resigned from the party in protest of perceived tribalism and authoritarianism. This brought about internal divisions. The UNDP on its part, split in 1994 over a decision taken by the vice-chairman to accept a ministerial appointment without consulting the party. Even though in 1997 the SDF, UNDP, and UPC boycotted presidential elections for perceived lack of an independent electoral commission, the leader of the UNDP and a handful of members from both parties accepted ministerial posts in President Biya's new cabinet.

³⁷²Above.

Conversely, Cameroon's preamble is seen to be inconsistent and lacking and passive about its historical experiences. The South African constitution's preamble is a well-founded preamble that tallies the spirit of the constitution with the letter of the constitution, so that the constitution remains as a single integrated document. In other words, the nature or the foundation of the letter of the constitution could be traced back to the preamble that expresses the spirit of the law. In this regard, it makes sense then when Theil posits that preambles offer themselves as antithesis to specific horrors inflicted upon a people or society at a given period. In this sense therefore, preambles operate with a view to the present and future and constantly refer to the past that brought them into existence.³⁷³ Because preambles are often considered mere aspirations, they merely define central principles that explain the interpretation of the subsequent text. Given that preambles cannot replace norms, it is thus considered more of a master plan than a source of directly enforceable rules, and lacks any immediate legal obligations but rather practical implications through legal interpretation.³⁷⁴ It must be noted that a formal commitment to the respect of human rights is followed by a more detailed bill of rights entrenched in the constitution of South Africa. This shows that there is a degree of communication and interaction between the preamble and subsequent provisions of the law.³⁷⁵

The constitution of Cameroon states in Article 65 that the preamble is part and parcel of the constitution and therefore attributes legal force to the preamble in terms of human rights. Nevertheless, by entrenching this article, the government of Cameroon is aware that human rights will never be justiciable because the constitution does not provide for any proper and effective mechanism to sanction against any human rights violation; citizens do not have the *locus standi* to seize the constitutional council that is charged with the mandate to protect human rights, and no account is given as to why a bill of rights cannot be entrenched in the constitution instead of highlighting that Article 65 of the preamble that contains human rights shall be part and parcel of

³⁷³S Theil "Three insights from Peter Haberer's 'preambles in the text and context of constitutions'" (2015) UK Constitutional Law Association Blog <http://ukconstitutionallaw.org> (accessed 8/4/2015).

³⁷⁴Above.

³⁷⁵Above. The preamble of Cameroon's constitution is passive and dwells more on aspirations than on the past that brought them into existence. No account is given of the degree of discrimination Cameroonians experienced in the form of imperialism and colonialism and suffered at the hands of the colonisers. The language used is also synonymous with celebratory language since it mentions "jealous of our hard-earned independence", yet fails to mention anything about those who suffered for the freedom of the country as is the case with the South African preamble: "...honour those who suffered for justice and freedom in our land..." The Cameroonian constitutional preamble rather resorts to aspirational language such as "...assert our firm determination to build the Cameroonian Fatherland on the basis of the ideals of fraternity, justice and progress." This preamble embeds human rights but fails to affirm government's commitment to protect human rights by entrenching the same as provisions or letter of the constitution.

the constitution. This illustrates a clear distinction between the preambles of the Cameroonian and South African constitutions. This distinction elicits an amendment to the Cameroonian constitution's preamble to enable it conform to the conventional standard of modern constitutional preambles and end the hypocritical attitude of rendering lip service to a course it is not committed to in practice.³⁷⁶

4.8.2 Amenability of the state to the rule of law

In *Pharmaceutical Manufacturers of South Africa: In re ex parte President of the Republic of South Africa*,³⁷⁷ the then president of South Africa, Nelson Mandela allowed the court's decision to prevail when the court contested his authority to make law through proclamations. The presidential power of appointment is reviewable in post-apartheid South Africa. This was illustrated to an extent by President Zuma's futile attempt to reappoint or extend the mandate of the then chief justice of the CC of South Africa, Sandile Ngcobo. The president's attempt was opposed and rejected as being unconstitutional. Similarly, in the Simelane case, commonly known as *Democratic Alliance v. The President of South Africa & others*,³⁷⁸ President Zuma appointed Menzi Simelane as the director of public prosecutions, the appointee was suspended since civil society deemed that he did not have the "proper conduct". Conversely, in Cameroon, an appointment of such a nature is looked upon as *Actes de Gouvernement* or an act of state that is more of a political act and non-reviewable by any court.³⁷⁹ In my opinion the appointment of officials into public offices such as ministers and directors of public corporations or judges do not fall within that ambit, and are therefore reviewable if a proper jurisdiction is seized regarding the matter.

³⁷⁶Human rights are important issues that cannot be simply captured under criminal law in general since most human rights issues are commonly addressed in the Cameroonian penal code. To show serious commitment to the respect for human rights, specialised institutions erected for that purpose, such as the constitutional council, should be given the power to operate as real custodians of human rights and not mere theorisation of the same.

³⁷⁷2000 (2) SA 674 (CC).

³⁷⁸(CCT 122/11) ... 2012 (12) BCLR 1297 (CC); 2013 (1) SA 248 (CC) (5 October 2012).

³⁷⁹M Togne "La revision de la constitution du 18 Janvier 1996" (2013) 58. http://www.googl...kgf2mj2_EKNX2qQ However, in as much as appointments, proclamations, or convocations through presidential decrees such as the convocation of the electoral body for regular elections, state of emergencies, the dissolution of the national assembly, and nomination of a prime minister amongst others, may conform to the category of acts of state, if at all one were to consider this "*Actes de Gouvernement*" doctrine, that is non-reviewable.

However, it is not common in Cameroon's judicial history to find cases where the authority of any institution has been contested.³⁸⁰ The argument advanced for this lack of engagement is that in Cameroon no judge has jurisdiction over such matters. Nevertheless, Cameroon's legal history makes it possible for such challenges to take place. Perhaps judges may not be willing to entertain such matters for fear of compromising their promotion by the executive to superior echelons, and this disincentive accounts for the lack of radicalism in Cameroonian lawyers.³⁸¹ This lack of legal and judicial radicalism in Cameroonian lawyers is enhanced by the fact that Cameroonian lawyers did not question President Ahidjo's unilateral decision in 1972 to dissolve the federation and replace it with a unitary state in flagrant disregard of Article 47(1) of the Federal Constitution of Cameroon that prohibited such an act.³⁸² Because no one contested the process when it took place then, today Cameroonians find themselves unable to challenge any law or act perpetuated by public authorities, even if the officials acted arbitrarily or *ultra vires*.³⁸³

Furthermore, the president of Cameroon actually decides who to appoint, promote, and discipline in the judiciary, and consequentially the judiciary owes its survival in Cameroon to the executive (president of the republic). This unfortunate eventuality breeds neopatrimonialism since the judges may not be motivated to rule against the president's interest in order to safeguard the future of their profession as judges in Cameroon. This was the case with colonial personal rule where officials were appointed by the imperial European authority to whom the appointees were ultimately responsible. In the ordinary course of their careers appointees were subject to directives and orders that shaped their lives, such as transfers, promotions, and reappointments that if defied, they were unlikely to remain in office for long.³⁸⁴ Neopatrimonial domination has influenced court officials to view themselves as mere extensions of the president. The president delegates functions to the judiciary, and each dispersion of the sovereign authority is only delegated and not released.³⁸⁵

³⁸⁰N Wakai *Under the broken scale of justice: The law and my times* (2009) 95.

³⁸¹Above.

³⁸²As above 112.

³⁸³As above 114.

³⁸⁴R Jackson C Rosberg *Personal rule in black Africa: Prince, autocrat, prophet, tyrant* (1982) 15.

³⁸⁵G Tumwine-Mukubwa "Ruled from the grave: Challenging antiquated constitutional doctrines and values in Commonwealth Africa" in J Oloka-Onyango (ed) *Constitutionalism in Africa: Creating opportunities, facing challenges* (2001) 303.

4.8.3 Constitutions

The Constitution of South Africa has proven to be progressive and modern, dedicating a full chapter to the promotion and respect of human rights and another chapter to the constitutional protection of democracy through specialised national institutions, amongst others, in terms of Chapter two and Chapter Nine of the constitution respectively. The constitution has also implemented significant checks and balances to tame the power of the executive. Conversely, the Cameroonian constitution is relatively antiquated and immersed in executive dominance, contains few or no checks and balances at all, and gives no special attention to human rights since human rights in the Cameroonian constitution have been relegated to the preamble of the constitution that does not really have any strong influence on the constitution. Additionally, specialised institutions are not constitutionally protected and all other independent institutions are disempowered and placed at the mercy of the executive. While the language of the Constitution of South Africa is clear and specific, and says exactly what it seeks to say, the language of the Constitution of Cameroon is shrouded in obfuscation, unclear and couched in suggestive language rather than specific language that address a specific issue. The language in the Constitution of Cameroon is a language that merely rambles on about so many issues but is not concise on any.

The underlying philosophy and issues addressed by the South African interim constitution of 1993 ended up “setting the sun of its clauses” in 1996 and allowing the “sunrise clauses” to take over in 1996 when the current constitution was drawn up. Conversely, Cameroon has not had the sunset provision in any of its clauses since 1960 when it gained independence. Even though a number of amendments have been carried out, the underlying philosophy and ideology of the first constitution in 1960 has virtually moved through all the constitutions up to the present Constitution of 1996.³⁸⁶

While the South African constitution has entrenched real separation of powers where the judiciary has been separated from the other two powers via the establishment of an independent Judicial Services Commission that elects all judges in the country and isolates the president from the process, with a CC that the constitution has empowered with the power of judicial review, in

³⁸⁶In other words while the Constitution of South Africa has progressed to a modern constitution, the Cameroonian constitution has simply remained an outdated constitution that has failed to acknowledged the change of era and evolution from state protection to human rights protection.

Cameroon, despite the fact that separation of powers is mentioned in the constitution it is merely nominal and does not really serve to separate the judiciary from the influence of the executive.³⁸⁷

Generally, the Constitution of South Africa has demonstrated through various entrenched provisions, and an available mechanism for enforcing these provisions, that its constitution is progressive and modern in comparison to the Constitution of Cameroon, which constitution is not only inefficient by virtue of the absence of a certain number of entrenched provisions, but also because of the failure to provide a mechanism capable of enforcing the constitution, and this has projected the constitution as an out-dated and inefficient constitution that fails to fulfil the fundamental purpose of a constitution. The independence of the judiciary and the implementation process really makes a difference in the progressiveness and modernity of the constitution, as seen in the case of the Ghanaian constitution.

The Constitution of Ghana is strikingly similar to the Constitution of Cameroon: the presence of executive dominance; appointment of public officials across all social classes in Ghana; a parliament that rubber stamps the executive; and Ghana has had only one constitution since independence, which has constantly been amended since 1963, but no substantial changes have been made to the content.³⁸⁸ Despite the existence of all these flaws, Ghana has been hailed as a democratic success story and a model that must be adopted by other African countries desirous of circumscribing executive power and introducing the rule of law.³⁸⁹ The most likely question to be posed is, how then has the country striven politically amidst this flawed constitution that is epitomised by acute executive dominance? The answer is simple. The constitution is properly implemented and where the constitution entrenches progressive values, these are respected and implemented. Secondly, the Ghanaian constitution contains provisions that enhance the relative

³⁸⁷ As a matter of fact, the judiciary functions as a branch of the executive and actually takes orders from the executive as the minister of justice is the boss of the judiciary, in addition to appointments to the judiciary directly done by the president of the republic and at the same time he is the head of the Higher Judicial Council that is supposed to be an independent body charged with the duty of disciplining judges and other related issues. There is really no separation of powers in the constitution of Cameroon when other factors that contribute to this principle are examined. The constitution creates a constitutional council that is supposed to determine the constitutionality of legislation and yet this institution is paradoxically stripped of the power of judicial review, which is the power this council was supposed to possess so that in case any legislation is declared unconstitutional it can then strike down such legislation in an *a posteriori* situation. The absence of this power of judicial review in the Cameroon Constitution is prove that there can never be any separation of powers in Cameroon as the courts do not have the power to stop the executive from encroaching on any area not reserved for it. Therefore while separation of powers is possible in South Africa through the intervention of the CC, it is impossible to have separation of powers in Cameroon in the presence of a silent and inactive constitutional council.

³⁸⁸ K Prempeh "How not to write an African constitution: Reflections on Ghana's current constitutional review" (2012) <https://vimeo.com/24892737>

³⁸⁹ Above.

independence of the judiciary.³⁹⁰ The entrenchment of such provisions in the constitution has facilitated the proper implementation of the constitution. The executive has constantly been at loggerheads with the judiciary because they lose most of the cases that are brought before them. For this reason, the executive has constantly directed a diatribe on the judiciary for being impartial since the judiciary has in numerous instances ruled against the executive.³⁹¹

The Constitution of South Africa creates a CC to enforce the constitution, and the judiciary is independent of the executive and parliament. The president of the republic does not take part in the selection process of the JSC. This is one of the reasons why the Constitution of South Africa is progressive in comparison to the Cameroonian constitution.

4.9 CONCLUSION

This chapter has analysed the various institutions that are naturally set up for the purpose of upholding the rule of law and enforcement of constitutionalism. In analysing the institutions, it has been observed that most or all the institutions have not influenced a breakaway from the colonial ideology and jurisprudence. None of the institutions are independent, they are ineffective, and they are relics of colonialism, where the colonial master had total control over all colonial institutions and the colony could not undertake any action independently, but only with the accord of the colonial master. From the examination of the separation of the three arms of government through to the constitutional council, the justiciability of human rights, and the various national specialised independent institutions and civil society, loopholes exist in the manner in which they function since they turn to the guise of rule of law to rather enforce rule by law. Because the Constitution of Cameroon was established by the colonial government and a group of colonialism-minded elites instead of the Cameroonians themselves, every law entrenched in such a constitution can only represent the rule by law instead of the rule of law.³⁹²

³⁹⁰C Fombad “Constitutional reforms and constitutionalism in Africa: Reflections on some current challenges and future prospects” (2011) 59 *Buffalo Law Review* 1017.

³⁹¹Above. The Ghanaian situation under discussion explains why the Cameroonian constitution is not progressive. Because not only has the national assembly been made the rubber stamp of the executive, the judiciary is also subservient and answerable to the executive. This has marred the possibility of the constitution exhibiting any progressiveness. The Constitution of Ghana has thus proven that the lack of an implementing or enforcement mechanism to the constitution and a dependent judiciary have rendered the Cameroon Constitution non-progressive and outdated.

³⁹²See chapter one where distinction is made between the rule of law and rule by law.

The dependence of these institutions on the executive and their ineffectiveness stems from colonialism because the French colonial government used the constitution as their weapon through which the president of independent Cameroon exercised control over the legislature, appointments, patronised leadership in the country, and personalised foreign policy and dependence on France.³⁹³ Thus symbolic constitutionalism and a constitutional text without context reveals that the colonial ideology survived into the democratic dispensation, providing the elites with an opportunity to set up apparent constitutional structures and laws that are oriented towards continuous control of the post-colony by the former colonial master. Put differently, the present constitution, which is the fundamental law of the land upon which every other law takes its cue, can best be described as a constitution without constitutionalism since the above analysis illustrates that the president has only become an imperial president with the promulgation of the 1996 constitution, since the common use of force and human rights abuses characterises the administration. In the chapter that follows, reasons are offered as to why democratic transformation has not actually occurred in Cameroon despite the fact that colonialism has ended and recommendations to that effect are provided thereafter.

³⁹³M Schatzberg & W Zartman (eds) *The political economy of Cameroon* (1986) 195-196.

CHAPTER FIVE

REFLECTIONS, RECOMMENDATIONS AND GENERAL CONCLUSION

5.1 INTRODUCTION

The main aim of this thesis is to investigate why Cameroon has not shifted from its colonial ideology to more progressive ideology congruent with democracy despite having independence since 1960. An examination of the conceptual framework of the rule of law and constitutionalism in Cameroon reveals that democracy in Cameroon is a mere façade as there exists a common weakness in the functioning of all the institutions which implement the rule of law and constitutionalism in Cameroon. This weakness is a corollary of Presidential dominance which has led to the “hands of these institutions being tied.” These institutions which were initially created for the purpose of satisfying popular interest have been converted into institutions whose sole objective is to serve the President of the Republic and by implication the former colonial government. This situation has led to the post-independence Cameroonian Constitutions being reminiscent of a constitution without constitutionalism. A recap of the main question put differently has been: Why has there not been a shift from the colonial legacy despite the façade of democracy in Cameroon?

5.2 REFLECTIONS

The colonial regime commanded enormous unchecked and unfettered powers as a result of the ideology that defined that era which predated the entry into force of the Universal Declaration on Human Rights (UDHR) at least, but not the Covenants on Civil and Political Rights and on Socio-economic Rights of 1966. The colonial period in Africa is placed between the 1880s and early 1960s. Even though the colonisers had a democratic model of

government in Europe in terms of voting rights, even though limited, and multi-party system, colonisation in African and elsewhere turned out not to be a democratic system.¹ Colonial constitutions did not entrench constitutionalism as the powers of the colonial master were not meant to be limited but to be unlimited as to facilitate access to and power over whatever resources the colonialist desired on the conquered territory.

The indigenous government upon assuming power, made sure all the liberal and democratic provisions of the constitution of the Fifth French Republic which were directly copied into the independence constitution were reviewed and replaced with arbitrary ones.² In this respect, contrary to the role of the rule of law as defined in this thesis, the rule of law during the colonial period in Cameroon was rather the “rule by law.” The sole objective of the rule of law was for the exclusive purpose of maintaining peace, law and order which in turn facilitated the colonial government’s access to the exploitation of resources to supply to its industries in Europe and not for the sake of protecting the civil rights of Cameroonians as the norm of the rule of law requires.³ Thus, in varied respects, colonial regime continuity informs the *raison d’être* of the disregard for the rule of law and constitutionalism in post-independence Cameroon.

In more specific terms, the reason for the existence of a façade democracy in post-independence Cameroon can be traced back to a mixture of ideological and jurisprudential underpinnings going as way back as before independence. The Brazzaville Conference certainly served as an incentive to the creation of a “greater France” which entailed keeping all the colonies as part of France. Thus the 1971 Gorse Report clearly demonstrated how France has succeeded in entrenching the dependence of its former colonial territories in Africa. This dependence is evident in close personal relationships between the metropolitan and peripheral Gaullist leaders.⁴ Brazzaville was a watershed in colonial politics as it called for the inclusion of overseas representatives in the Constitutional Assembly that had to follow after the war as it was believed that extensive constitutional reforms were necessary for the purpose of wiping out repressive Vicky legislation and to step up the feeble institutions of the

¹D Uwizeyimana “Democracy and pretend democracies in Africa: Myths of African democracies (2012) 16 *Law Democracy & Development* 146.

²N Awasom “Politics and constitution-making in Francophone Cameroon, 1959-1960 (2002) *Indiana University Press* 49 (4) 24.

³B Muna *Cameroon and the challenges of the 21st Century* (1993) vi.

⁴R Joseph “The Gaullist legacy in Franco-African relations” in R Joseph (ed) *Gaullist Africa: Cameroon under Ahmadu Ahidjo* (1978) 27.

Third French Republic.⁵ The Colonial Parliament or Federal Assembly was proposed for the purpose of meeting many particular needs such as to guarantee the unity of the French world and freedom of each territory that constitutes the bloc France-Colonies or *la federation française* (French Federation).⁶ Another very strong reason explaining the resistance of the colonial ideology having survived into the present Cameroonian democratic dispensation and as a result establishing mirage a rule of law and constitutionalism institutions could be attributed to the theory of Felix Eboué, the colonial governor of Chad who made recommendations in a report prior to the Brazaville Conference entitled “*La nouvelle politique indigene pour l’Afrique Equatoriale Française.*”⁷ He advised that the secret of successful colonial rule as propounded by L.H.G. Lyautey who noted that in every society there exists a ruling class born to command, without which nothing can be done: “Let us get it on our side.” with this view, Eboué hoped to get the middle class (elite) Africans in an active role in administering the larger towns of Africa. But most especially the purpose of the liberalisation towards the African elite was to gradually integrate them with the colonial administration so that they are encouraged to assume a more responsible role in local matters.⁸ However, this association was not aimed at developing the sort of autonomy that will substitute French administration with local self-government.⁹

In Cameroon, the independence constitution was written by the colonial government and a hand full of local elites.¹⁰ Given that aside the colonial government maintaining its ideology of ruling out any autonomy and evolution outside the French bloc in its colonies¹¹ and of imperialism, the local elites themselves as per Felix Eboué’s Report were also oriented towards self-administration and not self-government. Having imbued the Cameroonian elites with such a dependence ideology, it is evident that the independence constitution drafted by the local elites and colonial administration who firmly believe in this ideology intentionally entrenched sham institutions.

The entrenchment of these institutions give the impression that the rule of law and constitutionalism are respected when these same institution merely give the latitude to the Chief Executive of Cameroon who represents the former colonial master, through the

⁵B Marshall *The French colonial myth and constitution-making in the Fourth Republic* (1973) 108.

⁶As above 109.

⁷As above 106. “new local politics for French Equatorial Africa.”

⁸As above 107.

⁹Above.

¹⁰J Mbaku “Economic dependence in Cameroon: SAPs and the Bretton Woods institutions” in J Mbaku & J Takougang (eds) *The Leadership Challenge in Africa: Cameroon under Paul Biya* (2004) 417.

¹¹Marshall (1973) 107.

application of their ideology, to be unstoppable in any act he undertakes even when it is illegal and unconstitutional. Eboue hoped to introduce a new breed of African elite that will cooperate or associate with the colonial administration and in order to facilitate this collaboration; he placed a moratorium on *indigénat* which permitted local officials to impose compulsory labour and punishment for infractions for non-Europeans. The essence of the liberalisation of these policies was to associate the African elite with the colonial administration to assume more responsibility but local self-government.¹² This policy of local elitism can be seen to have worked well for France in their to mission to create a “Greater France” as the strategy aimed at co-opting a collaborating stratum among the colonised to aid France in its imperial mission was a resounding success when one assesses the role played by assimilated Africans such as Houphouet-Boigny and Leopold Sedar Senghor who by virtue of their assimilation participated in French governments and devised laws for the “Greater France” in the same way like their metropolitan counterparts,¹³ one comes to the conclusion that elitism as espoused by Eboue worked perfectly for the colonial administration. While this greater France was repressing nationalists in Cameroun and Algeria, this did not stop these leaders to continue with their loyal service towards the “Greater France.”

The creation of the local elite who have actually taken over leadership in self-government in Africa today informs the reason why the colonial ideology is still firmly rooted in Africa and Cameroon in particular even though colonialism has long ended. The colonial practice has shaped the pattern of politics in contemporary Africa. This view is asserted by the continuing close interaction between the two functions of the colonial practice which are: facilitating France’s domination of its former colonial territories, and maintaining its rule over the erstwhile colonised by the faithful interlocutors of France who are the local elites.¹⁴ This position is reiterated by Davidson as he suggests that these elites in other words were “holding the ring” on behalf of their foreign patrons or paymasters.¹⁵ This is a system of clientelism which has enabled the local elites to maintain continuity of the colonial ideology even though colonialism has long ended in Cameroon.

Mutua has reiterated this premise by confirming that at independence the colonisers decolonised the colonial state and not the African peoples subjected to this state. Self-determination was not exercised by the victims of colonisation but by their victimisers, the

¹²Marshall (1973) 107.

¹³Joseph (1978)“France in Africa” 7.

¹⁴Above.

¹⁵B Davidson *The black man’s burden: Africa and the curse of the nation-state* (1992) 269.

elite who had control over the international state system.¹⁶ Continued dependence on the former coloniser was assured under the post-colonial state by the use of the instrument of narrow elite and their international backer.¹⁷

The idea of liberation of British and French colonies and restoration of peoples' sovereignty came to the fore after President Eisenhower called for the British and French to free their colonies as he informed Winston Churchill that though the empires will never perish, the subjects in the empire will resort to Patrick Henry's declaration "Give me liberty or give me death."¹⁸ At highly effective Socialist International assemblies in Paris a new vision for the creation and independence of African states was contemplated. It was within this context that Cameroonian firebrands in the likes of Dr. Felix Moumie and Ruben Um Nyobe came into contact with ideas of Marxism-Leninism and also became laden with socialist ideas. Um Nyobe was also fascinated by Fanon's thoughts in "Wretched of the Earth" which led them to start thinking about forming the UPC.¹⁹ Attracting Cameroonians from all walks of life including pro-French Cameroonians as members of the UPC, Dr. Moumie aimed at ushering in a new Cameroon without the bourgeoisie class. He believed the dispossession of the lands, exploitation and marginalisation of the wretched of the earth in Cameroon by the wealthy had to stop.²⁰ This made them embark on a struggle to oust the French in Cameroon and their ideology of imperialism and a bigger France or "French Union" which suggested that Cameroon will never be independent from France.

The UPC by 1949 was programmatically and organisationally the best political party in Cameroon and had developed a sound body of doctrine based of exclusively local themes. By 1949 the UPC was the first indigenous political party which espoused Cameroonian nationalism.²¹ One of the chief objectives of UPC was also unification of the two Cameroons and rapid advance towards independence and therefore self-government; which conflicted with French ideology in Cameroon, and severance of ties with France equally contrary to French ideology.²² This divergence in the ideological trajectory of the colonial administration

¹⁶M Mutua "Breaking the barriers: Radical constitutionalism in the new African century" in Oloka-Onyango (ed) *Constitutionalism in Africa: Creating opportunities, facing challenges* (2001) 308-309. Kampala: Fountain Publishers.

¹⁷Above.

¹⁸Cameroonwebnews The war that failed: The rise and fall of the mighty UPC (Union des Populations du Cameroon) (2012) <http://cameroonwebnews.com/2012/12/12/the-war-that-failed-the-rise-and-fall-of-the-mighty-upc-union-des-populations-du-cameroun-part-1/>

¹⁹Above.

²⁰Above.

²¹V Le Vine *The Cameroons: From mandate to independence* (1964) 148-149. Los Angeles: University of California Press.

²²As above 152.

and UPC hitherto degenerated into an ideological struggle, a war of pre-emption or “*guerre révolutionnaire*” against UPC. Its language suggested they were a communist-inspired movement and a reflection of Marxist theories in their publications scared the colonial administration as these conflicted with their imperialist ideology. The arrival of Roland Pre was very symbolic as France had just lost the *guerre révolutionnaire* in Indochina and was thus assigned with the mission of doing all he could to keep Cameroon as a French colony. Pre thus immediately embarked on the offensive against the UPC activities and propaganda.²³ In 1956 constitutional reforms drafted in Paris culminated in the *Loi-cadre* which for the first time gave Cameroonians hopes for independence.²⁴ The *Loi-cadre* brought about numerous modifications in the colonial politics which were not estimated to be substantial enough by other local politicians who then began to distrust the authenticity and composition of the new organisation created by the *Loi-cadre* policy.

The UPC was not happy that France and not Cameroonians defined the road to Cameroon’s independence and thus decided to disrupt all the activities that led to that goal. The UPC had gone underground to prepare its campaign against the upcoming elections of 23 December 1956.²⁵ By November the UPC had decided to carry out a campaign for voting abstention which was characterised by acts of sabotage and in the end the material abstention rate of some of the regions in the country were affected by the UPC campaign.²⁶

On September 13 1958, Um Nyobe the UPC leader was killed by a patrol consisting of colonial and Cameroonian forces near Boumnyebel Um Nyobe’s birthplace. With Um’s death, the rebellion came under control.²⁷ The death of the leader of UPC Um Nyobe and by implication the disempowerment of the organisation, given that the organisation had already been proscribed by the French colonial administration in 1955, had two implications: First, the colonial ideology emerged and became the new dominant ideology sustained in the Cameroonian dispensation.²⁸ The dominance of this ideology is evidenced by its manifestation as the underlying philosophy of the independence constitution that became the product of the constitution-making process that started in 1959. Second, the indigenous

²³As above 154.

²⁴As above 157.

²⁵As above 158.

²⁶As above 161.

²⁷As above 170.

²⁸Um Nyobe’s closest man, Mayi Matip was weakened by the death of Um and as a result he and many other rebels decided to relinquish their campaign against government. The then Prime Minister of Cameroon, although still under the French rule, as the UN Trusteeship was still in force, Ahidjo, allowed Matip to organise his followers into an organised political faction under the colloquial name *rallie* UPC. This strategy polarised and further weakened the UPC given that there now existed two opposing factions of the UPC political party. N Rubin Cameroun: An African federation (1971) 96-97.

people of Cameroon did not take part in constitution-making. This idea of carving out Cameroonians from the constitution-making process has been sustained throughout the processes that came up with the constitutions of 1960, 1961, 1972, 1996 and 2008. Cameroonians never participated in any of the processes.

Another important issue that has facilitated the continuity of the colonial ideology was the issue of cooperation accords concluded posterior to the proclamation of Cameroon's independence and prior to Cameroon joining the United Nations.²⁹ Cameroon gained its independence on the 1 January 1960 but only concluded the cooperation accords with France on 13 November 1960.³⁰ These Accords or Agreements accorded the statute of a state to Cameroon and a number of competences of statehood such as ministries were transferred to Cameroon by France but with the exception of the ministries of finance, international commerce, customs, defense, external relations, justice, interior and commerce which were still held by the French government.³¹ On 30 December 1958 France handed over the autonomy and responsibility of justice and maintaining of peace and order to Cameroon. However, the French government notified the UN of the Accord concluded with Cameroon to terminate the UN trusteeship on the date of its independence.

The precipitated turnabout from the French policy of keeping its colonial territories as part of *la plus grande France* was inspired by a major political upheaval which saw the return of General De Gaulle to power and the introduction of the French Fifth Republic. Under this Republic, France conclusively abandoned the policy encouraging an organic link between the metropolis and their African colonies.³²

The UN accepted to carry out this request after satisfying itself of the proper representation of the Legislative Assembly.³³ The French ordinance of 30 December 1958 became a provisional measure by virtue of the Accords concluded between France and Cameroon.³⁴ The final cooperation Agreement passed by a UN decision on 5 December 1959 fixed the date for the termination of the UN Trusteeship in Cameroon on the 1 January 1960.

These cooperation Agreements were mostly characterised by excessive secrecy. The original Cooperation Agreements in full have never been published including the revised versions of

²⁹M Ligot *Les Accords de coopération entre la France et les états Africains et Malgache d'expression Française* (1964) 56. Paris : Documentation Française, 1964.

³⁰Above.

³¹As above 38.

³²N Rubin *Cameroon: An African federation* (1972) 92.

³³As above 39.

³⁴Above.

the Agreement down from 1973 to 1974.³⁵ More importantly, after Cameroon gained independence on 1 January 1960, the constitution of the land was only drawn up in February of that year. The constitution did not inform of any set of secret agreements between France and Cameroun, concluded in December 1959 and provided for cultural, diplomatic, fiscal, monetary and economic cooperation between both countries, and both financial and military assistance by France to the independent government of Cameroun.³⁶

Joseph argues that what is known about these Cooperation Agreements is far less than what is not known about them. He buttresses his argument by evoking the fact that the Cooperation Accord concluded between Cameroon and France on 13 November 1959 did not provide any mutual defence clause. Yet, on the date of the signature of the Agreement, Cameroon was the sole territory in Black Africa hosting French troops engaged in a counter-insurrectionary struggle and part of the troops remained in Cameroon even after the insurrections had been quelled.³⁷ Le Vine corroborates Joseph as he confirms that a series of Franco-Cameroonian conventions which were both public and secret testify to the relationship that France was no longer the final locus of power in Cameroon after independence but however remained in the background as part of Ahidjo's sustenance system.³⁸ This explains the reason why the unpublished security agreements enabled Ahidjo to request French military assistance to help put down the UPC insurgence during the years 1960-1966.³⁹

Given this state of events, it must be understood, parenthetically, that even though the 1959 statute of Cameroun called Cameroun a state, this statute did not truly make it one as the reserved powers retained by France could only suggest that sovereignty ultimately reposed in Paris and not in Yaounde, the capital of Cameroun.⁴⁰

As Mbembe argues here, the sovereignty of post-colonial African states has been privatised⁴¹ when as illustrated above there exists cooperation Agreements affecting an entire state yet only done in secret. There is a convergence between the struggle to privatise state sovereignty and the struggle to concentrate and privatise the apparatus of coercion, given that the control of the means of coercion facilitates the appropriation of resources and utilities formerly concentrated in the state.⁴² This accomplishment will be in line with the France's

³⁵Joseph (1978) 17.

³⁶Rubin (1971) 101.

³⁷As above 17-18.

³⁸V Le Vine Leadership and regime changes in perspective in M Schatzburg W Zartman (eds) *The political economy of Cameroon* (1986) 23.

³⁹Above.

⁴⁰Le Vine (1964) 217.

⁴¹A Mbembe *On the postcolony* (2001) 78.

⁴²Above.

aim of a “Greater France” which in this case is to continuously have access to the resources of Cameroon even after independence, and informs French assimilationist and imperialist ideology. In my opinion, another way through which France facilitated its post-colonial relationship with Cameroon, apart from the cooperation agreements, was also through the constitution-making process which delivered a constitution similar to the Fifth Republic’s constitution which was drawn up in 1958 while Cameroon was still under the colonial rule of France. I constantly make reference to French colonialism instead of French Trusteeship because despite Cameroon being a UN Trust handed over to French and English administration, which *de jure* never entertained colonialism, what happened *de facto* however made it a colony. Ghai holds that all colonial constitutions were repressive and only served the goal of facilitating the exploitation of the colonies.⁴³ Relying on this argument, there is a sufficient basis upon which one can rely that if these colonial constitutions were designed to enable exploitation of the colonies and were repressive at the same time, then the fact that the colonial administration made a huge input in the independence constitution evinces the *raison d’être* of the continuity of the colonial ideology in Cameroon despite the shift to a democratic dispensation. This therefore explains why the democratic dispensation in Cameroon is a mere façade; because while a shift occurred in terms of dispensation, none was experienced in terms of ideology.

In other words, the African post-colonial state generally a general technology of domination as though a central state continues to exist apparently, its formal structure still remains intact the same the formalism of its rituals happen, and its spectacle. The autocrat, in this case the Head of State is still in control of the power of appointment at least in theory and uses it in his advantage.⁴⁴ In this kind of a polity which promotes clientelism, where there exists real power and is used, it is not motivated by law or regulation but always on the basis of non-legal, and temporary arrangement which can be reviewed at any time without any prior notification.⁴⁵ This makes postcolonial African states a fertile ground for forms of indirect private government.

As a matter of fact, there has been no shift from the colonial legacy of Cameroon despite the façade of a democracy simply because the conditions and factors that favoured and encouraged colonialism have not been transformed.

⁴³Y Ghai “A journey around constitutions: Reflections on contemporary constitutions” (2005) *South African Law Journal* 804.

⁴⁴As above 79.

⁴⁵Above.

5.2.1 Constitutionalism and the rule of law in Cameroon

As earlier outlined in chapter one of this thesis, the rule of law does not mean that laws passed by parliament must be absolutely accepted and respected by the people, but rather that “just laws” and “good laws” passed with the consent of the people in a democracy must be respected by the people.⁴⁶ Moreover, according to some theorists, relying on the Greco-Roman conception of “higher law”, individuals were absolved from the duty to obey if they were faced with a law which was inconsistent with the natural law.⁴⁷ Thus an unjust law which is forcefully imposed on the people is justification for resistance and even tyrannicide.⁴⁸ By virtue of this theory, Cameroon’s constitutions which all result from a constitution-making process which was elite driven, a top-down process and non-participation of the people of Cameroon can neither ensure nor incarnate the rule of law. In other words, the local elite and the colonial government, and not the indigenous people had significant input in the process.⁴⁹ In this respect, Muna argues that although independence meant self-government, nothing was said about the sovereignty or the fundamental rights of the people.⁵⁰ There was no new orientation in alignment with the requirements of a democratic and autonomous government in the manner the new government governed in independence.⁵¹ In other words, if the rule of law requires laws to conform to certain standards, then the mere fact of laws being passed by Parliament without the approval of the people and by extension not “just laws,” will not culminate in a rule of law system, but rather a “rule by law” system. It is a set of rules simply passed by an autocrat who uses his transient parliamentary majority for the law to be rubber-stamped.

The main purpose of passing it through parliament is for the law to be legalized but the law remains entirely illegitimate. The rule of law and rule by law are different in that; if opponent political actors agree to recourse to law for the resolution of their conflict, this indicates that law rules.⁵² However, true rule of law can only be possible if institutions transform brute power.⁵³ Where one political force monopolises power and rules without restraint, it is known

⁴⁶M Shapiro & A Sweet *On law, politics, & Judicialization* (2002) 166.

⁴⁷M Cappelletti & W Cohen *Comparative constitutional law: Cases and materials* (1979) 6.

⁴⁸Above.

⁴⁹J Mbaku “Decolonization, reunification, and federation in Cameroon” in J Mbaku & J Takougang *The leadership challenge in Africa* (2004) 43.

⁵⁰Muna (1993) 5.

⁵¹Above 13.

⁵²M Maravall & A Przeworski *Democracy and the Rule of Law* (2003) 3.

⁵³Above 8.

as rule by law. In this sense, it is understood that law is used as a tool of the political actor and he is not bound by law.

The examination of the separation of powers in Cameroon is epitomized by an “imperial presidency.” A president who’s powers are extensive and far reaching and go as far as influencing parliament, the judiciary and even independent and special administrative bodies in the country. These kinds of colonising powers are inconsistent with, and cannot uphold the rule of law. It is upholding the rule of law that prevents the all-powerful president from subjecting the citizen from arbitrary decisions by the executive.⁵⁴

The rule of law ensures the primacy of the law, the dignity of man should be given prime attention and provision made for the legitimate rights of the people.⁵⁵ The independence of the judiciary is indispensable in the preservation of a rule of law society. The judiciary in other words serves as the oracle of the rule of law given that the rule of law can only exist where there is a strong and independent judiciary entrusted with the responsibility to make sure that the laws of the land are enforced fairly and equally.⁵⁶

As Fombad has noted, constitutionalism refers to the combination of the idea of limited and accountable government and exemplified by two main factors. First, limitations are imposed on government which respects certain core values and second, the ability of citizens to legally constrain government to respect these limitations.⁵⁷ These factors as already discussed extensively in chapters one, three and four of this thesis as Fombad reiterates are: The recognition and protection of human rights and freedoms, the separation of powers, an independent judiciary, the review of the constitutionality of laws, the control of the amendment of the constitution and institutions that support democracy.⁵⁸

Moreover, the rule of law and constitutionalism overlap in that the rule of law in its widest understanding means that there is an agreement between the members of a society that laws are not prejudicial, but preexist and constrain the conduct of any ruler in a given point in time. The law is sovereign and not the ruler. What this implies is that the ruler can only gain legitimacy if he derives his powers from the law.⁵⁹ In this regard, the President of Cameroon derives his powers from the constitution. However, the bone of contention is whether the law is not prejudicial and whether it has the potential of constraining the President of Cameroon?

⁵⁴Muna (1993) 67.

⁵⁵Above.

⁵⁶Muna (1993) 85.

⁵⁷C Fombad “Constitutional reforms and constitutionalism in Africa: Reflections on some current challenges and future prospects (2011) 59 *Buffalo Law Review* 1014.

⁵⁸Above.

⁵⁹As above 263.

The simple answer is no. two reasons explain the answer no. first; the fundamental law of Cameroon is prejudicial. The people of Cameroon have never taken part in any constitution-making process since 1960, albeit having experienced three major constitutional amendment phases of 1961, 1972 and 1996. Second, the fundamental law cannot constrain the powers of the President of the Republic as the judiciary is emasculated and subservient to the executive and a Constitutional Council which lacks the power of judicial review.

Mungo Beti reaffirms the fact that Cameroon was established through colonialism but had never been reconstructed and reconstituted after independence to provide institutional structures strong enough to constrain the state and consequently minimize impunity and government-induced tyranny.⁶⁰ Thus the fundamental idea behind constitutionalism is to ensure that the constitution stop politicians from violating it with impunity.⁶¹ Tumwine-Mukubwa argues that the state has curtailed people's constitutional rights through legislative and administrative means. Parliament and the executive have reigned supreme instead of the constitution.⁶² He makes allusion to Ghai who terms personal rule or patrimonialism as a situation epitomized by the ruler and his officials being insulated from rational-legal order or from constitutional rule and as a result are above the law.⁶³

Ghai's argument rightly falls in context with the situation in Cameroon where the constitution instead of restraining presidential powers and constraining the President to respect and uphold the law, the constitution rather protects the President from all acts committed during his term of office and goes further to even protect him when he leaves office. In other words, articles 8, 9 and 10 invest the President with enormous powers to the extent that these powers are inconsistent with the objective of a constitution. Article 53 simply absolves the President from every acts committed while in office and he shall not be held accountable for such crimes even when he leaves office. Such provisions are simply anti-rule of law and are not supposed to be part of a constitution. How such provisions found their way into the constitution could be informed by the lack of citizenry participation in the constitution-making process in Cameroon. A society which has lost control of its destiny really cannot institutionalize power based on constitutional rule.⁶⁴ In such a situation, there is assurance

⁶⁰M Beti *Main basse sur le Cameroun : Autopsie d'une decolonisation* (1972) quoted in J Mbaku « Judicial independence, constitutionalism and governance in Cameroon: Lessons from French constitutional practice» (2014) *European Journal of Comparative Law and Governance* at fn 40.

⁶¹Fombad (2011) 1015.

⁶²G Tumwine-Mukubwa "Ruled from the grave: Challenging antiquated constitutional doctrines and values in Commonwealth Africa" in Oloka-Onyango (2001) 302.

⁶³Above.

⁶⁴As above 303.

that the executive is almost always going to encroach on constitutional rights and democracy. The ideology of constitutionalism is not attributed sanctity and not hailed as a time-honoured culture by both ruler and the ruled in Africa. Thus legitimacy of the ruler arises from other sources. Unfortunately, some of these sources are quite antithetical to constitutional rule.⁶⁵ These extra-legal sources of constitutional legitimacy which are very common in Cameroon have been illustrated by the Ugandan Minister for security as quoted in a local Uganda daily after he illegally detained people above the constitutional mandated period. He said:

It is against the law. We are holding them against the law. But I am convinced we are doing a good thing for society. It is better to infringe on the rights of a few people to save many others.⁶⁶

Certainly the Minister did not see anything wrong with his action, talk less of being bothered about the ideology of constitutionalism. This patrimonial form of domination has equally affected the courts to the extent that its officials simply view themselves as the extension of the ruler.⁶⁷ During the colonial era in Cameroon, the judicial power was usurped from the hands of the judiciary and concentrated in the hands of the colonial administrator.⁶⁸ At independence the situation did not evolve to turn the judiciary into an independent power along the lines of the executive. Rather article 37(3) of the constitution makes the President of the Republic, a member of the executive, the guarantor of the independence of the judiciary. This is evidence that even after independence there has still been continuity in the colonial ideology. By being an extension of the ruler or executive, the judiciary is merely delegated powers by the ruler from his sovereign power than the powers being released.⁶⁹

Judges in Cameroon have thus accepted their subordinate position to the executive and heeded to executive pressure as best illustrated in the Nigerian case: the case of *Bronik Motors and Anor v. Wema Bank Ltd*, the court mentioned the following “Judicial power’ means the power which every sovereign authority must of necessity have to decide controversies between its subjects.” This explains the reason why courts have looked on helplessly as citizenry rights are being curtailed by the executive and parliament.⁷⁰ Worst still, the courts in Cameroon have been discouraged from being activist. The court as in the French system is

⁶⁵Above

⁶⁶Quoted in Tumwine-Mukubwa in Oloaka O’nyango (2001) 303.

⁶⁷Above.

⁶⁸C Anyangwe The magistracy and the bar in Cameroon (1989) 34 fn 34.

⁶⁹Tumwine-Mukubwa in Oloaka O’nyango (2001) 303.

⁷⁰Above.

simply *la bouche de la loi*. The court is relegated to merely interpreting the law as it ‘is’ and nothing more. The courts cannot avoid applying the law as it is simply because the judges have suggested that its application will infringe human rights.

The job of enacting laws and by extension human rights is that of parliament,⁷¹ the courts are there merely to interpret and within strict limits and the execution of the judgments reached by courts is done by the executive. My interest in this thesis has been to project or highlight the fact that under colonialism the sovereignty of the people was held by the colonial powers and thereby suspending the people’s right to be protected by the rule of law and constitutionalism which was reserved only for the European population in Cameroon. The all-powerful Governor-General had unfettered powers as he accumulated all three governmental powers in his hands and could crush the colonized without being held to account.

I have attempted to demonstrate that after the collapse of colonialism and the introduction of democracy, the courts, which serve as the oracle of the rule of law and the organ implementing the separation of powers in Cameroon and thereby limiting the wide-ranging powers of the President of the Republic so as to uphold constitutionalism, has failed. The failure of this arbiter has facilitated the continuity of the colonial ideology into a dispensation espousing conflicting views with colonialism. Everything in the new dispensation is mere theorization. There exist a legislative, an executive and judiciary branch of government in Cameroon, which means in theory the principle of separation of powers is respected. However, in practice, the executive controls parliament through its transient majority and the judiciary is subservient to it. Even the Constitutional Council which was created by the Constitution of 1996 has not yet gone functional and is deprived of the power of judicial review. These defects existing in the constitution and democracy of Cameroon makes the constitution reminiscent of a constitution without constitutionalism.

The President of the Republic has control over all organs of the Constitution such as the Judiciary, by appointing, promoting and disciplining judges, parliament, as the President’s party being the majority party has 152 seats in Parliament out of the 180 seats, leaving the opposition a negligible 28 seats.⁷² This traces the roots of the imperial nature of the President of Cameroon in the present democratic dispensation to the colonial legal order, which just like the all-powerful colonial governors of the colonial period who combined the functions of

⁷¹Article 26(2) (a) of the Cameroon Constitution of 1996.

⁷²BBC News Africa ‘Big win for Cameroon’s ruling party’ [news.bbc.co.uk/2/hi/Africa/6913281.stm](https://www.bbc.com/news/2/hi/Africa/6913281.stm) (accessed 5/8/2015).

legislature, executive and judiciary,⁷³ still does the same in the present polity albeit in a masked manner. This unfortunate reality reveals that transformative constitutionalism is far-fetched in Cameroon. According to most post-colonial scholars, the survival of states of this nature since independence has not depended on internal legitimacy of its populace because such legitimacy has never existed. On the contrary, the post-colonial state in Africa has endured primarily as a result of international legitimacy.⁷⁴ In this light, the Cameroon post-independence polity has always looked like what Mahmood Mamdani describes as the colonial state being Janus-faced, in that internationally Cameroon has a recognised statehood status and a member of the UN and signatory to the most important human rights treaties, yet domestically the executive has no restraint and constantly encroaches on human rights, and has control over parliament and the courts. With this state of affairs, the rule of law and constitutionalism can only be a mirage and not a reality. Cameroon has not progressed in any way from what it used to be during the colonial era in terms of the rule of law and constitutionalism. This premise can better be illustrated by the case of the verdict passed by the Supreme Court after the alleged rigging of the 1992 elections. The President of the Supreme Court after heeding to popular pressure to rule on the elections dispute in which the winner of the elections of the 1992 Presidential elections as declared by the Ministry of Territorial Administration, the President of the Supreme Court started reading the verdict by first of all acknowledging the numerous irregularities registered in the elections. However, in ruling on the verdict he simply said “my hands are tied.” He did not say who tied his hands and why the hands were tied.⁷⁵ This reveals two things: first, that the judges who operate in the name of the people of Cameroon are still held hostage, or the hands of the courts in Cameroon are still tied by the former colonial power who in this case is represented by the President, and that the President as a colonial comprador still holds unfettered powers; over parliament and judiciary and rules by decrees.

The President is a colonial comprador in the sense that he holds unfettered powers not at the request of the people of Cameroon but at the request of the former colonial master so that they can continue to loot the wealth of the country through this native or local agent just as it happened during the colonial period. Second, Cameroon has not had a clean break with the colonial ideology and this case of judges’ hands being tied reveals that Cameroon is still

⁷³C Fombad E Nwauche “Africa’s imperial presidents: Immunity, impunity and accountability” (2012) 5 *African Journal of Legal Studies* 96.

⁷⁴Mutua in Oloaka O’nyango (2001) 315.

⁷⁵I Chia “Cameroon Supreme Court Chief Justice had called for popular uprising” (2012) The Chia Report <http://www.chiareport.com/2012/06/cameroon-supreme-court-chief-justice-had-called-for-popular-uprising.html> (accessed 15/5/2015)

under “rule by law” and not “rule of law.” Jean-Paul Satre has reaffirmed this notion in the following words:

...in order to triumph, the national revolution must be socialist; if its career is cut short, if the native bourgeoisie takes over power, the new state, in spite of its formal sovereignty, remains in the hands of the imperialists.⁷⁶

South Africa on the contrary apart from little traces which have proven that the rule of law and constitutionalism is not an all rosy issue in South Africa such as Nkandlagate, Guptagate, the Marikana massacre and President Zuma sounding like a populist appealing for the rule of law to be disregarded when he said “The powers conferred on the courts cannot be regarded as superior to the powers resulting from a mandate given by the people in a popular vote.”⁷⁷ In *Justice Alliance of South Africa v The President of the Republic of South Africa and Others*,⁷⁸ the Constitutional Court stopped the President of the Republic of South Africa from extending the term of office of Chief Justice Sandile Ngcobo when it came to an end in 2011, arguing that it was unconstitutional. Not only was the rule of law upheld by the Constitutional Court, it also succeeded in restraining the excessive powers attributed to the president by the constitution. While both presidents of Cameroon and South Africa have been attributed enormous powers by the constitution, those of the former have no limitation while those of the latter have constraints as illustrated by the *Justice Alliance* case. All in all, while the Supreme Court verdict on the 1992 Presidential elections in Cameroon depicts Cameroon as still espousing the colonial ideology while in a democratic dispensation, there is a mark of disparity with the situation of South Africa where a clean break with apartheid was established after the fall of the regime.

The case of *State of South Africa v Makwanyane* in which the judges stated that the death penalty institutionalises some kind of vengeance and savagery belonging only in the past and inconsistent with the present dispensation. The judgment revealed a clean break with the past and shows the strength of the new dispensation; a dispensation in which even the will of the majority can be trumped by constitutional imperatives. This point of convergence between the colonial past of Cameroon and apartheid in South Africa informs why South Africa has been

⁷⁶J-P Satre in F Fanon *The wretched of the earth* (1963) 10 preface. London: Penguin Books.

⁷⁷Address to the National Assembly bidding farewell to Chief Justice Ngcobo and welcoming Chief Justice Mogoeng, 1st November, 2011, “People’s power and the courts,” The Bram Fisher Lecture, 2011

⁷⁸(CCT 53/11, CCT 54/11, CCT 62/11) [2011] ZACC 23; 2011 (5) SA 388 (CC); 2011 (10) BCLR 1017 (CC) (29 July 2011)

able to make remarkable strides regarding the rule of law and constitutionalism despite having experienced only twenty-one years of democracy, as compared to Cameroon which has been a democracy for well over fifty five years today and its “hands are still tied.” This turn of events can best be captured in W.E.B Du Bois’ words “A system cannot fail those it was never meant to protect.”⁷⁹

5.3 RECOMMENDATIONS FOR CONSTITUTIONAL TRANSFORMATION IN POST-INDEPENDENCE CAMEROON

The analysis of the two legal systems reveals deficiencies in Cameroon’s constitutionalism and its application of the rule of law. South African post-apartheid jurisprudence has been drawn upon in making recommendations to address the deficiencies. These recommendations have been assessed within the context of the prevailing situation in Cameroon to establish which of the recommendations are capable of immediate implementation and which will require contextual change for implementation to be possible. That is not to say that the South African dispensation is perfect. There are deficiencies in the South African constitutional dispensation which have been borne in mind in making these recommendations.

It must be noted that the following recommendations are neither proposed to the current autocratic regime who will likely not pay heed as the same may be against their interest, nor to the international community on the basis of human rights, since they do not have the authority to intervene in the affairs of a sovereign state for the purpose of imposing a new “progressive constitution”. Conclusively, the recommendations are incumbent on the citizenry of Cameroon who have the duty or responsibility to inspire a revolution that will enable them to impose these recommendations on the state during the new constitution-making process.

- The Constitution of Cameroon is too flawed to be fixed by a mere amendment. The Constitution simply has to be abrogated and a new one modeled on modern constitutions that promote respect for conventional human rights and standards, civil liberties, the rule of law and state obligation towards citizenry as a point of departure is required. It must be borne in mind that since the adoption of the 1960 constitution which was epitomised by Machiavellian and Leviathanian theories, there has never

⁷⁹Democratic Underground.com "A system cannot fail those it was never meant to protect" - W.E.B. Du Bois. <http://www.democraticunderground.com/10025863857>.

been any clean break with such ideologies as the 1961, 1972 and 1996 constitutions maintains the same underlying philosophies. This is evidence that even though Cameroon had independence in 1960, the colonialism ideology has survived into the present democratic dispensation and the only way to break with such an ideology is to cut the umbilical cord of that ideology; abrogating the constitution and reconstructing another with the imprimatur of the Cameroonian citizenry consent.

- Presidential powers in the new Cameroon constitution should be circumscribed to make the President responsible and accountable to the people. This may restrain his arbitrary treatment of citizens and the violation of their human rights. Articles 53 and 9 of the constitution should not be included in the new constitution because they negate the rule of law and constitutionalism. This Cameroon constitution was closely modeled on that of the French Fifth Republic. While the latter was written to largely accommodate the personality and personal views of President De Gaulle, and drafted in a context that brought President De Gaulle to power; the circumstances under which the independence constitution of Cameroon was written had no striking similarity with those existing in France in 1958.⁸⁰ For this reason, the amount of powers attributed to the President of the Republic of Cameroon should not have happened in the first place. This provides the basis for which the new constitution should considerably circumscribe presidential powers, but care will be taken to avoid circumscribing the powers to the level that will make it difficult or impossible to discharge his mandate as President of the Republic. His term of office will be limited to two terms of four years each, making a maximum of eight year. After this period any attempt to extend one's mandate for whatever reason shall be considered high treason.
- The Higher Judicial Council (HJC) under the new constitution shall be presided over by the Chief Justice or President of the Supreme Court as is the case with the Judicial service Commission of South Africa⁸¹ and not by the President of the Republic or Minister of Justice under the old constitution. The President of the Republic may not have the last word in matters of appointment, promotion and discipline of judges as was the case under the old constitution where the HJC was merely relegated to an advisory institution, who could only give their opinion in such matters. Under the new constitution, the HJC shall be charged with the preparation of a nomination list with

⁸⁰Le Vine (1964) 227.

⁸¹Section 178(1) (a) constitution of the Republic of South Africa 1996.

three names more than the number of appointments to be made and the list shall be submitted to the President of the Republic as stipulated under the South African Constitution.⁸² The judges of the Supreme Court of Cameroon shall hold office for a non-renewable term of 12 years or until the judge attains the age of 65, unlike the case of South Africa which is held at 70 years. Unlike the case of South Africa where an Act of Parliament may extend the term of office of a Constitutional Court judge,⁸³ Parliament in Cameroon may not be given the mandate to do same because Parliament in Cameroon is a mere extension of the executive and the number of seats they occupy in Parliament simply constitute a two-thirds majority, which will work in the interest of the executive in any circumstance. It is hoped therefore that under the new constitution, the imperial powers of the President of the Republic of Cameroon which allowed him to directly influence judges of the Supreme Court will considerably diminish and his involvement in the HJC will simply be a symbolic one as he would simply be appointing judges from a list prepared by the judiciary itself will hinder the President from having full and total control of the process, which if otherwise allowed might lead to neo-patrimonialism.

- The judiciary in Cameroon shall no longer be under the Ministry of Justice which is part of the executive branch. Thus the judiciary shall no longer be headed by the Minister of Justice but by the Chief Justice or President of the Supreme Court of Cameroon. As in the case of South Africa, the Judiciary in Cameroon shall be independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.⁸⁴ No person or organ may interfere with the functioning of the courts.⁸⁵ Article 37(2) actually appoints the President of the Republic the guarantor of the independence of the judiciary. The implication is that not only will the independence not be effective as the President of the Republic is a member of the executive branch, but also that the Judiciary is not a co-equal power with the executive, but rather subjected to the executive. While this article reveals itself as a relic of colonialism in Cameroon in terms of France's article 64 of the French Fifth Republic Constitution, there seems to exist a sharp contrast and no congruity in the reasons behind the adoption of the provision by both France and Cameroon. The French model of the independence of the judiciary was a reaction

⁸²Sec 174(4) (a,b,c).

⁸³Sec 176(1) which has been substituted by sec 15 of the Constitution Sixth Amendment Act of 2001.

⁸⁴Section 165(2) Constitution of the Republic of South Africa, 1996.

⁸⁵Section 165(3) Constitution of the Republic of South Africa, 1996.

against the obsessive Gallic fear of legal dictatorship established by a “*government des juges*.” This happened before the French Revolution where royal courts known as *Parlement* abused judicial review enormously. When the French Revolution broke out, one of the first reactions the revolutionaries took was to break the powers of these courts by rendering them subservient to the executive.⁸⁶ This mistrust of the judiciary should not have been evident in Cameroon as Cameroon’s Judiciary history is not in any way closer to what France experienced. The powers attributed to the President of the Republic to appoint, promote, transfer and dismiss judges simply reinforce the powers of the President to have complete control over the judiciary. Even though in exercising this right he is held upon to receive advice from the HJC, it is not evident that any substantial change will ensue as the President of the Republic also controls this body.⁸⁷ It is for this reason that the Judiciary must be completely taken out of the control of the executive and left in the hands of the judiciary itself under the new constitution. Once this is done, the rule of law and constitutionalism will no longer be a mirage but a reality because the judiciary will act fearlessly as no one will have the power to influence the judges if they passed a judgment contrary to executive will or against their interest.

- In other to make the separation of powers a prominent feature of governance in Cameroon, the judicial review mechanism must be introduced and applied in Cameroon. Since 1960, the various constitutional amendments carried out have created an imperial presidency,⁸⁸ a feeble legislature and a subservient judiciary, thereby effectively neutralising the concept of separation of powers. As a result of the fact that no constitutional mechanism is provided to prevent one branch of government from usurping the powers of another, the present constitutional arrangement in Cameroons allows the President of the Republic to totally dominate both the judiciary and legislature and can therefore act with impunity.⁸⁹ In making the new constitution, the constitutional engineers should make sure that separation of powers is not merely symbolic as it is the case with the present constitution. The rules of engagement of the legislature should be amended to be able to stop the executive from using parliament as its rubber stamp. It should be structured in such a way that if

⁸⁶C Fombad “A preliminary assessment of the prospects for judicial independence in post-1990 African constitutions (2007) *Public Law* 237.

⁸⁷Above.

⁸⁸J Mbaku “Judicial independence, constitutionalism and governance in Cameroon: Lessons from French constitutional practice” (2014) *European Journal of Comparative Law and Governance* 387.

⁸⁹Above 389.

the opposition is not part of the parliamentary process, then a motion cannot go through. In certain circumstances a super majority alone will not be enough to allow an executive motion to pass. If the rules are made more stringent to avoid a one party show, then parliament will be more engaging and not merely serving as a rubber stamp which legalizes all executive bills. Above all, with an active judicial review mechanism capable of striking down the acts of the legislature, the executive might refrain from using parliament by subterfuge to legalise its policies which only serve ulterior motives.

- The Constitutional Council may maintain its appellation but in practice it should act and have a mandate similar to that of the Constitutional Court of South Africa. It may still however, act as a specialized institution exclusively for human rights issues and can remain outside the ambit of the judiciary as it has hitherto been. It must be borne in mind that Cameroon copied this model for rights adjudication from France with a defective judicial review mechanism which has not adjudicated any human rights violation in Cameroon since its inception about nineteen years ago. My recommendation to depart from this model towards that of South Africa is premised on the fact that if Benin which was also a former French colony which also adopted the French constitutional system was able to later break rank with this defective model of judicial review to adopt a model similar to that of South Africa, then Cameroon can equally do same. The Constitutional Court of Benin just like the Constitutional Council of Cameroon is placed outside the judiciary as a specialized court under title five of the Beninese constitution as espoused by Kelsen. While articles 121(a) and (b) discuss about the Constitutional Court giving its opinion on the constitutionality of laws prior to their promulgation and on the laws and any regulatory text deemed to be infringed on the fundamental human rights and on public liberties, article 122 elaborates further and properly articulates the unconstitutionality of a law disregarding citizen human rights.⁹⁰ In a nutshell, under the new constitution a citizen in Cameroon shall have *locus standi* to bring a complaint to the constitutional Council whenever they deem the legislature to be capable of encroachment on their fundamental rights.

⁹⁰ Any citizen may complain to the Constitutional Court about the constitutionality of laws whether directly or whether by the procedure of the exception of unconstitutionality invoked in a matter which concerns him before a court of law. This must grant a stay until the decision of the Constitutional Court which must be reached within a period of thirty days.

- In order for the Constitutional Council to pass independent judgments, the process of absolute appointments by the President of the Republic should be reviewed. Just like the system of South Africa, the task of coming up with a list of nominees should be entrusted to the HJC or better still a novel body could be created for the exclusive purpose of Constitutional Council appointees dubbed the “Supreme Constitutional Council” (SCC) to come up with a list of nominees from which the President of the Republic simply appoints. This will avoid the unfortunate situation whereby a network of patronage is created as a result of the appointees owing their appointment to the President of the Republic and in order to return the favour or to keep their positions during reappointment, they might try to attract the consideration of the President of the Republic by being loyal to him even when loyalty will be at the detriment of the state in general.
- Human rights must follow the lead of the Bill of Rights in the South African Constitution in Chapter two. Human or fundamental rights have been trivalised in Cameroon surprisingly, at a time and era when fundamental rights are supposed to epitomize the constitutional framework in Cameroon. Yet the Cameroon constitution simply relegates a scanty number of fundamental rights in the preamble. There is no need to talk of a democracy when human rights have not been given a prominent position in the constitution as is the case with the South African Constitution (Chapter two). Colonialism was characterized by complete violation of human rights without a whiff of remorse from the colonialist because the colonial territories had their sovereignty suspended and held by the colonialists. In a new dispensation where the sovereignty of the people is assumed or considered to have been restored, the people can no longer be resting on the state periphery. The people have to be the main focus of the new dispensation. As earlier highlighted in the introduction that the recommendations will be contextualized and those that can immediately be implemented will be separated from those that will require time to be implemented, human rights implementation and enforcement constitute a good example here. As concerns civil and political rights, these will take immediate enforcement under the new constitution and will fall under the safeguard of the Constitutional Council which will serve as the custodian of the rights. As concerns socio-economic and cultural and even community rights, the enforcement will not go automatic as it is the case with the South African Constitution. My argument for this postponement is predicated

upon the fact that these rights will require a lot of funds to implement and enforce them. It must be recalled that the two countries Cameroon and South Africa emerged from two distinct oppressive backgrounds and periods. While Cameroon emerged from colonialism wherein the colonialists exploited the wealth of Cameroon to take overseas for Europe's development, apartheid was exercised on the same ground where a single group of people based on race, segregated others but however still used the wealth to develop the same country. By the time South Africa gained independence, the country was considerably developed given that the artificial walls of segregation were torn down and the wealth previously amassed by the white minority now served the interest of all races. This made it possible for South Africa to now use the huge economy that developed from the apartheid regime to fulfill a common good. In this respect, it could be possible for socio-economic rights to be implemented and enforced. However, in the case of Cameroon where the colonialists had pillaged the whole country and taken the wealth to Europe while even further deepening the gap of poverty in Cameroon by creating a bourgeoisie or middle class at independence, there was and there is currently no way socio-economic rights could be achieved immediately. All the same, socio-economic rights still have to be implemented in Cameroon following the human rights Committee recommendation of progressive realization. As highlighted in the preamble of the constitution of South Africa:

...Recognise the injustices of the past;...heal the divisions of the past and establish a society based on the democratic values, social justice and fundamental human rights.

Cameroonians suffered from social injustice such as exploitation from the colonialist and therefore experienced abject poverty and only socio-economic rights can fix these wrongs of the past. As Cecile Fabre has pointed out, governments must constitutionalise social rights. In this respect, he recommends that government can rather be placed under a weaker constitutional constraint, which will only require that:

The government of the day must take all steps to ensure that it satisfies social rights to minimum income, housing, education and health care, as far as it can, within the constraints of resources reasonably available to pursue them.⁹¹

Even though under the new constitution the government of Cameroon will not be required to immediately implement and enforce socio-economic rights, it is however, going to be required to put up a progressive plan on how these rights will be realized in the near future. It is based on this plan that the judiciary or the Constitutional Council will constantly constrain government to realize social rights and not on the social rights entrenched in the Bill of Rights of the new constitution. I emphasise that Cameroon can realize social rights because the amount of money lost every year to corruption and the funds looted from public coffers by civil servants could be converted into the realization of social rights. So one of the means through which social rights will be realized in Cameroon is through minimization of corruption through a robust anti-corruption campaign lunched by government and implemented by the judiciary. All the funds looted from the public coffers will be redirected towards the realization of social rights.

- Specialized institutions in Cameroon are not constitutional institutions like in South Africa, but rather administrative institutions. The best way to render these accountability institutions effective is to shield them from political and opportunistic manipulation from dominant parties of today as is the case in South Africa.⁹² Firstly, the underlying structure of the institutions as well as their composition and powers must be clearly defined by the constitution.⁹³ Secondly, legal principles must be clearly defined for the purpose of limiting the ability of government to interfere with the operation of these institutions.⁹⁴ It is argued that post-1990 constitutional reforms still did not succeed in transforming such root causes that continue to deepen poverty in Africa. In order to overcome this challenge, it is recommended that strong and independent institutions of accountability must be constitutionalized.⁹⁵ So for the purpose of promoting the rule of law and constitutionalism in post-independence

⁹¹C Fabre “Constitutionalising social rights” in H Steiner P Alston *International human rights in context: Law politics morals* (2000) 279-280.

⁹²Fombad (2011) 1045.

⁹³Above.

⁹⁴Above.

⁹⁵Above 1046.

Cameroon, the new constitution must provide for these oversight institutions of specific branches of the government such as those considered in this thesis: ELECAM and The National Commission for Human Rights and Freedoms of Cameroon. In the South African Constitution, such institutions are entrenched in terms of Chapter 9 as a measure for supporting democracy. These institutions need the political will of the state to enhance its protection from political interference.⁹⁶ Such institutions have in the recent past been able to address low constitutionalism in South Africa in the case of the Public Protector relating to the improper utilization of tax payers' money to upgrade the President's residence at Nkandla commonly referred to as "Nkandlagate." Given that originally the report of the NCHRF of Cameroon is handed over to the President of the Republic, it is recommended that under the new constitution it shall be handed over to a standing committee of the National Assembly constituted of equal number of members from all political parties represented in Parliament. As concerns the appointment process of ELECAM and the NCHRF, another committee will be appointed in parliament for the sole purpose of coming up with a list of nominees for appointment by the President. In this way the President's role of appointment will be a mere symbolic one as he will be constrained to appoint only members whose names have been provided in the list of nominees into these institutions. In this way, the specialized institutions under the new constitution will be independent. Their budget will be voted directly by Parliament and paid in to the institutions concerned within stipulated limits, and criminal culpability to be levied on institutions responsible for payment if payments are delayed by subterfuge with the intension of undermining the financial independence of such organisations. Lastly, for these institutions to be removed from the constitution or for their Presidents or directors as the case might be, to be removed from office before the elapse of their term mandate, same like section 194(2) (a) which adopts two-thirds majority for that purpose, in the case of Cameroon, for this same purpose only Four-Fifth majority shall be accepted for the purpose of removing the leader or the body from the constitution. Given that the ruling party in Cameroon has a

⁹⁶Above.

crushing majority of members of parliament; 152 out of 180 seats,⁹⁷ and other seats held by some of the opposition members are usually coopted by the ruling party, it will be needless relying on two-thirds majority to stop the ruling party from passing a motion in that regard whenever the executive wants to achieve a given ulterior motive. The only way to stop the ruling party from getting rid of these institutions if they stipulate that these institutions are frustrating their interests is to raise the bar to an extent that even with their super majority they will not be capable of going contrary to common good for party interests. So for any such removal move to be orchestrated, the ruling party will need more than just the ruling party and their allies.

- Civil society in post-independence Cameroon should become much more robust and willing to defy all government actions if they do not serve the interest of the citizenry. Trade Union members and academics should be imbued with a spirit of nationalism, patriotism and if possible jingoism. They should not be flattered by the attractive pay packages offered by the executive for the purpose of winning them to their side and then neutralizing them. If this continues then the voice of the voiceless in post-independence Cameroon will completely fade into the background. The members of civil society should be able to resist such temptations and refuse to allow the executive to have its way. Under the new constitution, press freedom, freedom of association, participation, and freedom of speech will be indispensable and measures put in place to assure its prompt implementation.

5.4 GENERAL CONCLUSION

The main research problem this thesis addresses is premised on the fact that there was no substantive change in the law when Cameroon gained independence on 1 January 1960 and the sovereignty of the people was restored. Hence objective transformation did not take place. The shift from the colonial past of Cameroon to a new dispensation, in terms of which

⁹⁷BBC News Africa 'Big win for Cameroon's ruling party' news.bbc.co.uk/2/hi/Africa/6913281.stm (accessed 5/02/2015).

sovereignty was invested in the people was merely symbolic and therefore did not result in a true transition to democracy. This apparent or symbolic transition has turned Cameroon into a façade democracy. For the purpose of addressing this problem a research question which targeted the contextual issue was asked: What informs government's disregard for the rule of law and constitutionalism in post-independence Cameroon given its transformation from colonial rule to a Republic in 1960? This question has evoked a number of assumptions such as: The present predicament relating to constitutionalism and the rule of law in Cameroon has its roots in colonialism, The independence of Cameroon and the emergence of self-rule and, by implication, the establishment of a democracy after the departure of the colonial powers is a myth, The subsequent dominance of French imperialism in an ideological struggle was manifested in the making of the Cameroonian constitution which converted the President into an "imperial President" and French comprador who for all intents and purposes has no restraint as was the case with the all-powerful colonial governor general. At the dawn of South African democracy, structures which encouraged brutality were transformed into structures which promote respect for human rights, democracy and the rule of law. An analysis of constitutionalism and the rule of law in Cameroon and post-apartheid South Africa suggests that Cameroon should adopt a structural model along South African lines, with a view to improving the constitutional position in Cameroon and, post-apartheid South Africa has experienced a shift in ideology from, the pre to post-democratic period. Such an ideological shift is not evident in Cameroon.

In order to ensure that a coherent conclusion addressing the issues raised in the thesis has been achieved, I go chapter by chapter with reference to the research questions addressed in each chapter. Chapter one generally demonstrated amongst others, that to properly address the research question constitutive concepts to constitutionalism and the rule of law must be examined in Cameroon and South Africa. These concepts fall within the parameters of the liberal theory which espouse the limitation of government powers in favour of protection of human rights. The explanation for the indispensability and application of these concepts and theory is that under the new dispensation in Cameroon, the citizenry who was conquered under the colonial regime has been liberated. In order to translate this liberation into practical terms, concepts which shift power or sovereignty from government or the leviathan to the citizenry must be applied as a means of demonstrating whether or not there has been a practical transition to liberty.

Chapter two addressed the question: Under what constitutional and historical context did colonialism operate in Cameroon? Towards the end of the chapter I make some observations concerning apartheid South Africa.

The research has established that colonialism in Cameroon was experienced under the Germans, then under the English and French. Under the colonial masters constitutionalism and the rule of law was disregarded as the three state powers were always concentrated in the hands of the executive. The court systems were usually segregated in such a way that the Europeans operated under the rule of law while the natives operated under authoritative customary law. In a nutshell, the colonial period in Cameroon was undemocratic, authoritarian, repressive and exploitative on the citizenry.

The apartheid constitutional system was designed to isolate and frustrate the black people of South Africa. The apartheid regime followed the Westminster parliamentary system which concentrated powers in the hands of a white minority who could legislate against the black majority of South Africa in the absence of their representatives. They succeeded in establishing laws that segregated against the black majority, dispossessed them of any civil liberties and left the entire black majority disenfranchised. The executive controlled parliament and the judiciary during the apartheid era. South Africa had previously experienced colonialism, segregation before ultimately experiencing apartheid from 1948. So colonialism and apartheid in South Africa as in Cameroon was undemocratic, repressive, authoritarian and exploitative on the black majority.

Chapter three addressed the question: How did South Africa transform from an apartheid regime to a constitutional dispensation and to what degree has this constitutional dispensation been transformative in post-apartheid South Africa? In addressing this question I have focused on arguing how to a reasonable extent South Africa has addressed certain core issues which demonstrate that the rule of law and constitutionalism have been properly upheld in South Africa. I have however highlighted key constitutional issues which suggest that I understand that the rule of law and constitutionalism are still progressive and transformative rather than being completely transformed. Such issues are amongst others; Marikana massacre, Nkandlagate, and Guptagate. I go further to demonstrate why South Africa is a desirable paradigm worthy to be emulated by Cameroon by depicting its radical departure from the apartheid ideology and a progressive change in jurisprudence as evidenced by the abandonment of the tenor in *Hess v. The State*⁹⁸ to *Brown v. Leyds N.O.*⁹⁹ which was

⁹⁸(1895) 2 Off. Rep. 112.

confirmed as the new operating rule in the post-1994 constitutional dispensation in the case of *S v. Makwanyane and Another*.¹⁰⁰

Chapter four addressed the question: What were the effects of colonialism on Cameroon? In addressing this question I made use of a number of pieces of legislations, Presidential decrees and jurisprudence to demonstrate that the trend of the rule of law and constitutionalism as practiced under the colonial regime has made its way into the constitutional dispensation in Cameroon, giving government the impetus to disregard the rule of law and constitutionalism. I make use of the various institutions that implement and enforce the rule of law to demonstrate how these institutions paradoxically promote the disregard of the rule of law and constitutionalism in Cameroon. This is further evidenced by the fact that there exists no separation of powers in Cameroon; the presidency is imperial as it controls both parliament and the judiciary, the Constitutional Council has no power of judicial review, and the supposedly independent constitutional institutions are only administrative and not constitutional institutions and lacking independence. All these have been possible simply because the colonial regime ideology has not been transformed and the shift from colonialism is not evident in the present dispensation. The Cameroonian citizenry is therefore not protected as the shift from the previous regime to the present dispensation suggests.

Chapter five addresses the question: When the two systems are compared, it is true that no shift is experienced from the colonial legacy in Cameroon despite the façade of democracy. Can the South African situation be thus used as a model to improve the Cameroonian situation and what lessons if any, can Cameroon learn from South Africa? In addressing this question, I firstly, reaffirm some of the key issues addressing the rule of law and constitutionalism and the colonial legacy in Cameroon in the form of reflections before proposing a number of recommendations premised on the South African Constitution that can actually address the current rule of law and constitutionalism challenge in Cameroon. In this thesis South Africa has been used as a broad framework against which constitutional transformation is measured in Cameroon.

⁹⁹(1897) 4 Off. Rep. 17.

¹⁰⁰(1995) (CCT3/94) ZACC 3.

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