The position of the Cameroon state in litigation

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The question of the position of the Cameroon State, i. e., the Federal State and the Federated States, in litigation seems inseparably bound up with the Cameroon conception of sovereignty. Consequently it is possibly essential for the purpose of clarity to attempt an analysis of what sovereignty connotes in the Cameroon constitutional context before proceeding to an exposition of what ought to be the Cameroon legal concept of the position of the State in litigation.

In legal theory sovereignty is the power in a State to which none other is superior. John Austin defined it as the supreme authority in an independent society. The external sovereignty is of control from without; internal sovereignty is paramount power over all action within. The present thesis, however, is only concerned with internal sovereignty.

The instrument establishing the Federal Republic of Cameroon is **The Constitution of The Federal Republic of Cameroon** which came into force on 1st October 1961. It is this Constitution therefore that has expressly created the sovereignty of the Cameroon as a State. The Constitution is the highest legal norm within the Cameroon State and, ex hypothesi, other State legal norms must be deemed to derive their legal validity from it. It is in this context that any norm which is in conflict with this constitutional legal superior norm must be declared to be ultra vires and to that extent a legal nullity. This presupposes that the two Federated States Constitutions of East and West Cameroon are subordinate legal instruments the validity of which depends on their express or implied conformity with the provisions of the Constitution of the Federal Republic. It is also true that all laws passed by the legislative bodies within the State must be in harmony with the provisions of the Federal Constitution.

The legislative bodies, i. e., corporate bodies, empowered to make laws under the Constitution are the President, the Federal House of Assembly, the East Cameroon House of Assembly and the West Cameroon House of Assembly together with the House of Chiefs. The East Cameroon House of Assembly, for example, can only pass laws on matters atrictly within their jurisdiction. Thus generally they cannot enact laws on crime, because criminal law is an exclusively Federal

matter under Article 6 of the Federal Constitution. Similarly the Federated State Assemblies cannot make laws on public health, as this subject belongs to the Federal authorities under the Federal Constitution. On the other hand except in matters of appeals the Federal Assembly is not competent to make laws governing customary courts in West Cameroon, since this is a matter specifically reserved for the West Cameroon Parliament.

This shows that the Federal Constitution contains expressions, not necessarily precise in every case, of rights and duties of the various legislative bodies in the Republic and, of course, ultimately of the state inhabitants interse.

The nature of Cameroon Sovereignty

The Cameroon National Sovereignty is vested in the Cameroon people and they are to exercise such sovereignty either through deputies in the Federal Assembly or by way of referendum. The constitution makes it quite clear that no section of the people, nor any individual, may assume the exercise of this sovereignty. Thus problems which confronted John Austin, first English Professor in Jurisprudence at the University of London, in his attempt to locate the sovereign authority in the United States of American Federal Constitution are non-existent in the Cameroon Constitution at all. Generally the Cameroon Federated States cannot claim the exercise of Sovereignty because their population constitutes only a section of the Cameroonian people. Nor can the President of the Republic since he is only an individual, notwithstanding the great importance attached to his person as the first citizen of the Cameroon State.

As the status quo in our Republic is greatly influenced by French and British ideas it may be helpful to mention in passing their own conceptions of Sovereignty.

In the French Constitution of the Fifth Republic, Article 3 says National Sovereignty belongs to the people who exercise it through their representatives and by way of referendum. This provision is similar to the one contained in the Cameroon Constitution. The only difference is that, in the case of France, since the words "in the National Assembly" have been omitted in the appropriate article, the constitution leaves the exercise of sovereignty divided between the Assembly, the Senate, and the President of the Republic, the latter being equally a "representative" of the people. While it is true the Cameroon President is also a representative of the people by virtue of his election, he is legally not

a deputy in the National Federal Assembly. However, Article 4 of the Federal Constitution States that the Federal authority shall be exercised by :

a) The President of the Federal Republic,

b) The Federal National Assembly.

But it is submitted that the exercise of Federal authority here is not synonymous with the exercise of National Sovereignty. What then is the distinction between Federal authority and National Sovereignty? It appears the latter concept is wider in scope than the former. This can be inferred from the limited powers conferred on the Federal authorities under Articles 5 and 6 of the Constitution. The powers of National Sovereignty are legally unlimited (except in one case, i. e., adherence to the charter of the United National).

In the British Constitution the sovereign de jure is the Queen or Crown. The legislative Sovereign is the Queen in Parliament, which can make or unmake any law whatever. The legal Sovereign is the Queen and the Judiciary. The Executive Sovereign is the Queen and her Ministers. The de facto or political sovereign is the electorate: the Ministry resign on a defeat at a general election. The position of Britain in litigation and the implications of her sovereignty will be examined later in this thesis.

State Litigation

As already mentioned before, on the 1st October 1961 the newly created Federal Cameroon obviously entered into a radically different Constitutional context. National Sovereignty in the Republic of Cameroon became vested in the people of Cameroon. The only objective and logical deduction from this position seems to be that the Federal Constitution clearly conceives the State as a corporate entity capable of suing and being sued.

Let us then trace the historical development of civil litigation in East and West Cameroon beginning with the East in order to keep the litigating position of the entire Federal in a better perspective.

The Constitution having been drafted in french and passed by the East Cameroon Legislature before Federation, it is necessary to start from the position in French law, which is theoretically the same as in England: the state is immune from civil action. The reason is the separation of powers, which incidentally is the reason why a court cannot pronounce a law to be unconstitutional: this would be control by the judiciary over the legislature. In practice redress exists in the admi-

nistrative courts, whose jurisdiction has grown up not very methodically since the Revolution. The position now is that the administrative courts can both set aside (annul) an administrative order even of general application (a regulatory Decree) as being ultra vires, and also award damages for individual loss. It is important to remember that these courts are part of the executive, not of the judiciary, and their existence in no way affects the principle that the executive is free from judicial control.

To turn from France to the Constitution of the Cameroon, we find in Article 33 provision for jurisdiction "to decide complaints against administrative acts of the Federal Authorities, whether claiming damages or on grounds of ultra vires"—exactly the jurisdiction of the administrative courts in France. But in the Federal Republic this jurisdiction is entrusted not to an administrative court but to the Federal Court of Justice, and the provision is included in Part VI, entiled "The Judiciary". There can be no possible doubt that the Constitution has deliberately rejected French theory in respect of the Federal Government, although retaining French practice by entrusting this jurisdiction to a special court, i. e., the Federal Court of Justice.

The Constitution says nothing about claims against the State Governments; but by the operation of Article 46 again the Tribunal d'Etat set up by Decree 59-83 of 4th June 1959 of the Head of Government before Independence continues to exist, and to exercise the same jurisdiction over claims against the Government of East Cameroon. When set up the Tribunal d'Etat was an administrative court; but after independence Law No. 61-12 of 20th June 1961, while preserving the former Decree on a temporary basis, added that a "pourvoi" (more or less an appeal on a point of law) should lie to the Supreme Court and also amended the administration of Justice (Organisation du Judiciaire) Ordinance No. 59-86 of 17th December, 1956, so as to include the Tribunal d'Etat with the other courts of the State, albeit to be governed by special laws. This shows perhaps, not with the same inescapable clarity as the constitution itself, that even before the constitution the Tribunal d'Etat had become part of the Judiciary.

The long digression in this part of the thesis has been necessary to show that in East Cameroon, by the time the Constitution was framed, the phrase "administration of Justice" (Organisation Judiciaire) including—jurisdiction of all courts no longer excluded the entertainment of claims of private parties against the state, but on the contrary included it; and the special provision for the Federal Court of Justice merely confirms this classification.

We now turn to the position in West Cameroon.

Before October 1st 1961 West Cameroon (then known as Southern Cameroon) was administered as an integral part of Federal Nigeria and, as Nigeria was then a dependent State, the sovereignty of that country was still vested in the Queen of Britain. The Governor-General of Nigeria was by the existing constitutional arrangements the direct representative of the Qeen and enjoyed the state immunity which he derived from the Queen. Similarly the British Commissioner in the Southern Cameroon, representing the Queen in this component part of the dependent Nigeria Federation, enjoyed these immunities.

The English doctrine of Crown immunity arose in a constitutional system where the whole national sovereignty was vested in the King and where the State (as distinct from the King) was not conceived as having a corporate status or personality capable of having rights and duties or of suing and being sued in a court of law. The courts were the King's courts and he was the fountain of all justice which was administered in his name. This doctrine by degrees cristalised into a common law principle of immunity of the crown, the state departments or any crown agents under the British dominion, from legal process. The remedy against the crown was by way of a petition of right in the High Court, put on a statutory footing by the Petition of Rights Act, 1860. This availed not only against the sovereign in his public capacity, but also against the Sovereign in his private capacity, the common law drawing no distinction between the two, (Crown Proceeding page 2 by Glanville Williams). Generally, the remedy obtained by Petition of Right was as a matter of grace and not as of right. This procedure was hedged around by too many limitations which rendered it virtually ineffectual in several cases. For example the Crown was not liable in contract of personal service because of the rule that the Crown could not fetter its future action. It is in the light of all this that the position of immunity in the Southern Cameroon before and after the reunification of the two trust territories can be properly examined: and this I now do beginning with Section II of the Southern Cameroon High Court Law (S. C. 7 of 1955 which provides that:

a) The Common law

b) The doctrine of equity

c) The statutes of general application which were is force in England on the 1st day of January, 1900, shall in so far as they relate to any matter with respect to which the legislature of the S. Cameroon is for the time being competent to make laws be in force within the jurisdiction of the courts.)

It therefore follows that the Common law rule of Crown immunity—with its statutory amendments of 1860—as applied in England and

British dominions until 1st January, 1900 became part of Southern Cameroon law. After 1st October 1961 by Article 46 of the Federal Constitution previous legislation of the Federated States remained in force in so far as it did not conflict with the provisions of the Federal Constitution. The question is whether or not this Article has given exit to the entry of the English common law doctrine of crown immunity in the laws of West Cameroon. After 1st October 1961, justice in West Cameroon became a Federal subject and the Courts accordingly changed to be Federal (not West Cameroon) Courts. Besides this the constitution specially provides that justice shall be administered in the name of the Cameroonian People (a different concept from the State). It is incongruous that West Cameroon should adhere to a doctrine based on the peculiar historical accidents of English history. By the Crowns Proceedings Act. of 1947 England watered down the doctrine as it was realised that it had become incompatible with modern juridical ideas and social needs of that country. In a Federation like ours, uniformity in basic legal doctrines is very desirable. If the idea of crown immunity is preserved in West Cameroon, then we will have the position in Cameroon where a person injured by an officer of the East Cameroon Government or by a Federal Officer (even in West Cameroon) will have an effective legal remedy while a person injured by a West Cameroon Officer might not.

Finally, the Federal Constitution is the supreme legal norm of the Federation and any other legal norm which is in conflict with it is ipso facto void. The Federal Constitution only permits the continuation of Federated State law "in so far as it does not conflict with the provisions" of the Federal Constitution (Article 46 Federal Constitution).

The Petition of Rights Ordinance (Cap 149) which is the English prototype of the Petition of Right Act is in conflict with Article 2 of the Federal Constitution, which gives the Federation corporate personality and for this and other reasons, already mentioned, void. On similar grounds the whole common law principle of immunity is also void.

It would not have been necessary to labour this discussion at such great length but for a High Court of West Cameroon ruling in Eric Dikoko Quan and Peter Moki Efange. The Attorney General of West Cameroon (for the Government of West Cameroon) Suit Nos. WC/12/64 and WC/13/64.

The facts of the case were not fully recorded. But they seemed to be that the plaintiffs had alleged wrongful dismissal by the West Cameroon Government and had taken action against the defendant. The plaintiffs then made application to the High Court presided over by His Lordship, Chief Justice Gordon, for an order for pleadings in a writ.

At the hearing of the application the Counsel for the defendant raised a preliminary objection urging that the procedure as laid down in the Petition of Right Ordinance Cap. 149 should be strictly followed. The relevant sections are sections 4 and 5 of the Ordinance.

Section 4 reads:

The claimant shall not issue a writ *of summons, but the suit shall be commenced by the filing of a statement of claim in the Court and the delivering of a copy thereof at the office of the Federation or other officer designated as aforesaid, and no fee shall be payable on filing or delivering such statement.*

Section 5 reads:

The registrar shall forthwith transmit the statement of claim to the Secretary to the Governor-General and Council of Ministers and the same shall be laid before the Governor-General. In case the Governor-General shall grant his consent as aforesaid, the statement of claim shall be returned to the court, with the fist of the Governor-General endorsed thereon, and the claim shall be prosecuted in the court.

The contention of the defence counsel seemed to be that since the issues before the court could not have been brought as of right but as a matter of grace dependent on the discretion of the Governor-General (now His Excellency the Prime Minister) the plaintiff was technically wrong to have begun his case by the issue of a writ of summons.

The plaintiff's counsel argued that his client had rightly started off the action by writ of summons, since the substance of his client's case was not different from any ordinary action in which any person may apply to the court for the issue of a writ under the Supreme Court Civil Procedure Rules (Ord. II R. I.). The Plaintiff's counsel further urged that to follow the procedure as laid down in Cap. 149 would in effect deprive a citizen of certain of his fundamental human rights which the Federal Constitution has specifically preserved.

In the face of these two arguments by counsels the court had to determine whether Cap. 149 was still applicable in West Cameroon. The Court examined Article 53 (1) of the West Cameroon Constitutional Law 1961 which reads as follows:

Subject to the provisions of this section, the existing laws shall have effect after the commencement of this Constitution as if they had been made in pursuance of this Constitution and shall be read and construed with such modifications and exceptions as may be necessary to bring them into conformity with this Constitution.

Article 53 (4) is as follows:

> *For the purposes of this section 'the existing laws' means all Ordinances, Laws, Proclamations, rules, regulations, orders and other instruments having the effect of law made or having effect as part of the law of the State immediately before the first day of October, 1961.*

The Court then came to the conclusion that the Petition of Right Ordinance Cap. 149 "with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into comformity with the Constitution", is part of the law of this country.

It is submitted with great respect that His Lordship reached a wrong decision in this case because:

1. *He failed to take into account the effect of Article 2 and 46 of the Federal Constitution.*
2. *He failed to realise that Article 53 (1) of West Cameroon Constitution could only be properly interpreted taking full consideration of Articles 2 and 46 of the Federal Constitution. (Article 53 (1) and (4) Delegated legislation).*
3. *He did not consider the fact that the Administration of Justice is Federal and it would be incongruous to allow the existence of a doctrine in one part of the country when it is not tenable in other parts of the same country—the very antithesis of government policy of assimilation and systematisation of our laws.*
4. *He did not advert to the obsolescence of this anarchronistic doctrine of immunity which is impliedly abrogated by the new Cameroon legal order.*

The learned Lordship said, "The argument of Counsel for the plaintiff that to follow the procedure laid down in Cap. 149 would in effect be depriving an individual of his rights, is somewhat previous, it presupposes that the Prime Minister's fist would be refused, as of course. Until there has been an application for it and a refusal to grant it, the question of the fundamental rights of the citizen does not arise".

This argument by the learned Chief Justice does not, with due respect, stand the test of logic or of juristic analysis. His Lordship did not give due regard to the fact that His Excellency the Prime Minister's decision on such matters would be purely administrative and therefore discretional. It may be devoid of legal considerations. The exercise of this discretion whether right or wrong (this has nothing to do with the personal integrity of the Prime Minister)—cannot be questioned by any judicial tribunal. The very fact that there is a possibility of rejecting

the assertion of a primary right is proof positive that it could be taken away without legal justification in its secondary stage.

Furthermore what exactly did the learned and highly respected Chief Justice mean by "somewhat previous"? This phrase is important but nebulous in the context. It does not seem to have juristic colour or significance. If it means that the plaintiff's claim of infringement of his right was premature since His Excellency the Prime Minister had not decided to refuse to grant his fiat, then following the above analysis the learned judge's reasoning appears, with due respect, in this case, to have no locus standi.

To sum up it is respectfully submitted that the application for the Order of pleadings was wrongly disallowed and the case ought to be regarded as decided per incuriam, as Articles 2 and 46 of the Federal Constitution were not considered in interpreting Articles 53 (1) and (4) of the West Cameroon Constitution of 1961. Nor was the corporate nature of the new federal Republic adverted to. It is hoped that the law Revision Commission will examine this obsolete or impliedly abrogated doctrine of state immunity in their great task of the systematisation and assimilation of our laws. Humty dumpty will then find his rightful place out of our democratic Federation.

There should of course be an exception to this general principle of absence of State immunity in our law, i. e., there seems to be an overriding principle of public policy which is essential and even necessary. Sovereign privilege whether at the Federal or State level (where this is not asserted as a section of the Cameroon people only) should be preserved where an act or acts or omission constitute conduct prejudicial to the security of the Cameroon people. This safeguard should therefore be expressly incorporated into our law. The obvious reason for the exception is that the Cameroon people are by international standards entitled to defend their corporate existence, and they cannot successfully achieve this end by making security matters the subject of public controversy.

It is, however, realised that such "act or acts or omissions prejudicial to the security of Cameroon people" could be turned into an unruly horse in the hands of unscrupulous agents of the Cameroon people; i. e., they are subject to abuse by those who claim or purport to act on behalf of the Cameroon people. To obviate this it would be necessary to make provision specifically defining the act or acts or omissions prejudicial to the Cameroon people. A single Act of Parliament may be enough to execute this all important part of our legal order.