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The Separation of Powers, Constitutionalism and Governance in Africa: The Case of Modern Cameroon

JOHN MUKUM MBAKU, University of Utah

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Countries incorporate the principle of the separation of powers in their constitutions in an effort to meet several goals, the most important of which is to minimize government-induced tyranny. Specifically, countries that make this principle part of their constitutional practice intend to limit public servants by national laws and institutions, enhance government accountability, minimize opportunistic behaviors by civil servants and politicians, provide for checks and balances, and generally improve government efficiency. Cameroon, like many other African countries that transitioned to democratic governance in the early-1990s, incorporated the principle of the separation of powers in its amended 1996 constitution. However, Cameroonian have not ripped any of the benefits associated with the practice of this constitutional doctrine. Part of the problem is that in Cameroon, this doctrine is not a prominent feature of constitutional practice; it is simply an abstract constitutional construct that has no practical application in the country. To make this principle relevant to constitutional practice in Cameroon requires state reconstruction through democratic constitution making to provide institutional arrangements that allow for a true separation of powers, as well as mechanisms that enhance its practice.

I. INTRODUCTION

Why government? A possible answer to that question is that individuals form governments to protect their rights and provide them with an institutional structure within which they can organize their private lives and engage in those activities that enhance their welfare—e.g., start and run a business for profit; get married and raise a family; acquire property and dispose of it; enter into contracts; and protect their values from encroachment. Unfortunately, once a government has been set up, those who serve in it (i.e., civil servants and political elites) can turn the apparatus of state into instruments of plunder and extra-constitutional violence as they seek ways to enrich themselves at the expense of their fellow citizens. Thus, government, which is expected to protect the fundamental rights of citizens, can turn out to be the source of a lot of the violence directed at the people (especially members of vulnerable groups such as women, children and ethnic and religious minorities). A constitution and the practice of constitutionalism can help minimize government-induced tyranny and enhance the ability of citizens to live together peacefully and maximize their values—the constitution can constrain state custodians (i.e., civil servants and political elites) and prevent them from engaging in behaviors (e.g., corruption and rent seeking) that harm the welfare of citizens.¹

¹John Mukum Mbaku is Presidential Distinguished Professor of Economics and Willard L. Eccles Professor of Economics & John S. Hinckley Research Fellow at Weber State University. He is also a Nonresident Senior Research Fellow at the Brookings Institution, Washington, D.C., and an Attorney and Counselor at Law, State of Utah. He received the J.D. degree and Graduate Certificate in Environmental and Natural Resources Law from the
One of the most important challenges faced by architects of Africa’s modern constitutions is how “to design a system of governance that maximizes the protection of individual members of society while minimizing the opportunities for governments to harm them.”

The doctrine of separation of powers has emerged as an important institutional mechanism for resolving the dilemma that continues to confront today’s constitutional engineers—the need to design a governance system that effectively protects the fundamental rights of citizens while at the same time adequately constraining state custodians and preventing them from engaging in behaviors that harm the welfare of citizens. Unfortunately, today’s constitutional scholars have continued to struggle with defining the concept and showing how it functions to enhance governance.

In the mid-1980s, Africans began to seriously challenge what they believed were anachronistic and dysfunctional governance structures and for the first time in their existence since decolonization, “issues of nationality, gender, identity, human rights, and accountability” became “part of national and continental discourses.” The new awakening created a political environment within which Africans could revisit constitution making and seek to design and adopt institutional arrangements capable of adequately constraining the state and providing the wherewithal for peaceful coexistence and sustainable economic growth and development. As argued by Ihonvbere, this period provided “new opportunities for the training of new leaders, the development of new political arrangements, and the articulation of new structures of power to guarantee the emerging democratic arrangements.” Throughout the continent during this period, there were “debates going on around the question of constitutional reforms as part of the political or national question.”

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S.J. Quinney College of Law, University of Utah, where he was Managing Editor, Journal of Land, Resources & Environmental Law, and the Ph.D. (economics) degree from the University of Georgia. This article reflects only the present considerations and views of the author, which should not be attributed to either Weber State University or the Brookings Institution.

1 As argued by Mbaku, corruption has a significant impact on the welfare of the poor in Africa. For example, civil servants, in an effort to illegally enrich themselves, “usually allocate public goods and services capriciously, favoring those who are willing and able to pay bribes.” JOHN MUKUM MBAKU, CORRUPTION IN AFRICA: CAUSES, CONSEQUENCES, AND CLEANUPS (Lexington Books, 2010: 110). In the process, the poor are deprived of access to welfare-enhancing and, to a certain extent, life-saving, public goods and services (e.g., police protection, clean water, shelter, primary education, and basic health care, especially for women, infants and children). See id. at 100-111.


3 Fombad, supra note 2, at 301-302.


5 Id.

6 Id. at 143.

7 Id. The “national question” deals with the issue of citizenship and how the latter is defined and enforced within the country. In Nigeria, for example, there are more than 250 identified ethnic groups, each tracing its origins to some distinct geographic location within the country. Igbos, for example, are generally considered to be indigenes of the eastern part of
One of the most important issues that formed part of the national dialogue on constitution making in the African countries in the mid-1980s was how to provide each country with institutional arrangements capable of (1) adequately constraining the state so that civil servants and political elites could not engage in opportunistic or growth-inhibiting behaviors (e.g., corruption, rent seeking, financial malfeasance); (2) enhancing the peaceful coexistence of each country’s diverse population groups; and (3) providing the enabling environment for entrepreneurial activities and wealth creation. The search for and interest in institutional arrangements that can effectively constrain the government, as well as protect citizens’ fundamental rights, necessarily led Africans to the concept of separation of powers.

While many of the grassroots movements that emerged in the mid-1980s and early-1990s to spearhead the transition to democratic governance in Africa saw constitutionalism as the mechanism through which they could protect themselves against government tyranny, many of the continent’s opportunistic leaders supported constitutions that provide for the separation of powers simply as a way to convince the international community that they were now “born-again” democrats and hence, deserved to retain their political positions and continue to serve as overseers of their respective countries’ governance institutions. As argued by Fombad, “African regimes caught in the wake of the so-called ‘third wave’ of the country. On the other hand, the Yoruba are westerners. The question is: Should an Igbo be allowed to compete for a leadership position in a local government area (LGA) in Yoruba ancestral lands or should such an Igbo, even if he or she has lived in the Yoruba lands for generations be required to return to Igbo ancestral lands in order to participate in politics? This is the essence of the “national question” as it relates to citizenship in Nigeria. See, e.g., Olufemi Taiwo, Of Citizens and Citizenship, in CONSTITUTIONALISM AND SOCIETY IN AFRICA 55 (O. Akibá ed., Ashgate, 2004).


9 Fombad, supra note 2, at 302.

10 Of course, many of these old-time politicians (e.g., Paul Biya of Cameroon), who had spent most of their careers participating in and personally benefiting from authoritarian political systems, were opportunists who recognized the need to climb unto the democracy bandwagon in order to survive the wave of democracy that was sweeping the continent in the mid-1980s. For example, Biya came into office as President of Cameroon in 1982 through a democratic change of regime and promised to bring democracy and good governance to the country. Specifically, he came into office “with a reformist agenda, proclaiming to the nation in November 1982 that he was determined to put before the Cameroonian people an administration based on high moral values, professionalism, and dedicated to public service.” JOHN MUKUM MBAKU, CORRUPTION IN AFRICA: CAUSES, CONSEQUENCES, AND CLEANUPS 58 (Lexington Books, 2010). Biya, however, has turned out to be one of modern Africa’s most authoritarian leaders and in 2008, he manipulated the country’s constitution to effectively make himself a de facto “president-for-life.” Will Ross, Cameroon Makes Way for a King, BBC NEWS (April 11, 2008), available at http://news.bbc.co.uk/2/hi/afrika/7341358.stm (last visited on December 28, 2012).

democratization . . . tried to display their nascent democratic credentials by introducing new constitutions that apparently provide for a separation of powers.”

In 1961, the Republic of Cameroon (the former UN Trust Territory of Cameroons under French administration, which had gained independence in 1960) united with the former UN Trust Territory of Southern Cameroons under British administration to form the Federal Republic of Cameroon. The constitution for the new federation was a slightly amended version of the constitution that brought French Cameroons to independence in 1960. The Foumban Accords, as the 1961 constitution was called, retained the Gaullist political system, with an imperial presidency with virtually no real limits on the exercise of government agency, which had been established by the 1960 constitution. In 1972, a unitary constitution was adopted in Cameroon and the federation effectively abolished and the name of the country changed from Federal Republic of Cameroon (République Fédérale du Cameroun) to United Republic of Cameroon (République Unie du Cameroun), with the

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12 Id. Footnotes omitted.
14 The constitution making process in the former UN Trust Territory of Cameroons under French administration was influenced significantly by the blueprint developed by then French president, Charles de Gaulle, for the African colonies. In fact, the 1960 Constitution of the Republic of Cameroon (République du Cameroun) was modeled after the French Constitution of 1958. LeVine, supra note 13, at 226-27. LeVine questions the “appropriateness of modeling the Cameroun constitution so closely on that of the [French] Fifth Republic.” Id. at 227. While the French Constitution of 1958 was designed “in the context of the constitutional crisis that brought De Gaulle to power,” the political, social, and economic environment, as well as the “circumstances surrounding the writing of the Cameroun constitution were not in any way analogous to those existing in France in 1958.” Id. When the Federal Republic of Cameroon was formed in 1961, no effort was made to provide for robust constitutional discourse in order to enhance the development of a constitutional compact more suitable to governance in the new federation. In fact, only nominal changes were made to the 1960 Constitution of the République du Cameroun in order to bring the two parties together and form the federation. John Mukum Mbaku, Cameroon’s Stalled Transition to Democratic Governance: Lessons for Africa’s New Democrats, 1 AFRICAN AND ASIAN ST. 125, 131-37 (2003).
15 The final unification agreement was named after the République du Cameroun town of Fomban where the “constitutional talks” had taken place. Mbaku, supra note 14, at 135 & JOHN MUKUM MBAKU, INSTITUTIONS AND REFORM IN AFRICA: THE PUBLIC CHOICE PERSPECTIVE 83-86 (Praeger, 1997).
16 Mbaku, supra note 14, at 132. Of course, the République du Cameroun’s 1960 constitution was based on the Constitution of the French Fifth Republic (1958). As argued by LeVine, “[t]he resemblance to the French system was certainly more than nominal since the text of several of [the African] constitutions, especially in the sections dealing with the presidency, followed the French document almost word for word.” Victor T. LeVine, The Fall and Rise of Constitutionalism in West Africa, 35 J. MOD. AFRICAN ST. 181, 184 (1997).
latter considered a unitary state. In 1984, Paul Biya, who had taken over from Ahidjo as President, dropped the appellation “United” from the country’s name and hence, today, the country is officially known as “Republic of Cameroon.”

Since the essentially top-down, elite-driven, non-participatory process that brought forth the 1960 constitution, Cameroon has not engaged in any form of robust constitutional discourse to produce laws and institutions that guarantee the rule of law. In fact, the country’s present constitution—Constitution of Cameroon 2008—is basically the 1972 Constitution. The amended Cameroon constitution provides for the separation of powers and specifically states that “Judicial power shall be independent of the executive and legislative powers.”

The reality in Cameroon, as will be discussed in this paper, is that due to the enormous powers granted the President of the Republic under the constitution to “guarantee the independence of judicial power,” as well “appoint, dismiss, promote, transfer and discipline judicial officers, especially judges and prosecutors [,] limits in a fairly significant way not only the independence of the judiciary but also the effectiveness of the separation of powers.”

Political economy in Cameroon, like that in many other African countries, has been marked by personal rule, which has been made possible by the imperial presidency established by the 1960 constitution. Since reunification in 1961, Cameroon has been led by

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17 Greg Asuagbor, *Is Federalism the Answer?, in The Leadership Challenge in Africa: Cameroon Under Paul Biya* 489, 494 (John Mukum Mbaku & Joseph Takougang eds., Africa World Press, 2004). According to Asuagbor, “[t]he 1972 constitution, which established the unitary state, effectively abolished the two-state system, concentrated power in the center and established an imperial presidency with Ahmadou Ahidjo as its head.” *Id.* at 494. Arguing in favor of dissolving the federation, Ahidjo stated that federalism, with its decentralized form of administration promoted tribalism, was very expensive to maintain, and was not conducive to rapid economic growth and development. *Id.* It was decree No. 72-DF-270, which extinguished the federation and introduced a unitary form of government. Mbaku, *supra* note 14, at 135.


21 *Id.* at Article 37(3).

two executives and essentially one political party, the Cameroon National Union (CNU), whose name was changed to the Cameroon People’s Democratic Movement (CPDM) after Paul Biya took control of the presidency. The question to ask here is: Is there real, effective practice of the separation of powers in Cameroon’s governance system or is what is provided by Cameroon’s 1996 Constitution (as amended by Law No. 20008/001 of 14 April 2008) simply an abstraction that does not relate to what actually happens in the country today? To confront this question, this paper shall first, provide a brief overview of the doctrine of the separation of powers generally and argue that the doctrine has become a general constitutional principle fully embraced by many modern political systems, including those that came into being after the founding of the United Nations in 1945. Second, the paper will then examine governance in Cameroon to determine the extent to which the doctrine operates within the country’s three branches of government—executive, legislative, and judicial. Additionally, the paper will seek to determine if the doctrine of separation of powers as practiced in Cameroon, has strengthened or weakened constitutionalism and good governance in the country.

II. THE DOCTRINE OF THE SEPARATION OF POWERS: ITS PURPOSES AND ORIGINS

From time immemorial, social scientists, philosophers, and legal scholars have searched for a doctrine that would effectively undergird good governance. Over the years, the doctrine of the separation of powers has emerged as the most influential mechanism to provide for and ensure stability in government. But, what is the origin of that doctrine? Gwyn, in his excellent essay on the doctrine of the separation of powers, argues that the scholarly struggle to determine the origins of the doctrine has produced two schools of thought. According to one school, “while rudimentary, incomplete forms of the doctrine might be found in Locke and other earlier writers, the normative theory of the separation of powers, as we know it today, was almost entirely the product of Montesquieu.” The second school argues

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23 Ahmadou Ahidjo (1961-1982) and Paul Biya (1982-present). By 2008, Paul Biya who had been president since 1982 and was prevented by the 1996 constitution from contesting for another term as president, asked the National Assembly, which is dominated by his Cameroon People’s Democratic Movement (CPDM) political party, to change the constitution so that he could remain in office. The CPDM, which at the time held 153 seats in the 180-seat chamber, amended the constitution and allowed Biya to contest the 2011 presidential elections. He won those elections and began serving a seven-year term in office and since the new amended constitution—Constitution of Cameroon 2008—allows the president to run for re-election as often as he desires, many Cameroonians believe that Paul Biya will remain President of the Republic until death. According to Article 6(2) of the Constitution of Cameroon 2008, “Le Président de la République est élu pour un mandat de sept (7) ans. Il est rééligible” (The President of the Republic shall be elected for a term of seven (7) years. He shall be eligible for re-election.)

24 Mbaku, supra note 14, at 139.


26 Id. at 65.

27 Id.
that John Locke was the originator of the theory. Gwyn argues that there eventually was a third camp, which argued that “the doctrine [of the separation of powers] was generally accepted in England by the time of Montesquieu’s visit in 1729 and that, it had been accepted even in Locke’s day.” In his writings, Locke recognized that in order to prevent government tyranny, those who make the laws must not also be the ones to execute these laws. Thus, he argued that,

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\ldots \text{because it may be too great a temptation to humane frailty apt to grasp at Power, for the same Persons who have the Power of making Laws, to have also in their hands the power to execute them, whereby they may exempt themselves from Obedience to the Laws they make, and suit the Law, both in its making and execution, to their own private advantage, and thereby come to have distinct interest from the rest of the Community, contrary to the end of Society and Government.}
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Locke placed what he referred to as “federative” and “executive” power in the hands of the same person and legislative power in the hands of another. As Locke stated, “[t]hough, as I said, the Executive and Federative Power of every Community be really distinct in themselves, yet they are hardly to be separated, and placed, at the same time, in the hands of distinct Persons.” Although Locke “emphasized very strongly the need for independent, impartial judges, and [that] the distinction between giving judgement and the execution of judgement is clearly seen,” he, however, did not specifically make a neutral or independent judiciary a third branch of government, stopping short of devising what came to be known as the “pure” theory or doctrine of the separation of powers.

\[28\] Id. See also Fombad, supra note 2, at 304.
\[30\] Id. at 65 (footnotes omitted).
\[32\] Locke, supra note 31, at 384.
\[33\] Locke, supra note 26, at 384. Emphasis in original. See also M. J. C. Vile, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 60 (Clarendon Press, 1967). Note that Vile states that Locke’s “federative power” should be read “executive power.” Id. at 86.
\[34\] Vile, supra note 33, at 59.
\[35\] For a critique of Locke with respect to this point, see DAVID GWYNN MORGAN, THE SEPARATION OF POWERS IN THE IRISH CONSTITUTION 4 (Round Hall Sweet & Maxwell, 1997). Morgan argues that according to Locke’s concept of the Social Contract, “legislation should be made by the people’s representatives, and that the law should be supreme, in particular that it should control the government. . . . Locke accepted that the day-to-day affairs of government could not be dealt with efficiently by the people or their representatives and that a separate organ was required. There is thus a need for at least two organs of government which were independent of each other.” Id. at 4. See also Locke, supra note 31, at 368-71.
Many modern legal scholars, however, recognize Charles Louis de Secondat, Baron de Montesquieu, as the father of the form of the doctrine of the separation of powers that has had a very significant and important impact on governance in the United States, specifically the country’s Constitution. Montesquieu made two very important contributions to the doctrine of separation of powers: first, he separated governmental functions into three distinct categories—legislative, executive, and judicial; and second, believing that power holders were essentially opportunistic and would seek absolute power unless adequately constrained, he posited that those in power be constrained through the institution of a system of “checks” and “balances.” Nevertheless, Montesquieu was not advocating a system of governance in which each of the three branches of government would function in isolation, but one in which the branches would function together to provide an effective system of government, one that protected citizens and minimized government tyranny. While working together and cooperating with each other, each branch of government would also check on others to make certain that none would act unconstitutionally or usurp the power of another. As argued by Vile, however, Montesquieu’s theory of checks and balances was only applied to executive and legislative powers. The judiciary or the “power of judging” are not involved—“[t]he judiciary is not given any power over the other branches. Equally, its independence is absolute, for it is not subject to control by the other branches, except that the legislature can be a supreme court of appeal in order to mitigate the sentence of the law.”

Montesquieu’s version of the doctrine of the separation of powers was based on Britain’s 18th century constitution. Note, however, that Montesquieu’s conception of “executive” power was quite different from the meaning that had become traditional in English jurisprudence. In his formulation, “executive power” refers only to the “power of executing matters falling within the law of nations.” Montesquieu stated the doctrine of the separation of powers as follows:

When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

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37 Montesquieu, supra note 36, at 157-60.
39 Vile, supra note 33, at 93.
40 Id. Of course, a little over half a century later, the U.S. Supreme Court’s decision in Marbury v. Madison completely changed this view of government and made the judiciary forever an integral part of checks and balances.
42 Id.
43 Id.
Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.

There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.44

According to Montesquieu's statement, where a governmental system is undergirded by the rule of law, it must be the case that the judicial function is performed “by a body separate from legislature and executive.”45 Montesquieu, however, did not mean that each of the three government organs—executive, legislative, and judicial—would not be able to have influence over the activities of the others but only that “neither should exercise the whole power of the other.”46

The struggle of the American colonists for independence from Great Britain provided an opportunity for the development and elaboration of the doctrine of the separation of powers. America’s founding fathers adopted a “modified” and not “pure” form of the doctrine. As stated by Vile,47 “in the America of 1787 the doctrine of the separation of powers was modified, tempered, buttressed even, by the theory of checks and balances drawn from the older conception of English constitutional theory, but it remained itself firmly in the center of men’s thoughts as the essential basis of a free system of government.”48 In its pure form, the doctrine of the separation of powers provides for “three separate, distinct, and independent functions of government—the legislative, the executive, and the judicial—which should be discharged by three separate and distinct organs—the legislature, the executive (or government), and the judiciary (or courts).”49

But what were the goals of the doctrine of the separation of powers? Modern legal and constitutional scholars, who study U.S. accounts of the separation of powers in the late eighteenth-century, state that discussions of this doctrine at the time were extremely “superficial” and do not offer “an explanation for why such a separation is desirable beyond

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44 Montesquieu, supra note 36, at 151-52.
45 Wade and Phillips, supra note 41, at 46.
46 Id.
47 Vile, supra note 33.
49 Fombad, supra note 2, at 306.
vague references to its necessity in achieving ‘liberty’ and avoiding ‘tyranny.’” This was, however, in contrast to the articulation of the doctrine in England in the seventeenth century—its proponents specifically intended “to limit government officials by legal rules (the ‘rule of law’), to provide for the accountability of government officials, to eliminate a powerful group bias (that of government officials) from the legislature, to allow for governmental checks and balances, and to promote government efficiency.” This failure, by the framers or their contemporaries, to effectively articulate the values to be maximized by adopting the doctrine of the separation of powers, today’s constitutional scholars argue, has created challenges for the application of the doctrine in modern legal adjudications. Gwyn has identified some of those challenges. In “the absence of a clear articulation of the separation of powers doctrine,” he argues, “modern courts [are forced] to apply the doctrine without understanding its purposes.” In addition, “the distinction between legislative, executive, and judicial powers has been inexact and highly misleading.” Although Casper states that “[t]he constitutional text itself, although implying the notion of distinct branches, did not invoke the separation of powers as a principle,” some scholars have maintained “that the doctrine is implied in the first three articles, in which Congress is given ‘all legislative powers’ granted in the Constitution, the ‘executive power’ is vested in the President, and the ‘judicial power of the United States’ is vested in the Supreme Court and inferior courts created by Congress.” The U.S. Constitution, however, does not provide definitions for the three terms—“legislative,” “executive,” and “judicial power.”

According to the U.S. Constitution, “All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives” (Article I, § 1); “The Executive Power shall be vested in a President of the United States of America” (Article II, § 1); “The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish (Article III, § 1). The President “shall hold his Office during the Term of four Years” and his election is not undertaken along with that of members to the houses of Congress. Hence, the President may belong to a political party that is different

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51 Id. at 264.
52 Id. at 265.
53 Id.
54 Id.
55 Id.
56 Casper, supra note 48, at 221.
57 Id.
58 Id. at 266. Footnotes omitted. See also Wade and Phillips, supra note 41, at 46.
59 Id.
61 Id. at Article II, § 1.
from the one that holds the majority in either the House of Representatives, the Senate, or both.\textsuperscript{62}

In the early life of the Republic, the Supreme Court assumed the power to determine the constitutionality of acts of the legislature (i.e., the Congress) and those of the President (i.e., the executive).\textsuperscript{63} Regarding the doctrine of the separation of powers, the U.S. Supreme Court has ruled that, as contained in the U.S. Constitution, the doctrine excludes extensive delegation, by Congress, of its legislative powers, to executive agencies.\textsuperscript{64}

Some scholars have argued that in applying the doctrine of the separation of powers, the same individual should not serve in more than one of the three branches or organs of the government at the same time (e.g., a member of the President’s cabinet cannot sit in the legislature), one branch of government must not interfere with or usurp the functions of another, and “one organ of government should not exercise the functions of another.”\textsuperscript{65} Of course, this is the pure form of the doctrine and is only an ideal that modern democratic systems attempt to achieve.

In a study in which he reassesses the “validity of the separation of powers doctrine,” Gwyn\textsuperscript{66} argues that five versions of the doctrine were articulated in the century following its first appearance.\textsuperscript{67} These are the “rule of law, accountability, common interest, efficiency, and balancing of interests.”\textsuperscript{68} The first four versions, Gwyn argues, are “concerned with achieving liberty and the common interest,”\textsuperscript{69} and the fifth one is concerned with “governmental efficiency.”\textsuperscript{70} Below, I briefly examine them.\textsuperscript{71}

\textit{A. Rule of Law Version of the Doctrine of the Separation of Powers}

According to the United Nations,

the rule of law refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human

\textsuperscript{62}Wade and Phillips, \textit{supra} note 41, at 46.
\textsuperscript{63}\textit{Marbury v. Madison}, 5 U.S. (1 Cranch) 137 (1803).
\textsuperscript{64}\textit{A. L. A. Schechter Poultry Corp. v. United States}, 295 U.S. 495 (1935).
\textsuperscript{67}Gwyn, \textit{The Separation of Powers and Modern Forms, supra} note 66, at 68.
\textsuperscript{68}Fombad, \textit{supra} note 2, at 307. \textit{See also} Wade, Phillips & Bradley, \textit{supra} note 60.
\textsuperscript{69}Gwyn, \textit{The Separation of Powers and Modern Forms, supra} note 66, at 68.
\textsuperscript{70}Id.
\textsuperscript{71}This account is highly indebted to Gwyn, \textit{supra} note 61 & W. B. Gwyn, \textit{The Meaning of the Separation of Powers: An Analysis of the Doctrine from its Origin to the Adoption of the United States Constitution} 127-28 (Tulane Studies in Political Science, 1965).
rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.  

This version of the separation of powers doctrine argues that in order for the rule of law to function in a country, lawmakers (i.e., those who enact the laws) should not be the same people who “also judge or punish violations of [the law].”  

If, for example, legislators, that is, those who make the laws, are constitutionally allowed to also enforce them, they may behave opportunistically and make laws that benefit themselves and their benefactors but significantly disadvantage others. In his interpretation of Montesquieu, Sir William Blackstone, KNT, states as follows:

> The magistrate may enact tyrannical laws, and execute them in a tyrannical manner, since he is possessed, in quality of dispenser of justice, with all the power which he, as legislator, thinks proper to give himself. But, where the legislative and executive authority are in distinct hands, the former will take care not to entrust the latter with so large a power as may tend to the subversion of its own independence, and therewith of liberty of the subject. With us, therefore, in England, this supreme power is divided into two branches; the one legislative, to wit, the parliament, consisting of king, lords, and commons; the other executive, consisting of the king alone.

Gwyn argues that here, Montesquieu is thinking of the “rule of law” version of the separation of the separation of powers. This version of the separation of powers, however, does not mandate that the executive not be granted discretionary power or the power to make laws. As argued by Gwyn, the rule-of-law version of the separation of powers “does not require that executive officials possess no discretionary power or have no power to make legal rules or orders themselves.” Instead, executive officials must exercise any discretion

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73 Gwyn, The Separation of Powers and Modern Forms, supra note 66, at 68.
74 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND IN FOUR BOOKS, VOL. I, BOOKS I & II 105 (Collins and Hannay, 1832).
76 Id. at 104-105.
77 Gwyn distinguishes between “general rules of behavior” and “particular law”—the latter he terms “commands enforced by the courts referring to a particular person, place, or thing.” Gwyn, The Separation of Powers and Modern Forms, supra note 66, at 68.
78 Id.
79 Id.
granted them by the law and make laws only within “limits set by more general known laws made by a legislature not subject to the will of the executive.”

B. Accountability Version of the Separation of Powers

This version addresses the issue of accountability of governmental officials. Who should perform the function of punishing and, indeed, removing from office recalcitrant and non-performing, opportunistic, or poorly-performing officials? Historically, it was argued that if the legislature was granted the power to call to task and hold accountable, governmental officials, these same officials should not be allowed to dominate legislative assemblies. Why? If they were granted the power to exercise dominance over the legislature, these officials would be acting as judges in their own cases.

John Lilburne, a leader of the Leveller movement, was an ardent supporter of the doctrine of the separation of powers. He developed what Gwyn calls the accountability version of the doctrine. Lilburne argued that public or government officials should not also serve in the legislature if they are to be accountable to the latter. According to Lilburne,

It is one of the most unjust things in the world, that the Law-makers should be the Law executors, seeing by that means, if they do never so much injustice and oppression, a man may spend both long time, and all he hath besides, before ever he can get any Justice against them, yes, and it may be, hazard the losse of his life too.

And therefore it were a great deal better for the Common-wealth, that all the executors of the Law should be such persons as doe not in the least belong to Parliament, that so they may not be able to make any factions to save their Lives and Estates, when they doe injustice.

Lilburne and the Levellers, Gwyn argues, believed that the doctrine of the separation of powers could serve as a powerful mechanism to fight parliamentary tyranny. In virtually all the pamphlets that Lilburne produced, can be found the argument that government officials must not be allowed to serve in the legislative assembly if the latter is granted the

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81 Raz, supra note 72, at 69 and generally Gwyn, supra note 33.
83 Gwyn, THE MEANING OF THE SEPARATION OF POWERS, supra note 25, at 40. See also id., at 60-61, 77-78 & 126-27.
84 Id.
85 Quoted in Id. at 40.
86 Id. at 41.
responsibility to call the former to account (that is, to make certain that government officials function within the law). 87

In modern legal and judicial systems, where more institutions than just the legislature are capable of monitoring governmental officials and making certain that they do not behave with impunity, the only requirement is that the institution so chosen to perform the accountability task is independent from the executive. As Gwyn has argued, while legislatures do participate in performing the accounting function, other institutions, such as the courts, as well as the electorate, are equally involved. 88

C. The Common Interest Version of the Separation of Powers

In late seventeenth and early eighteenth century England, there was a desire to maximize the common interest and minimize the ability of individuals serving in government (in the executive and legislative branches) from acting opportunistically—the argument was that individuals within the legislature, for example, may form interest groups or factions and pursue the latter’s interests instead of the general population (i.e., the common interest). It was believed at the time that the common interest could be safeguarded by separating legislative and executive powers. 89 Lilburne and the Levellers also dealt with this version of the separation of powers—they argued that it was necessary to make certain that those who served in the assembly (i.e., legislature) did not maximize their own private interests instead of those of the public, whom they were representing or elected to serve. 90

In modern democracies, however, the pursuit of private interests by different interest groups or factions within legislative assemblies is not necessarily detrimental to good governance or the maximization of the common interest. In fact, parliamentary groups with conflicting interests can bargain and compromise with each other and reach agreements that are in the common interest. The common interest version of the separation of powers is still valid as long as no single group is allowed to dominate the legislative process or “exercise disproportionate influence that is prejudicial to the rest of society.” 91

D. The Balancing of Interests Version of the Separation of Powers

In fourteenth century England, the “mixed constitution” emerged as the “dominant idea underlying the design of government organs.” 92 In one formulation of this doctrine, the powers to make law were granted to three estates, namely, the King (monarch), House of Lords (Lords), and the House of Commons (Commons)—basically, the idea was that “each of the major interest groups of the day must be allowed to have an institutional influence upon the functioning of government.” 93 In addition to the fact that the mixed constitution enhanced the representation of the country’s distinct classes in government, it also provided

87 Id. at 40.
88 Gwyn, The Separation of Powers and Modern Forms, supra note 66, at 69.
89 Id. See also GWYN, THE MEANING OF THE SEPARATION OF POWERS, supra note 25, at 39-40.
91 Fombad, supra note 2, at 308.
92 Morgan, supra note 30, at 2.
93 Id.
effective constraints against the ability of any of the major interest groups to dominate and/or control others.\textsuperscript{94}

By the mid-seventeenth century, the mixed constitution had evolved into what came to be known as the “balanced constitution.”\textsuperscript{95} Under the latter, governmental functions were divided into two—legislative and executive—and the monarch assigned to carry out the executive function, while the Commons and the Lords were granted power to make the laws.\textsuperscript{96} Morgan argues that this new articulation of the functions of government provided the wherewithal for the separate organs to check each other.\textsuperscript{97} However, a model of government that approximated the separation of powers did not appear in Britain until the appearance of the country’s only written constitution—the Instrument of Government 1653.\textsuperscript{98} Speaking of this balancing of interests, Montesquieu,\textsuperscript{99} states as follows:

The legislative body being composed of two parts, they check on one another by the mutual privilege of rejecting. They are both restrained by the executive power, as the executive is by the legislative.

These three powers should naturally form a state of repose or inaction. But as there is a necessity for movement in the course of human affairs, they are forced to move, but still in concert.\textsuperscript{100}

\textit{E. The Governmental Efficiency Version of the Separation of Powers}

During the seventeenth and eighteenth centuries, the separation of powers was advocated as a way to improve the effectiveness of the government.\textsuperscript{101} At the time, it was assumed that in order to “preserve liberty and the public interest, a large representative assembly was required to make or consent to legislation.”\textsuperscript{102} However, such a large representative body was considered incapable of adequately performing the function of enforcing the laws without “secrecy, expertise and dispatch.”\textsuperscript{103} Thus, it was suggested that the function of executing the laws (i.e., the executive function) be granted to a much smaller organization.

At this time in the history of England, the House of Commons was considered too large to operate the government with the “necessary secrecie and expedition.”\textsuperscript{104} The

\textsuperscript{94} Id.
\textsuperscript{95} Id.
\textsuperscript{96} Id. at 2-3.
\textsuperscript{97} Id. at 3. Note, however, that “balanced constitutionalists” argued that there was need for “some degree of co-operation and, hence, of association between the distinct organs.” Id. Without such association, that is, with strict independence, they could “paralysis” in government. Id.
\textsuperscript{98} Id.
\textsuperscript{99} Montesquieu, \textit{supra} note 36.
\textsuperscript{100} Id. at 160 (Book XI, Chapter 6).
\textsuperscript{101} Gwyn, \textit{The Separation of Powers and Modern Forms}, \textit{supra} note 66, at 70.
\textsuperscript{102} Id.
\textsuperscript{103} Morgan, \textit{supra} note 35, at 15. \textit{See also} Gwyn, \textit{The Meaning of the Separation of Powers}, \textit{supra} note 25, at 32-33.
\textsuperscript{104} Quoted in Gwyn, \textit{The Meaning of the Separation of Powers}, \textit{supra} note 25, at 32.
recommendation was that “an additional organ of government,” preferably, “the magistracy,” be tasked with executing the laws.\footnote{Id. Gwyn was quoting Harrington.}

The basic idea behind the separation of powers as a way to improve governmental efficiency lies in the belief that each governmental function is different in character and that effectively carrying out the duties associated with each function requires different types of expertise and qualities. Thus, it would be necessary to structure each institution (executive, legislature, and judiciary) so that it could carry out its constitutionally assigned functions effectively. While, for example, the legislature, must be placed in an institution that enhances “broad representation and ensures deliberation” before decisions are made, the executive can be “housed in an institution headed by one individual in order to be able to act quickly and secretly.”\footnote{James W. Ceaser, \textit{Doctrines of Presidential-Congressional Relations, in Separation of Powers and Good Government} 89, 94 (Bradford P. Wilson & Peter W. Schramm eds., Rowman & Littlefield, 1994).} The efficiency argument, however, does not play a significant role in the modern doctrine of separation of powers.\footnote{See generally Sharp, \textit{supra} note 48.}

III. \textsc{The Separation of Powers in Modern Political Governance}

Gwyn argues that “it was Montesquieu’s analysis of governmental power into legislative, executive, and judicial functions which brought to those categories the great popularity which continued down into this century.”\footnote{GWYN, \textit{The Meaning of the Separation of Powers}, \textit{supra} note 25, at 101.} Gwyn cautions that it is worth noting that “while English writers before Montesquieu’s time usually did not distinguish between executive and judicial functions in classifying governmental power, they did insist that those who judged civil and criminal cases should not also exercise legislative or other executive functions.”\footnote{Id. at 101-102.}

But, do all modern governments, which have adopted the doctrine of the separation of powers, have identical types of political systems? In a study of modern governmental systems, Gwyn distinguished three types of representative government which, he argues, are compatible with the separation of powers doctrine.\footnote{Gwyn, \textit{The Separation of Powers and Modern Forms, supra} note 66, at 72-78.} The first is the “presidential” or “congressional” government which was created in the United States in 1787 and which has significantly influenced governance in many of the new countries that came into being after the end of colonialism around the world.\footnote{Id. at 73.} The second governmental type is the parliamentary or Westminster model, common in Great Britain and its former colonies.\footnote{Id. at 78.} The Westminster model, however, is said to not embody the separation of powers.\footnote{Id. at 75.} The third type is the assembly model of government, whose origins can be traced to the
Interregnum period in England\textsuperscript{114} and France of the 1870s.\textsuperscript{115} However, it is today associated primarily with the now defunct Soviet Union and its satellite states.\textsuperscript{116} As argued by Fombad, “within these three types lie numerous hybrids, prominent among them being the French Fifth Republic Constitution of 1958, which combines a parliamentary system with the element of a strong and elected President.”\textsuperscript{117} Below, I briefly examine the important features of each of the three systems.

\textit{A. The American Presidential System}

The U.S. Constitution, which went into effect on March 4, 1789, clearly embodies the doctrine of the separation of powers. The Constitution’s first three articles\textsuperscript{118} clearly express the separate powers of the three branches of the federal government—the legislature, the executive, and the judiciary. Article I vests the legislative powers in the bicameral Congress, which consists of the Senate and the House of Representatives. According to Article I, “All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”\textsuperscript{119} Article II vests the executive power in the president: “The executive Power shall be vested in a President of the United States of America.”\textsuperscript{120} Finally, Article III vests judicial power in the Supreme Court and other inferior courts that may be established by the Congress of the United States: “The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”\textsuperscript{121}

The election of the President is held separately from that of members of the Congress and the President holds “Office during the Term of four Years.”\textsuperscript{122} The elected president may, therefore, come from a political party other than the one that holds the majority in either the House of Representatives, the Senate, or both.\textsuperscript{123} As argued by Gwyn, “[n]either the president, the head of the executive branch, nor the legislature is able to determine the election of the other: both are directly or indirectly elected by popular vote for definite terms of office.”\textsuperscript{124} In line with the doctrine of the separation of powers, an individual “may not be a member of both the legislative and executive branches of government at the same time.”\textsuperscript{125} Similarly, a standing judge cannot serve in Congress and in an executive position at the same

\textsuperscript{114} For an examination of this period in English history, see generally JEFFREY DENYS GOLDSWORTHY, THE SOVEREIGNTY OF PARLIAMENT: HISTORY AND PHILOSOPHY 135-141 (Clarendon Press, 1999).
\textsuperscript{115} Gwyn, The Separation of Powers and Modern Forms, supra note 66, at 76-78.
\textsuperscript{116} Id.
\textsuperscript{117} Fombad, supra note 2, at 310. See also JOHN BELL, FRENCH CONSTITUTIONAL LAW 14-20 (Clarendon Press, 1992).
\textsuperscript{118} THE CONSTITUTION OF THE UNITED STATES OF AMERICA, ARTICLES I – III.
\textsuperscript{119} Id. at ARTICLE I, § 1.
\textsuperscript{120} Id. at Article II, § 1.
\textsuperscript{121} Id. at Article III, § 1.
\textsuperscript{122} Id. at Article II, § 1.
\textsuperscript{123} Id. at Article II, § 1.
\textsuperscript{124} Gwyn, The Separation of Powers and Modern Forms, supra note 66, at 75.
\textsuperscript{125} Id.
time. The Vice President of the United States, however, is the only member of the executive branch of the government who is constitutionally empowered to exercise, albeit, limited legislative power. In his or her role as President of the Senate, the Vice President is empowered to cast the deciding vote if there is a tie.

Although the President of the United States cannot directly initiate legislation, he or she can make recommendations regarding bills to the Congress: The President of the United States “shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient.” Through the right to veto legislation, the President can also exercise some level of control over the legislative function. Additionally, the President does exercise some control over the judiciary system through the power granted him or her by the Constitution to “grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.”

Congress is granted power to check the executive, through, for example, the approval of treaties negotiated and entered into by the president. In addition, the Congress has the right to approve executive appointments of ambassadors, judges, and other senior officers of the administration. Each of the two chambers of Congress has and can exercise some judicial powers—each House has the power to judge and punish its own members for contempt. The Constitution grants the Senate additional judicial powers—this chamber is granted the “sole power to try all Impeachments.” The Congress, in addition to the judicial powers enumerated above, is also granted the power by the Constitution to create and regulate “inferior” (i.e., lower) [federal] Courts.

The U.S. Constitution does not specifically allocate the judiciary any powers of supervision—specific or general—over the executive. Nevertheless, the judiciary can use “its general equitable jurisdiction to issue writs of mandamus against executive officers to ensure that they perform their constitutional duties.” The judiciary does have the authority to force executive compliance with the guarantees provided in the Bill of Rights. In his judgment in *Marbury v. Madison*, Chief Justice John Marshall granted the Supreme Court the power to determine the constitutionality of legislative statutes. The United States is a

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126 CONSTITUTION OF THE UNITED STATES OF AMERICA, Article II, § 6, cl. 2.
127 Id. at Article I, § 3, cl. 4.
128 Id.
129 Id. at Article II, § 3.
130 Id. at Article I, § 7, cl. 2. The President’s veto of legislation, however, can be overridden by a two-thirds in both Houses of Congress. Id.
131 Id. at Article II, § 2, cl. 1.
132 Id. at Article II, § 2, cl. 2.
133 Id.
134 Id. at Article I, § 5.
135 Id. at Article I, § 3, cl. 6.
136 Id. at Article III, § 1.
137 See id. at Article III.
138 Fombad, supra note 2, at 312. See also id. at Article III.
139 See Marbury v. Madison, 5 U.S. 137, 176-80 (1803).
140 Id. at 180.
141 Id.
common law country and as such, its courts follow the norm of *stare decisis*, which allows courts to serve a quasi-legislative function. Of course, it is important to note that Congress does have the power to nullify judge-made law if it does not concern constitutional issues.

The separation of powers, as practiced in the United States’ presidential system, then, recognizes, first, that certain governance functions belong specifically to each of the three branches of government—executive, legislative, and judiciary—and second, it is necessary to permit a certain minimal level of interference by one into the functions of another in order to minimize arbitrariness and capriciousness in the performance of the assigned functions.

B. The British Parliamentary System of Government

The British parliamentary system of government or the so-called Westminster model is found not only in the United Kingdom but also in several of Britain’s former colonies. Although the absence of a written constitution means that “there is no formal separation of powers in the United Kingdom,” Lord Diplock, in *Duport Steels Ltd v. Sirs* states that “at a time when more and more cases involving the application of legislation which gives effect to policies that are the subject of bitter public and parliamentary controversy, it cannot be too strongly emphasized that the British Constitution, though largely unwritten, is firmly based on the separation of powers: Parliament makes the laws, the judiciary interpret them.”

In the United Kingdom (UK), “the executive and legislature are closely entwined.” The UK legislature (i.e., the Parliament) comprises the Crown, the House of Commons, and the House of Lords. The executive, on the other hand, comprises the Crown and the Government (which includes the Prime Minister and members of the Cabinet). Such a fusion of legislative and executive powers means that there is not a strict separation of powers in the British parliamentary system, at least not of the scale found in the U.S. presidential governmental system. Nevertheless, the doctrine of the separation of powers

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146 *Id.* at 116.

147 And, indeed, in other common law jurisdictions.


149 *Id.*
informs governance in the UK and is an integral part of the country’s unwritten constitution. The separation of powers in the UK can be better understood by examining the relationship between (i) the legislature and the executive; (ii) the executive and the judiciary; and (iii) judiciary and the legislature.

In the UK, the executive is headed by the monarch (at moment, the Queen), who is the nominal head, and the Prime Minister, who is responsible for the day-to-day functioning of the government.\(^{150}\) In addition, the Queen is also an integral part of the Parliament—“legislative authority is vested in the Queen in Parliament.”\(^{151}\) In addition to serving as one of the heads of the executive branch, the Prime Minister is also leader of the majority party in Parliament.\(^{152}\) Cabinet ministers are part of the executive and by convention, must be members of either of the two chambers of Parliament.\(^{153}\) The Parliament exercises significant power over the executive—in addition to the fact that it can force a dissolution of the government by withdrawing its support, Parliament also controls the executive through “question time,” select committees, and opposition days.”\(^{154}\) On the other hand, the executive can also perform legislative functions based on powers vested on it by the acts of Parliament.\(^{155}\)

With respect to the relationship between the executive and the judiciary, the latter is expected to “ensure that any delegated legislation is consistent with the scope of power granted by Parliament and to ensure the legality of government action and the actions of other public bodies.”\(^{156}\) Before the Constitutional Reform Act 2005, the Lord Chancellor was the head of the judiciary and could preside over the House of Lords when the latter was acting as a court.\(^{157}\) The Lord Chancellor is also a member of the House of Lords and hence, is a legislator—the Lord Chancellor, thus, serves in all three branches of government. The Constitutional Reform Act 2005 relieved the Lord Chancellor of his judicial functions and vested the Lord Chief Justice with the role of head of the judiciary.\(^{158}\) In addition, the Lord Chancellor no longer serves as Speaker of the House of Lords. The latter is now allowed to elect its own Speaker. The Constitutional Reform Act 2005 made these changes in order to “create a more formal separation of powers.”\(^{159}\)

UK judges are legally prohibited, under the House of Commons (Disqualification) Act 1975, from standing for election to Parliament.\(^{160}\) Judges must interpret legislation “in line

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150 Wade & Phillips, supra note 41, at 42-54.
151 Id. at 42.
152 Wade & Phillips, supra note 41, at 242.
155 Wade & Phillips, supra note 41, at 43. See also Bradley & Ewing, supra note 153, at 94.
156 Benwell & Gay, supra note 148. Note, however, that under the principle of parliamentary supremacy, primary legislative acts are not subject to judicial review.
157 Bradley & Ewing, supra note 153, at 94.
158 Benwell & Gay, supra note 148.
159 Id. The Act also created a Supreme Court to serve as the highest court in the UK. The Supreme Court has taken over the functions that were previously exercised by the Lords of Appeal in Ordinary (the Law Lords). This reform effectively separated the judicial role from the House of Lords. Id.
160 Benwell & Gay, supra note 148.
with the intention of Parliament and are also responsible for the development of the common law (judge-made law).”

In the higher courts, judges are granted life tenure, “which protects their independence, and a resolution of both Houses [of Parliament] is needed to remove a High Court judge from office, which judges at the lower levels can only be removed after disciplinary proceedings.” Within the UK judiciary system, judges have immunity from any “legal action in relation to their judicial functions and absolute privilege in relation to court proceedings.”

As argued by Lord Phillips of Worth Malravers, President of the UK Supreme Court,

The citizen must be able to challenge the legitimacy of executive action before an independent judiciary. Because it is the executive that exercises the power of the State and because it is the executive, in one form or another, that is the most frequent litigator in the courts, it is from executive pressure or influence that judges require particularly to be protected.

Under the UK constitution, judges are subordinate to Parliament. According to Wade and Phillips,

[while the courts may examine acts of the Executive to ensure that they conform with the law, the doctrine of legislative supremacy denies the courts the power to review the validity of legislation. The judges are under a duty to apply and interpret the laws enacted by Parliament. The effect of their decisions may be altered by Parliament both prospectively and also, if thought necessary, retrospectively. In one sense, therefore, the courts are constitutionally subordinate to Parliament, but the courts are bound only by Acts of Parliament and not by resolutions of each House, which may have no legal force.]

The heart of the British conception of the separation of powers is that

. . . Parliament, the executive and the courts have each their distinct and largely exclusive domains. Parliament has a legally unchallengeable right to make whatever laws it thinks right. The executive carries on the administration of the country in accordance with the powers conferred on it by law. The courts interpret the laws, and see that they are obeyed. This requires the courts on occasion to step into the territory which belongs to the executive, not only to verify that the powers asserted accord with the substantive law created by

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161 Id.
162 Id.
163 Id.
165 Wade & Phillips, supra note 41.
166 Id. at 52.
Parliament, but also, that the manner in which they are exercised conforms with standards of fairness which Parliament must have intended.\textsuperscript{167}

\textbf{C. France’s Hybrid System}

The version of the doctrine of the separation of powers, which has taken hold in the United States, has its roots in the scholarship of French intellectual, Baron de Montesquieu.\textsuperscript{168} As a Frenchman, Montesquieu was influenced by the Declaration of the Rights of Man and of the Citizen (1789), particularly Article 16.\textsuperscript{169} The doctrine is enshrined in the French Constitution of 1958.\textsuperscript{170} However, the understanding and practice of the doctrine of the separation of powers in France is quite different from that in the United States and the United Kingdom. French practices allow for “close cooperation between the executive and the legislature, rather than a strict separation of powers.”\textsuperscript{171}

The judiciary plays a very distinctive role in the French presidential system of government. Before the French Revolution of 1789, as argued by Merryman,\textsuperscript{172} “the regional parlements became centers of conservative power.”\textsuperscript{173} Regional judges, whose sympathies lay with the “landed aristocracy,” usually “interpreted” royal legislation to deprive it [i.e., the legislation] of its intended effects, refused to register royal edicts and hindered royal officials in the performance of their functions.”\textsuperscript{174} Many critics of the pre-1789 regime believed that the most effective way to minimize judicial excesses was to protect the “legislative and executive powers of government from any form of judicial control.”\textsuperscript{175} As argued by Montesquieu, “[a]gain, there is no liberty, if the judiciary power be not separated from the legislative and executive.”\textsuperscript{176} Thus, the post-revolution institutional arrangements specifically “included a variety of measures abolishing remaining feudal institutions, establishing rights of personality, property and contract for all French citizens, instituting representative government and centralizing governmental power in Paris.”\textsuperscript{177} In fact, Article 13 of the French law of August 16-24, 1790, which is still in force today, specifically states

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  \item 167 R. v. Secretary of State for the Home Department, ex parte Fire Brigades Union and Others, 2 All ER 244, 267 (1995).
  \item 168 \textsc{Baron De Montesquieu}, \textit{The Spirit of the Laws}, supra note 36.
  \item 169 Article 16 states that “Any society in which no provision is made for guaranteeing rights or for the separation of powers, has no Constitution” (“Toute Société dans laquelle la garantie des Droits n’est pas assurée, ni la séparation des Pouvoirs déterminée, n’a point de Constitution”), \textsc{Article 16, The Declaration of the Rights of Man and the Citizen}, 1789, at http://www.diplomatie.gouv.fr/en/france/institutions-and-politics/the-symbols-of-the-republic/article/the-declaration-of-the-rights-of (last visited on February 15, 2013).
  \item 171 Fombad, supra note 2, at 316.
  \item 173 \textit{Id.} at 109.
  \item 174 \textit{Id.} at 110.
  \item 175 \textit{Id.}
  \item 176 Montesquieu, supra note 36, at 152 (Book XI, Chapter 6).
  \item 177 That is, the legal and judicial regime that emerged from the French Revolution of 1789.
  \item 178 Merryman, supra note 172, at 110.
\end{itemize}
\end{footnotesize}
that “judicial functions are and will remain forever separate from the administrative functions. The judges will not be allowed, under penalty of forfeiture, to disturb in any manner whatsoever, the activities of the administrative corps, nor to summon before them the administrators, concerning their functions.”

The French judiciary has limited power to determine the constitutionality of laws. That authority, however, is not exercised by a judicial body but by what is referred to as a quasi-Bornapartist institution called the Conseil constitutionnel (Constitutional Council). The Constitutional Council was established by General Charles de Gaulle “as a means of ensuring executive control over the legislature.” However, today, the Constitutional Council functions “mainly to review the constitutionality of legislation that has been proposed by the executive and adopted by parliament, before it has entered into force.”

Article 34 of the French Constitution provides another unique feature of the French incorporation of the doctrine of the separation of powers into their laws—the section expressly defines only the legislative competence of parliament. Outside the field of legislative competence defined by Article 34, the executive is free to legislate on all other matters. Article 39 grants the Prime Minister “the right to initiate legislation.” As argued by Fombad, “residuary legislative power,” under the French Constitution of 1958, “lies not with the parliament, as it does in other countries, but with the executive.”

The French Constitution makes the judiciary subservient to the executive. According to Article 64, “The President of the Republic shall be the guarantor of the independence of the Judicial Authority.” Article 64 further states that in performing this duty, the President is to be assisted by the “High Council of the Judiciary.” However, the same constitution, at Article 65, also grants the President the power to preside over the High Council of the Judiciary. Given the fact that the High Council of the Judiciary is the institution responsible for making recommendations for judiciary appointments, as well as disciplining


180 Sweet, supra note 179, at 2748. See also Merryman, supra note 172, at 117.

181 Sweet, supra note 179, at 2748.

182 Id. Note that the jurisdiction of the Constitutional Council can be “invoked in the abstract, without the necessity for parties or for a specific case or controversy.” Merryman, supra note 172, at 117.


184 Id. at Article 34.

185 Id. at Articles 34 & 37.

186 Id. at Article 39.

187 Fombad, supra note 2, at 317.

188 Constitution of October 4, 1958, supra note 183, at Article 64.

189 Id.

190 Id. at Article 65.
judges, the executive has significant power to control the judiciary.\textsuperscript{191} Unlike the American case, where the judiciary is considered a co-equal branch, with the legislature and executive, of the government, under France’s version of the separation of powers, the judiciary is separate from but largely subservient to, the executive.

Some scholars have argued that given the fact that under the French Constitution, the judiciary is an institution that is largely subordinate to the executive, “the doctrine of separation of powers in France thus means little more than distinguishing between the legislative and executive branches of government.”\textsuperscript{192} The French system of democracy does not provide the strict separation of powers; instead, it provides for “close collaboration between the executive and legislative powers” and “skews the balance of power toward the executive.”\textsuperscript{193}

IV. Evolution of Cameroon’s 2008 Constitution


The Cameroon Constitution of 2008, which currently is the highest law in the land, is an amended version of the Constitution of 1996. The amendment was effected by Law No. 2008/001 of April 14, 2008.\textsuperscript{194} The 1996 Constitution was an amended version of the Constitution of 1972, which itself was an amended version of the 1960 Constitution of the République du Cameroun.\textsuperscript{195} Despite the fact that Cameroonians were expected to adjust and adapt this borrowed constitutional model to meet the specificities of their country and the values unique to their various stakeholders, the country’s constitution, and hence, its governance institutions, are remarkably similar to those of France.\textsuperscript{196} Writing about

\textsuperscript{191} Id.
\textsuperscript{192} Fombad, \textit{supra} note 2, at 318.
\textsuperscript{193} Id.
\textsuperscript{195} The République du Cameroun was the former UN Trust Territory of Cameroons under French administration, which had gained independence from France in 1960. Like most other francophone territories in sub-Saharan Africa, Cameroon accepted Charles de Gaulle’s offer of association as independent republics within the French Community. As a consequence, the country’s first constitution—the Constitution of 1960—was based on the French Constitution of 1958. \textit{See generally VICTOR T. LEVINE, THE CAMEROONS: FROM MANDATE TO INDEPENDENCE} (examining, inter alia, constitution making in the UN Trust Territory of Cameroons under French administration). In 1961, the République du Cameroun united with the former UN Trust Territory of Southern Cameroons under British administration to form the Federal Republic of Cameroon (République Fédérale du Cameroun). The new federation’s constitution was simply an amended version of the 1960 constitution of the République du Cameroun. That 1961 constitution represents the foundation for the present constitution in Cameroon (“Cameroon Constitution 2008”).
constitution making in the former UN Trust Territory of Cameroons under French administration, LeVine argues that the “government” was more interested in producing almost any document and having it adopted as soon as possible than in encouraging wider discussion of its basic provisions—thus, according to these critics, accounting largely for following the French model so closely.197

. Colonialism and the Historical Origins of Constitution Making in Cameroon

In the summer of 1884, the German Commissioner for West Africa, Gustave Nachtigal, signed accords with several indigenous kings on the Cameroon River District and founded the colony of Kamerun along the Bight of Biafra.198 Eventually, the Germans undertook additional explorations inland and significantly increased the size of the colony as far north as Lake Chad.200 Shortly after Germany had established its authority on the Cameroon River District and created a colony, the government in Berlin sought to accord it locus standi in the German legal system.201 The German colonial government, however, did not initiate a process of robust constitutional discourse in the colony, one that would have granted the

197 The République du Cameroun actually gained independence on January 1, 1960, without a constitution. It was not until February 21, 1960, that the committee (Consultative Committee) tasked with “drafting” the constitution presented a document to the people for ratification. The “government” referred to here is the government of the République du Cameroun, led by Ahmadou Ahidjo, the first president of the République du Cameroun. LeVine, supra note 195, at 221 & JOHN MUKUM MBAKU, INSTITUTIONS AND REFORM IN AFRICA: THE PUBLIC CHOICE PERSPECTIVE 80-88 (Prager, 1997) (examining, among other things, constitution making in the UN Trust Territory of Cameroons under French administration).

198 LeVine, supra note 195, at 227. LeVine, of course, questions the wisdom and “appropriateness of modeling the Cameroun constitution so closely on that of the Fifth Republic.” Id. While the Constitution of the Fifth Republic was designed “in the context of the constitutional crisis that brought De Gaulle to power” in the France of 1958, the environment and “circumstances surrounding the writing of the Cameroun constitution were not in any way analogous to those existing in France in 1958.” Id.

199 Two documents, which were to determine the relations between the Africans on the Cameroon River District and the Germans, were signed. The first one was signed on July 12, 1884 and expressed the wishes of Africans—the latter were exclusively members of the Duala ethnic group and hence, the agreement only applied to territories belonging to the Duala and areas in which the Duala controlled trade as middlemen. The German consul appended his signature to the document, indicating that the Germans were willing to adhere to the values expressed in the agreement by the Duala people. The second document, also dated July 12, 1884, was a treaty concluded between the Duala kings and German traders. On Monday July 14, 1884, the German flag was officially raised on the Cameroon River District and Consul Nachtigal formally announced to the Duala and the rest of the world that the territory was now a German colony. HARRY R. RUDIN, GERMANS IN THE CAMEROONS, 1884-1914: A CASE STUDY IN MODERN IMPERIALISM 40-41 (Archon Books, 1968).

200 JOHN MUKUM MBAKU, CULTURE AND CUSTOMS OF CAMEROON 24 (Greenwood, 2005).

201 Rudin, supra note 199, at 126-27.
inhabitants the opportunity to participate fully and effectively in constitution making. Despite the fact the Duala had signed the treaties on July 12, 1884 with certain stipulations, the latter were not to have significant impact on constitution making in the post-annexation period. Instead, Bismarck proposed a bill to the Reichstag in Berlin on January 12, 1886. The Reichstag eventually passed the bill on April 10, 1886 and the law took effect a week later granting the colonies “legal status in the German constitutional system.”

The development of the colonial constitution was an exclusive function of the German government in Berlin. Although German planters resident in the colony of Kamerun participated fully in the designing of the constitution and the building of governance institutions, the African citizens of the colony were not granted the opportunity to participate, nor were they allowed to provide input into the process. The new colonial constitution vested significant powers in the Kaiser. As suggested by Rudin, such a “concentration of authority in [the hands of the Kaiser] was the legal device through which [German] traders sought to be as unhampered in administering and exploiting the colonies as they had been in acquiring them.”

The First World War broke out in Europe in August 1914 and by February 1916, the Germans had lost the colony of Kamerun to Allied Expeditionary Forces. By September 26, 1914, the Germans had departed from Douala, then the colony’s most important commercial hub. Subsequently, a condominium was formally established following the exchange of a series of correspondences between M. Delcassé (France) and Sir Francis Bertie & Sir Edward Grey (UK) during the period September 21 and 24, 1915. The Allied powers agreed to govern the city of Douala jointly until such a time that the remaining pockets of German resistance in the colony were defeated and the peace secured. Once it was determined that German resistance had been contained and victory was imminent, arrangements were made to divide the colony’s territory between Britain and France so that

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202 Under the terms of the second agreement signed on July 12, 1884, between Duala kings and the German consul, the Duala surrendered lands to the Germans under the following conditions: “rights of third parties to be respected, treaties of commerce and friendship with others to remain in force, land under cultivation and the land on which the towns were built to remain the property of present owners, Kumi (a gift to natives for the right to trade) to be paid to kings and chieftains as in the past, native customs to be respected for the time following the institution of the new administration.” Id. at 41. Unfortunately, for the Duala and other groups within the Kamerun colony, land confiscation by German planters was to become one of the most contentious issues. Id. at 241.

203 Id. at 126.
204 Id. at 127-28.
205 Id. at 128-129.
206 Adolf Woermann, head of the C. Woermann firm, based in Kamerun, was a member of the committee charged with compacting the colonial constitution. His influence was quite significant. Id. at 159.
207 Rudin, supra note 199, at 129.
208 Mbaku, supra note 200, at 26.
209 LeVine, supra note 195, at 31.
210 Id. at 32.
211 Id. at 32.
each of the European nations could govern its part independently of the other.\footnote{Id.} The agreement, signed on March 4, 1916, terminated the condominium and effectively partitioned Kamerun into French and British zones of influence.\footnote{Id.} Under the agreement, territories that had been ceded to Germany in 1911 by France were returned and administratively, became part of French Equatorial Africa.\footnote{Id.} Of the remaining Kamerun territories, France received four-fifths of the area and the rest, two disconnected pieces bordering the British colony of Nigeria, were granted to Britain, which the latter chose to administer as part of Nigeria.\footnote{Id.}

Although officials in Paris originally objected to a mandate under the League of Nations, they eventually relented and the mandate was officially confirmed on July 22, 1922.\footnote{See Articles 22 and 23 of the Covenant of the League of Nations, at http://www.unhchr.org/refworld/publisher,LON,,3dd8b9854,0.html (last visited on February 20, 2013).} The League imposed on both France and Britain certain “trust” duties regarding the former German territories. Article 22 of the Covenant of the League of Nations\footnote{Id.} states as follows:

To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilization and that securities for the performance of this trust should be embodied in this Covenant.\footnote{Id. at Article 22.}

In 1939, when World War II broke out, the League of Nations seized to exist and the mandates became the exclusive responsibilities of France and Britain.\footnote{Mbaku, supra note 200, at 29} However, when the United Nations was formed in 1947, both British Cameroons and French Cameroons were transferred to the care of the UN and they became UN Trust Territories.\footnote{LeVine, supra note 195, at 138-39.} By accepting the trusteeship agreement, both France and Britain agreed to adhere to the provisions of Article 76 of the Charter of the United Nations.\footnote{Id.)} Article 76 sets out the political objectives of the trusteeship system as follows:

\begin{itemize}
  \item To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilization and that securities for the performance of this trust should be embodied in this Covenant.
\end{itemize}
to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement...\[222\]

In 1958, when Britain announced that it would grant independence to Nigeria effective October 1, 1960 and Paris also announced that it would grant the UN Trust Territory of Cameroons under its administration independence effective January 1, 1960, it became necessary for the United Nations to determine the future of the UN Trust Territory of Southern Cameroons and the UN Trust Territory of Northern Cameroons, all of which were at the time, under British administration. In UN Resolution 1349 (XIII), issued between February and March 1959,\[223\] the UN General Assembly terminated the trusteeship and resolved, in agreement with France, the Administering Authority, that the Cameroons under French administration would gain independence effective January 1, 1960.\[224\] On January 1, 1959, France granted the Cameroons autonomy to deal with all issues except international affairs.\[225\] On January 1, 1960, the former UN Trust Territory of Cameroons under French administration gained independence and took the name République du Cameroun.\[226\]

In a resolution adopted on March 13, 1959 and titled “The Future of the Trust Territory of Cameroons under United Kingdom Administration,”\[227\] the UN General Assembly recommended that the Administering Authority (i.e., the UK), “take steps, in consultation with a United Nations Plebiscite Commissioner, to organize, under the supervision of the United Nations, separate plebiscites in the northern [i.e., UN Trust Territory of Northern Cameroons] and southern [i.e., UN Trust Territory of Southern Cameroons] parts of the Cameroons under United Kingdom administration, in order to ascertain the wishes of the inhabitants of the Territory concerning their future.”\[228\]

2. The 1960 Constitution of the République du Cameroun

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\[222\] *Id.* at Article 76.


\[224\] Mbaku, *supra* note 200, at 33.

\[225\] *Id.*

\[226\] *Id.*


The former UN Trust Territory of Cameroons under French administration was one of the francophone territories in sub-Saharan Africa that accepted Charles de Gaulle’s offer of association as autonomous political entities within the French Community. Cameroon’s decision to accept de Gaulle’s offer forced the new country to model its constitution and its governance institutions after the French Constitution of 1958.

An examination of the decolonization of the UN Trust Territory of Cameroons under French administration has already been provided by several authors. The primary focus of this section is to briefly examine constitutional discourse in the UN Trust Territory of Cameroons under French administration and show how top-down, non-participatory and elite-driven constitution making resulted in the adoption of constitutional rules that failed to make allowance for the effective separation of powers—one that would have, at the very least, minimized the type of government tyranny that exists in the country today. The constitution that the République du Cameroun adopted after independence in 1960 was “drafted” by the Consultative Committee, which had been created by Law No. 59-56 of October 31, 1959 and, as argued by several scholars, its resemblance to that of the French Fifth Republic was uncanny.

In the case where a democratic approach to constitution making is adopted, the country’s relevant stakeholder groups would elect representatives and the latter would meet in conference to draft the constitution based on political principles established or agreed upon in an earlier period and through a democratic process. Constitution making in the UN Trust Territory of Cameroons under French administration could hardly be considered to have been democratic. The process was top-down, elite-driven, non-participatory, and not inclusive. First, by accepting de Gaulle’s offer of association, Cameroonian authorities effectively gave up any discretion they had with respect to the compacting of the country’s constitution—implied in the acceptance was the belief that the new country’s constitution

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229 Guinea was the only French colony in sub-Saharan Africa that voted “non” to the proposal. See Guia Migani, De Gaulle and sub-Saharan Africa: From Decolonization to French Development Policy, 1958-1963, in GLOBALIZING DE GAULLE: INTERNATIONAL PERSPECTIVES ON FRENCH FOREIGN POLICIES, 1958-1969 251, 256 (Christian Nuenlist, Anna Locher & Garret Martin eds., Lexington Books, 2010).

230 LeVine, supra note 196, at 226-27.


233 JOHN MUKUM MBAKU, INSTITUTIONS AND REFORM IN AFRICA: THE PUBLIC CHOICE PERSPECTIVE 82-83 (Praeger, 1997).
would be informed by the French Constitution of 1958. Second, the Union des populations du Cameroun (UPC), the colony’s largest and most significant indigenous political organization and the only one which at the time represented a significant part of national political opinion, had been proscribed by the French colonial authorities and was not granted permission to participate in constitutional discourse—the UPC was not allowed to participate either in the framing of the political principles that were to serve as a foundation for drafting the constitution or in any discourse informing the constitution-making exercise. France’s decision to exclude the UPC from participating in the process of choosing the constitutional rules for the new country “effectively eliminated a significant portion of national political opinion from the constitutional deliberations and placed the process of selecting the new rules in the hands of a group that was, for all intents and purposes, alien.” Finally, the outcome of the constitution-making process was a constitution that was remarkably similar to that of the French Constitution of 1958.

Some observers have argued that Cameroon’s first constitution was exclusively a product of political exigency and that Cameroonian, including their leaders, were eager to rid themselves of the European presence and gain independence as quickly as possible. According to LeVine, several individuals who had served on the Consultative Committee later “voiced the opinion that the government was more interested in producing almost any document and having it adopted as soon as possible than in encouraging wider discussion of constitutional principles.”

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234 As many critics have argued, the 1960 Cameroon Constitution was essentially a Cameroon edition of the French Constitution of 1958. See, e.g., LeVine, supra note 195, at 227.


236 Id. at 43.

237 Consider, as an example, Article 5 of the Constitution of Cameroon: “The President of the Republic, as Head of State and Head of Government, shall ensure respect for the Constitution and the unity of the State, and shall be responsible for the conduct of the affairs of the Republic.” Now, take a look at Article 5 of the French Constitution of 1958: “The President of the Republic shall ensure due respect for the Constitution. He shall ensure, by his arbitration, the proper functioning of the public authorities and the continuity of the State.” Note LeVine’s criticism of the constitution-making process in the UN Trust Territory of Camerouns under French administration where he argues that whereas the French Constitution of 1958 was “written largely to accommodate the personality and political views of President de Gaulle, and was drafted in the context of the constitutional crisis that brought De Gaulle to power[,] the circumstances surrounding the writing of the Cameroun constitution were not in any way analogous to those existing in France in 1958.” LeVine, supra note 195, at 227. In fact, France, unlike Cameroon, was not emerging from more than 50 years of colonial occupation during which time its laws and institutions had been systematically abrogated (or, at the very least, attenuated) and replaced by alien structures.

238 LeVine, supra note 195, at 226-27.

239 Id.
Thus, Cameroonians were willing to forgo robust and inclusive constitutional discourse until independence was achieved and the Europeans were summarily expelled. It was expected that after independence, the departure of the colonial government, and the subsequent capture of the apparatus of government by Cameroonians, the latter would engage in democratic constitution making to produce laws and institutions that reflected their values. Such “locally-focused” institutional arrangements would provide Cameroonians with effective governance structures—that is, those capable of adequately constraining the state while, at the same time, enhancing peaceful coexistence, and engagement in entrepreneurial activities.


Those Cameroonians who believed and argued that any constitution, no matter how poorly constructed, “was adequate to accelerate decolonization and allow the colony to achieve independence and that democratic and effective constitutional discourse would be undertaken after the departure of the French either were extremely naïve or had a lot of faith in the government of Ahidjo, members of the new national assembly, and others whose post-independence public positions had endowed them with significant economic benefits.” Unfortunately, Cameroon’s first constitution, which was a thinly disguised copy of the Constitution of the Fifth Republic, did not adequately constrain the state, effectively granting civil servants and political elites almost unlimited power to act with impunity.

The Ahidjo-led government of the République du Cameroun did not make any effort to engage citizens of the new country in democratic constitution making as had been anticipated by many Cameroonians. However, with the help of French troops, the Ahidjo government continued to consolidate its hold on power by destroying the UPC, the country’s only viable opposition party. During the country’s second year of independence, 1961, the Ahidjo government preoccupied itself with unification with the UN Trust Territory of Southern Cameroons under British administration, which at the time was still a colony. In February 1961, a UN-supervised plebiscite was held in Southern Cameroons and citizens opted for unification with the now independent République du Cameroun to form a federation. This decision provided the peoples of Cameroon with a second chance to engage in democratic constitution making to provide themselves with more effective institutional arrangements, especially those that reflected the values of the country’s relevant

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240 Id.
241 Mbaku, supra note 233, at 83.
242 Id.
243 Id.
244 Id.
245 Id.
246 Id. at 84. The two questions put before the citizens of the two territories—the UN Trust Territory of Southern Cameroons under British administration and the UN Trust Territory of Northern Cameroons under British administration were: “(1) Do you wish to achieve independence by joining the independent Federation of Nigeria? (2) Do you wish to achieve independence by joining the independent Republic of Cameroon?” See, e.g., CHARLES MANGA FOMBAD, CONSTITUTIONAL LAW IN CAMEROON 26 (Wolters Kluwer, 2012). The Northern Cameroons voted to join the Federation of Nigeria and the Southern Cameroons voted to join the République du Cameroun.
stakeholders and were capable of dealing effectively with the problems that they faced. Southern Cameroons’ political leaders believed that the new arrangement between Southern Cameroons and the République du Cameroun would be a “loose voluntary association between political units, with each allowed to retain a significant level of political and economic autonomy.” In fact, Southern Cameroonians expected to “retain their traditions of open political debate, a free press, and a legal system based on English common law, as well as an economic system that granted traders and producers significant levels of economic freedom, as well as encouraged entrepreneurship.”

The opportunity made possible by the 1961 unification of Southern Cameroons and the République du Cameroun was not utilized to provide Cameroonians with institutional arrangements that guarantee the rule of law. Instead, the Ahidjo-led government, with the complicity of Southern Cameroons leaders, all of whom appeared clueless during the constitutional convention, developed and imposed on the people institutional arrangements that enhanced the ability of the elites to entrench themselves politically, as well as provide them with the wherewithal to act with impunity.

The constitutional convention that produced the 1961 constitution took place in Foumban, a town in the République du Cameroun. The reasons why Cameroonians failed to draft and adopt a constitution that would have helped them institutionalize democratic governance in the country have been examined thoroughly elsewhere. Here, I will summarize the most important and pertinent ones. First, République du Cameroun’s president, Ahmadou Ahidjo, and his government, were quite satisfied with the Gaullist model of government that had been established with the French Fifth Republic-inspired constitution of 1960. Thus, Ahidjo did not have any interest in engaging in the type of robust constitutional discourse that would have enhanced the ability of Southern Cameroonians to choose laws and institutions more beneficial to them.

Second, the Southern Cameroons delegation to the Foumban constitutional talks was seriously underfunded, inexperienced, and lacked adequate counseling in constitutional matters. Third, the République du Cameroun was already an independent country with its own institutional arrangements and an internationally recognized identity and had access to significant amounts of financial resources that were provided by the French government. Southern Cameroons, on the other hand, had virtually been abandoned by the British, the colonial administrator of record, and hence, did not receive the necessary assistance needed

\begin{itemize}
\item Id.
\item Id. Emphasis in the original.
\item John Mukum Mbaku, \textit{Cameroon’s Stalled Transition to Democratic Governance: Lessons for Africa’s New Democrats}, 1 \textit{African \& Asian St.} 125, 131 (2002).
\item Id. and Mbaku, \textit{supra} note 233, at 84-85.
\item See, e.g., Mbaku, \textit{supra} note 233, at 81-88.
\item See generally LeVine, \textit{supra} 195.
\item Mbaku, \textit{supra} note 248, at 132.
\end{itemize}
to enhance its ability to negotiate terms of unification that were more favorable to Southern Cameroonians.\(^{254}\)

Fourth, the Southern Cameroons’ most important political organization, the Kamerun National Democratic Party (KNPD), had convinced the majority of citizens that union with the Federal Republic of Nigeria would “subject them to further marginalization by a domineering and economically and politically more advanced Nigerian citizenry, especially the Igbos.”\(^{255}\) These fears, argued some scholars, might have forced a lot of Southern Cameroonians to give very little consideration to the platform presented by the Cameroon People’s National Congress (CPNC), which had been campaigning in favor of unification with Nigeria.\(^{256}\) The overwhelming support that Southern Cameroonians gave to the union with the République du Cameroun most likely weakened the position of the team that the Southern Cameroons government sent to the Foumban constitutional negotiations and affected their ability to secure rules more favorable to the people.\(^{257}\)

Fifth, the UN placed certain constraints on the Southern Cameroons as a condition for the latter’s independence, which negatively affected the territory’s ability to negotiate with the République du Cameroun. For example, in Foumban, the Southern Cameroons delegation could not have used the threat of “exit as a weapon against opportunistic behavior by the other partner in the Foumban constitutional negotiations since UN conditions for independence precluded the territory’s existence as a sovereign entity.”\(^{258}\) As an independent country with fully functioning laws and institutions, the République du Cameroun, on the other hand, could have exited the negotiations, kept its constitution and other institutions, and proceeded with its existence as an independent country. If the République du Cameroun had taken such a step, the Southern Cameroons would have had to either unite with the Nigerian Federation or stay as a colony until the United Kingdom (the administrator of record) and the United Nations could determine an acceptable outcome.\(^{259}\) It was perfectly clear to the delegation from the Southern Cameroons and other observers that when the Southern Cameroons delegation arrived in Foumban, it would face a severely non-competitive negotiating environment, would not be able to negotiate from a point of strength, and hence, it would not be able to secure constitutional rules favorable to its peoples.

Sixth, bitter conflict between the main political parties in Southern Cameroons—the CPNC and the KNPD—made it extremely difficult for the territory to send a representative delegation to Foumban. The CPNC, which supported union with the Federation of Nigeria, had lost the February 1961 plebiscite to the KNPD and, as a consequence, the territory was now poised to unite with the République du Cameroun. The failure of the two parties to deal with their differences and present a unified political front in Foumban enhanced the ability of Ahidjo and his delegation to weaken both and force the territory to accept unification conditions that were to prove damaging to its citizens. Seventh, as mentioned earlier, officials of the now independent République du Cameroun had no desire to weaken their

\(^{254}\) Id.

\(^{255}\) Mbaku, supra note 248, at 132.

\(^{256}\) See generally N. F. Awosom, *The Reunification Question in Cameroon History: Was the Bride an Enthusiastic or a Reluctant One?*, 47 AFRICA TODAY 91 (2000).

\(^{257}\) Mbaku, supra note 248.

\(^{258}\) Id. at 132-133.

\(^{259}\) Id.
existing institutions and engage in the type of democratic constitution making that would have provided Southern Cameroonians with the opportunity to select rules necessary to set up the type of loose federation that they had hoped would form the nature of their association with the République du Cameroun.\textsuperscript{260}

Finally, it is difficult to imagine that the parties actually negotiated during the brief period they spent in Foumban in the summer of 1961. For example, the entire proceedings lasted only 90 minutes and the parties were not granted the opportunity to engage in the type of dialogue that would have effectively challenged each side’s ideas for federation.\textsuperscript{261} The Southern Cameroons delegation was totally intimidated by the other side and as a result, it failed to “protest, in the harshest terms, what was basically an effort to deprive the Southern Cameroonians of the opportunity to secure a union agreement that would guarantee their political and economic autonomy.”\textsuperscript{262}

Given the fact that the Southern Cameroons was totally committed to unification with the République du Cameroun, Ahidjo and his delegation were not under any pressure to negotiate in good faith and hence, they were not willing to subject their 1960 constitution to any rigorous examination. As a consequence, the only concessions that the République du Cameroun made in order to effect the union was an innocuous and little understood, especially to the Southern Cameroonians delegation, annex to the 1960 constitution called “transitional and special dispositions,”\textsuperscript{263} which were designed “supposedly to keep each state’s institutional arrangements in place until further negotiations could be undertaken to turn the union into a fully functioning federation.”\textsuperscript{264} Thus, the federation’s first constitution was not the product of any robust constitution making discourse in which all the relevant stakeholders of both territories were granted the facilities to participate fully and effectively in the rules selection process but nothing more than the “revised” constitution of the République du Cameroun of 1960. This constitution sought to unite two peoples who had, first, been colonized by the Germans, then separated by Europeans in 1916 and forced to undergo new and separate colonial experiences—“with marked contrasts not only in language, law, administration and education, but also in political culture and attitudes.”\textsuperscript{265}

The federal constitution or the Foumban Accords created a country consisting of two federated states—\textit{West Cameroon} (the former UN Trust Territory of Cameroons under British administration) and \textit{East Cameroon} (the former République du Cameroun).\textsuperscript{266} In the new union, West Cameroon politicians expected to retain a significant level of autonomy for their state. However, this approach to political economy conflicted significantly with Ahidjo’s proclivity for centralization and an imperial presidency.\textsuperscript{267} Ahidjo and his group, strengthened by their success during the constitutional “negotiations” in Foumban, were able to transfer the centralizing features of the 1960 constitution to the federation and hence,

\textsuperscript{260} \textit{Id.}
\textsuperscript{261} \textit{Id.}
\textsuperscript{262} \textit{Id.} at 134.
\textsuperscript{263} \textsc{John Mukum Mbaku, Institutions and Reform in Africa: The Public Choice Perspective} 86 (Praeger, 1997). \textit{See also Charles Manga Fombad, Constitutional Law in Cameroon} 28 (Wolters Kluwer, 2012).
\textsuperscript{264} Mbaku, \textit{supra} note 263, at 86.
\textsuperscript{265} Fombad, \textit{supra} note 263, at 28.
\textsuperscript{266} Mbaku, \textit{supra} note 248, at 134 & Fombad, \textit{supra} note 263, at 28.
\textsuperscript{267} Mbaku, \textit{supra} note 263, at 86 & Fombad, \textit{supra} note 263, at 28.
the institutions of the new federal republic were essentially those of the former République du Cameroun. As argued by Kofele-Kale, in the new federal republic, “it was often difficult to tell in many instances where the eastern state [that is, the former République du Cameroun, which took the name East Cameroon in the federation] jurisdiction left off and where that of the federal government began. The lines were blurred, and this only reinforced Anglophone perception of francophone domination.”

The fact that West Cameroon had failed to negotiate for the establishment of a true federal system of government, one that would have enhanced its ability to retain its institutions and be able to make decisions impacting the welfare of its citizens without interference from Yaoundé, became evident shortly after unification. For example, on December 20, 1961, not long after the October 1, 1961 unification, the new federal president, Ahmadou Ahidjo, issued a new decree—No. 61-DF-15—and divided the country into six regions and, by making the federated State of West Cameroon one of the six political divisions, the new decree effectively abrogated the autonomy granted the state by the 1961 federal constitution. Given the fact that government in each of the six regions was headed by a Federal Inspector, whose political authority superseded that of all regional administrators, West Cameroon authorities soon realized that the power to make a significant number of decisions regarding state issues granted by the 1961 constitution had effectively been abrogated by the federal president’s December 20, 1961 decree. Under the new political set-up, the Federal Inspector could, and in many cases did, overrule decisions made by West Cameroon’s prime minister, the constitutional head of the state. This was, indeed, a clear violation of the spirit of the federation that had been established through the Foumban Accords.


As argued by Fombad, “the federated states were only allowed to act in matters that the Federal government did not wish to act on. Although Article 4 of the Constitution defined the federal authority as inhering in the President and the Federal National Assembly, but since the President was given wide-ranging powers that enabled him to control and dominate all national institutions, this effectively made the federal structure a sham ab initio.” In 1972, with the help of law No. 72-DF-270, Ahidjo effectively put the nail to the coffin of what had been a “dead-on-arrival” federation and created a unitary system of government. The name of the country was changed from Federal Republic of Cameroon (République Fédérale du Cameroun) to United Republic of Cameroon (République Unie du Cameroun). These changes were effected despite the fact that Article 47 of the federal

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268 Fombad, supra note 263, at 28 & Mbaku, supra note 263, at 86.
270 Id. at 63.
271 Mbaku, supra note 248, at 135.
272 Id.
273 Id. See also Fombad, supra note 263 at 182.
274 Fombad, supra note 263, at 28.
275 Id.
constitution of 1961 expressly prohibited any changes to the constitution that would impair or constrain the “unity and integrity of the federation.”

That Ahidjo and his delegation to the Foumban constitutional negotiations never intended to establish an effective constitutional federal system of government in Cameroon is evidenced by the actions that he took in Foumban, as well as those that he engaged in following the formation of the federation on October 1, 1961. First, using presidential decrees, Ahidjo proceeded to eliminate any structures that enhanced a decentralized form of decision making within the government and created, usually by decree, a “highly centralized political system that was more powerful than that expected of the Gaullist model.” Ahidjo’s concentration of power in the presidency was so thorough that no member of his cabinet could even undertake public policy initiatives without approval from the chief executive.

Second, Ahidjo created a sophisticated patronage system that allowed him to rule the country through “a highly paid and privileged ethno-regional client network that enhanced [the President’s] ability to monopolize political power in the country.” At the top of this network was Ahidjo, the grand baron, who had access to and control of all the country’s resources. Below him were several ethno-regional barons who became national spokesmen for their ethnic groups and/or regions. For example, West Cameroon politicians such as Solomon Tandeng Muna, Nzo Ekah Nghaky, and Emmanuel Egbe Tabi became spokesmen for the country’s Aglophone minority. As long as each junior baron continued to deliver the loyalty and support of the constituency that he represented, he was guaranteed, by Ahidjo, to retain his position in the national governance system, as well as, receive a compensation package that included significant pecuniary and non-pecuniary rewards. Of course, the president made certain that the loyal junior baron was granted access to enough public money to fund projects in his constituency.

The composition of the ethno-regional network included people from virtually all the country’s major population groups. As argued by Kofele-Kale, Ahidjo availed himself of and ruled through “networks and coalitions that included, in varying combinations, leaders of critical southern and western ethnic groups, his own northern allies, businessmen, traditional chiefs and magnates, and members of the country’s intelligentsia.” The only condition for membership in this exclusive club was that the individual be a legitimate representative of a well-defined political constituency within the country (e.g., an ethnic group or collection of ethnic groups) and be able to deliver the loyalty and support of that constituency, particularly in the sham elections that characterized the Ahidjo era in government.

276 Mbaku, supra note 248, at 135.
277 Id. at 136.
279 Mbaku, supra note 248, at 136. See also LeVine, supra note 278, at 181.
280 Mbaku, supra note 248, at 136.
281 Id.
282 Kofele-Kale, supra note 269.
283 Id. at 23.
Third, using presidential decrees, Ahidjo was able to effectively “outmaneuver his political rivals by regularly appointing academics and civil servants to public positions, effectively blurring the divide between politics and administration.” Through presidential decrees, Ahidjo regularly shuffled or expanded his cabinet and brought into it, his major opponents, providing them with the opportunity to participate gainfully in the spoils system. Of course, the fear of losing the position granted an individual to join the government and “chop” prevented the individual from criticizing or opposing the government.

Fourth, Ahidjo’s “highly repressive and suffocating political machinery in Cameroon” destroyed all avenues for either criticizing the government or opposing it. While President of Cameroon, Ahidjo regularly argued that “multiparty political competition would plunge the country into ethnic-motivated civil war and that his rule was what prevented the country from degenerating into anarchy.” Ahidjo, however, was not a simpleton with power but a highly skilled political operator “who not only managed to keep Cameroon peaceful and engaged in productive pursuits from 1961 to 1982, but produced a polity that was the envy of many of its neighbors.”

According to LeVine, a scholar who has published extensively on Cameroon political economy,

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285 Mbaku, *supra* note 248, at 137. “Chop” literally means “to eat.” However, as used here, “chop” is closer to “plunder,” as to plunder someone else’s resources. Here, the resources being plundered for the benefit of the junior baron and his extended family (which may include not only the village the public official-cum-plunderer comes from, but also the entire ethnic group or region of which he or she is a member) are public resources. This process represents what French political scientist, Professor Jean-François Bayart, has described as the “politics of the belly.” Several eating metaphors have been used to describe Africa’s corrupt behaviors, as in “dividing the national cake” (Nigeria), securing a “meal ticket” (Cameroon), or “chomp dem money” (plunder someone else’s money) (Cameroon). See J.-F. Bayart, *The State in Africa: The Politics of the Belly* (1993) (describing the emergence in post-independence Africa of a new type of political economy characterized by opportunistic alliances between a few political and economic elites. The primary and in many cases, the only, objective of these alliances, is to enhance the ability of participating elites to monopolize political power so that they can use the apparatus of state to enrich themselves and the ethno-regional groups that form their bases of political support. Such alliances constitute an important foundation of the corruption that continues to pervade African States today. It was this process that allowed Nigeria’s former military dictator, Sani Abacha, to amass a fortune worth billions of U.S. dollars. While members of his coalition benefitted significantly from the corrupt enterprise led by the now deceased dictator and lived in wanton luxury, most of the country’s citizens were relegated to a life of intense misery, characterized by an extremely high level of material deprivation. See generally K. Maier, *This House Has Fallen: Nigeria in Crisis* (2000).
286 Mbaku, *supra* note 248, at 137.
288 Mbaku, *supra* note 248, at 137.
It was Ahidjo’s tactics that made the difference in the final analysis. He treated his opponents firmly, sometimes harshly, but made sure that even his bitterest enemies had both the chance of joining his side and of actively sharing in the perquisites of rule. That he was never vindictive is to his credit: Mbida was repeatedly offered various portfolios, Okala came out of prison to become an ambassador, and several former UPC leaders have taken high and well-paying jobs in the government. The style of the regime appears to have been actively reconciliationist, pragmatic and tactically consistent.

The highest law in Cameroon today is the amended Constitution of January 18, 1996. It is officially known as “Law No. 2008/001 of 14 April 2008 to amend and supplement some provisions of law No. 96/6 of 18 January 1996 to amend the Constitution of 2 June 1972.”

B. The Road Leading to the Amended Constitution of January 18, 1996

In 1991, Cameroon’s opposition political parties took advantage of the limited liberalization that had been made possible in the country by “changes in global politics, pressure from France and other benefactors, as well as that from several constituencies within the country, to push for a Sovereign National Conference.” Many Cameroonians, especially those in the opposition, believed and hoped that a Sovereign National Conference (SNC) would provide an enabling environment for Cameroonians to kick-start the type of constitution-making process that the country had never been able to engage in since the formation of the federation in 1961. The opposition hoped that through the SNC, all relevant stakeholders in the country would be able to participate fully and effectively in the production of constitutional rules that maximized their values and enhanced their ability to live together peacefully.

President Paul Biya rejected the opposition’s call for an SNC and proposed something called a Tripartite Conference (TC), which was to be controlled by the government. The opposition’s fears were that the government-controlled TC would simply push an amended version of the 1972 Constitution into the people and deprive the latter of the opportunity to engage in democratic constitution making to choose their own rules. The TC, like the opposition, was supposedly concerned about providing the country with a constitution that reflected the new multiparty political environment. The TC met during October-November 1991 and in its final declaration on November 17, 1991, the TC established a Technical Committee on Constitutional Matters (TCCM) and charged it with formulating “the outlines of a ‘new’ Constitution.” The TCCM was made up of 7 Francophones and 4 Anglophones and was expected to undertake a task that many in the opposition believed belonged to all

290 Unless it is specifically indicated otherwise, any references to the “Constitution” should be taken to refer to the 1972 Constitution as amended in 1996.
291 Mbaku, supra note 248, at 147.
292 The opposition’s call for a national conference was accompanied by nation-wide strikes and demonstrations. See, e.g., Fombad, supra note 263, at 29.
293 Mbaku, supra note 248, at 147.
294 Id.
295 Fombad, supra note 263, at 29.
Cameroonianians and should have been handled through a more representative and participatory forum such as an SNC.\textsuperscript{296} Constitutional scholars argue that the relevant stakeholder groups must be the ones to determine the political principles, which would form the foundation for the drafting of a constitution.\textsuperscript{297} Otherwise, the outcome would be rules that do not reflect the customs, traditions, cultures, and values of those to be governed by the new constitution.\textsuperscript{298} Given the fact that since independence of the former UN Trust Territory of Cameroons under French administration in 1960 and reunification with British Southern Cameroons in 1961, Cameroonians had never really engaged in democratic constitution making to choose rules that would maximize their values and enhance their ability to live together peacefully and create the wealth that they needed to deal with poverty and improve their living conditions,\textsuperscript{299} many Cameroonians believed that the SNC would finally provide the opportunity for the country to engage in the type of constitution making that had escaped the people in 1960 and 1961. Thus, relegating the job to a government appointed committee, as had been the case in 1959 in the former UN Trust Territory of Cameroons under French administration as the territory prepared for independence, was a terrible mistake.\textsuperscript{300}

A little background to the events leading to the struggle between the government and the opposition for the convening of an SNC is informative. In the mid-1980s, there were mass demonstrations throughout the continent in favor of transition to democratic governance.\textsuperscript{301} In Cameroon, many people, especially those who historically had been marginalized (e.g., the Anglophones) “began to agitate for what they believed were long-delayed institutional reforms to introduce multiparty politics in the country.”\textsuperscript{302} Of course, many of these groups that were agitating for change in the status quo did not see multiparty politics as an end in itself but believed that a competitive political system would provide the people with the enabling environment for the effective reconstruction and reconstitution of anachronistic and dysfunctional state systems inherited from the European colonialists. Such state reconstruction, they believed, would be undertaken through a bottom-up, participatory, and

\begin{itemize}
  \item Mbaku, \textit{supra} note 248, at 147.
  \item PATH TO PEOPLE’S CONSTITUTION: A CDHR PUBLICATION ON CONSTITUTIONALISM, DEMOCRACY & RULE OF LAW (‘Segun Jegede, Ayodele Ale & Eni Akinsola eds., Committee for the Defense of Human Rights, 2000).
  \item Id. and Mbaku, \textit{supra} note 248, at 148.
  \item See generally Mbaku, \textit{supra} note 248; Fombad, \textit{supra} note 263; LeVine, \textit{supra} note 13 & JOHN MUKUM MBAKU, INSTITUTIONS AND REFORM IN AFRICA: THE PUBLIC CHOICE PERSPECTIVE (Praeger, 1997).
  \item Mbaku, \textit{supra} note 248, at 148. During preparations for independence in the former UN Trust Territory of Cameroons under French administration, the job of drafting the new country’s constitution was relegated to the Consultative Committee, which was created by Law No. 59-56 of October 31, 1959.
  \item Mbaku, \textit{supra} note 248, at 141.
\end{itemize}
people-driven process, setting the stage for the effective deepening and institutionalization of democracy in the country.  

President Paul Biya, however, used force to prevent the formation of opposition political parties and any other organizations that could have enhanced popular participation in governance. Biya’s stubbornness and unwillingness to compromise was considered unsustainable, in view of developments around the world generally and in Africa in particular—the cruel and inhuman apartheid system in South Africa had finally collapsed, superpower rivalry had ceased following the disintegration of the Soviet Union and the demise of socialism in Eastern Europe, and several authoritarian regimes in the African continent had seized to exist. In fact, these developments in the global political economy only emboldened the opposition and enhanced their ability to continue to push for change. Eventually, the continued sustained protests by the country’s prodemocracy groups, a significant deterioration in national economic conditions, as well as pressure from the international community, especially from Cameroon’s traditional benefactors, France and the European Union, forced Biya to decree the legalization of competitive politics in the country. On December 19, 1990, President Biya officially legalized multiparty politics in Cameroon and shortly after that, many political parties became operational.  

Shortly after the so-called “Liberty Laws” were passed in December 1990 legalizing political competition, many of the registered opposition parties called upon the government to convene a Sovereign National Conference “along the lines of the 1789 Estates-General in France.” The opposition was convinced that an SNC would provide Cameroonians—representatives of all relevant stakeholder groups, including especially the Anglophones, who since reunification in 1961 had been systematically marginalized and pushed to the political and economic periphery—with the facilities to participate fully and effectively in the total and complete overhaul of the dysfunctional and anachronistic Gauallist system of government inherited from the French. Other African countries, such as Benin and Republic of Congo (Congo-Brazzaville), had successfully convened sovereign national conferences that had provided them with the opportunity to restructure and transform their governance systems and Cameroon opposition parties believed that they could do the same.

303 Id.
305 Mbaku, supra note 248, at 142.
306 This is the name given to the laws that were enacted by President Biya legalizing political competition in the country. See Fombad, supra note 263, at 29.
307 Fombad, supra note 263, at 29. The 1789 French “états-généraux” was a general assembly consisting of the clergy (first estate), the aristocracy (second estate), and the masses (third estate). The assembly met in 1789 for the first time since 1614 at the request of King Louis XVI to seek solutions to the country’s financial problems. See, e.g., STEWART ROSS, THE FRENCH REVOLUTION 15 (Evans Brothers Limited, 2002).
308 Fombad, supra note 263, at 29.
in their own country. To demonstrate to the government that they were serious about their demands, the opposition parties organized and carried out civil disobedience demonstrations that were referred to as “ghost town campaigns” (“opération villes mortes”). The campaigns also included a decision to withhold the payment of taxes until the government had complied with opposition demands.

On March 27, 1991, President Biya finally responded to the opposition. However, the response was not what the opposition had expected or anticipated. In a speech to the National Assembly, Biya essentially ridiculed and made fun of the opposition and its demands and declared as follows: “Je l’ai dit et je maintien, la conférence nationale est sans objet pour le Cameroun.” Shortly after the speech, riots broke out in major cities throughout the country, reinforcing the ghost town campaigns. Economic activities in many urban areas, including especially the country’s economic capital, Douala, were brought to a standstill. Unfortunately for the opposition, it had underestimated the extent to which the French government was willing to go to ensure Biya’s survival. At the same time that the economy was bleeding profusely because of the strikes, the French were busy providing the Biya government with significant infusions of money that could be used to augment losses from uncollected tax revenues and other leakages in public revenues. As a consequence, the government was able to survive the heavy financial losses imposed on it by the strike. While the political class appeared to be fairing well, the masses were totally devastated and crippled by the strikes and as a consequence, when the strikes ended, the opposition had lost a significant part of its support base. Hence, when, from October 30 to November 17, 1990, the opposition met with Biya, the latter was able to deal with the former on the latter’s terms. The failed strikes had weakened the opposition so much that it did not have the wherewithal to negotiate effectively with the government during the so-called Tripartite Conference—the latter consisted of the government, opposition parties, and well-known personalities.

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310 Fombad, supra note 263, at 29-30.

311 “I have said and I repeat, the national conference has no purpose for Cameroon.” Fombad, supra note 263, at 30.


313 Fombad, supra note 263, at 30. These personalities were chosen by the Biya government and included only individuals who were supporters of the ruling Cameroon People’s Democratic Movement (CPDM). The conference produced the Yaoundé Declaration, and among other things, charged the TCCM with the job of drafting the country’s multiparty era constitution.
was now clear that Biya was going to relegate the job of constitution making to the Technical Committee on Constitutional Matters (TCCM), a committee that was exclusively under the control of the government.314 The TCCM met irregularly between November 1991 and February 1992 and faced a lot of problems. While the committee was able to reach some consensus on a “broad range of issues including decentralization of political and administrative power and the entrenchment of fundamental rights as cardinal goals of the new constitutional dispensation,”315 there was no agreement on the details. While, for example, the Anglophone members of the TCCM argued that “meaningful decentralization and devolution of power could only be undertaken within a federal system, the Francophones argued in favor of devolution of power within a centralized, unitary governmental system.”316 Francophones essentially were in favor of maintaining the Gaullist system and simply creating municipal governmental jurisdictions to which certain powers could be devolved at the discretion of the president.317 The work of the TCCM was officially suspended in February 1992 in order to make allowance for parliamentary elections that were scheduled to take place on March 1, 1992. While controversy remained concerning when the committee was going to resume its deliberations, the government abruptly announced that a draft constitution had been completed and that the committee had unanimously agreed upon it. The government published the draft constitution, which had preserved the main structures of the Gaullist system. The new draft, like the constitution which it replaced, was characterized by significant levels of centralization of political power and an imperial presidency.318

While controversy over the release of what many in the opposition believed was a fraudulent draft constitution was brewing, President Biya issued a new decree and created another committee and charged it with drafting a new constitution. The decree was issued in 1993 and the committee was granted only two weeks to complete its work—to solicit input from the public, incorporate it into a draft constitution and present it to the president. The committee, however, worked exclusively on the draft left behind by the TCCM. In November 1994, more than eight months after the 1993 committee had been appointed and without any public pronouncement from it, the president announced the creation of yet another committee and charged it with reviewing a recently published document titled PROPOSALS OF THE PRESIDENT OF THE REPUBLIC FOR A REVISION OF THE CONSTITUTION.319 The opposition claimed that the process of compacting the country’s constitution had been effectively hijacked by the president and had been reduced essentially to tinkering with the Constitution of 1972. The opposition’s claim proved to be prophetic—this final committee presented a document to the president, which the latter subsequently submitted to parliament in November 1995. The president eventually signed this document on January 18, 1996. That document is the 1996 Constitution of Cameroon.320 There, thus, was not any genuine constitutional exercise in Cameroon during the period 1991-1996. The

314 Mbaku, supra note 248, at 147.
315 Fombad, supra note 263, at 30.
316 Mbaku, supra note 248, at 148.
317 Id.
318 Id.
319 Id.
320 Its official name is Law No. 06 of 18 January 1996 to Amend the Constitution of 2 June 1972.
government of Paul Biya and his CPDM party had effectively hijacked the process of state reconstruction and forced on the Cameroon people an amended version of the 1972 constitution. The “new” constitution retained the Gaullist system—the imperial presidency was retained.  

C. Some Thoughts About the 1996 Constitution

The 1972 Constitution contained only thirty-nine articles while the 1996 version had sixty-nine articles. The question that many Cameroonians, especially those who were either members of the opposition or supported what the opposition was trying to accomplish in the country, were asking was: Was the 1996 Constitution a “revised constitution” or a “new constitution?” A close look at the two constitutions reveals that despite the fact that one contains significantly more articles than the other, the “philosophical orientation of the two texts are very similar.” Paul Biya and his government effectively shifted the mandate from state reconstruction through participatory and inclusive constitution making to constitution revision designed to reinforce and maintain the status quo. Although the fundamental philosophy underlying the 1972 and 1996 constitutions was the same, the latter did make several very critical changes. First, the 1996 constitution significantly reinforced the Gaullist system with its imperial presidency—the President’s extensive powers, made possible by the 1972 constitution, were dramatically enhanced and at the same, the minimal powers that the legislature (i.e., the National Assembly or l’Assemblée Nationale) was granted by previous constitutions were curtailed significantly. Thanks to the 1996 Constitution, the president has the power to appoint virtually everyone who serves in the government—from heads of parastatals to the prime minister and cabinet ministers. In addition, the President can appoint and dismiss members of the judiciary, the military and other institutions within the country. Also, in addition to the fact that he can veto laws passed by the legislature, he has complete control over virtually all state institutions. The 1996 Constitution did make some innovations but they are essentially ineffective. For example, the “new” constitution introduced the Senate as a second chamber to the National Assembly. However, these institutions are seriously compromised by the fact that they have little or no power to initiate legislation and they are largely subservient to the executive.

Second, as has been stated by many scholars, “a Constitution is only as good as the mechanism provided for ensuring that it is respected by all citizens, and its violations are

321 Fombad, supra note 263, at 31. It was quite appropriate that the new constitution’s name was Law No. 06 of 18 January 1996 to Amend the Constitution of 2 June 1972 since there really was no constitutional writing exercise, nor was there any robust national debate on the constitutional principles that were expected to undergird the new constitution. The fact of the matter is that the President of the Republic simply tinkered with the 1972 Constitution and produced what came to be known as the Constitution of Cameroon 1996.

322 See, e.g., M. Kamto, Révision constitutionnelle ou écriture d’une nouvelle constitution, 23 LEX LATA 17 (1996).

323 Fombad, supra note 263, at 31. See also Kamto, supra note 320.

324 Fombad, supra note 263, at 31.

325 Id.

326 Id.
promptly sanctioned.”

The 1996 Constitution introduced the concept of an independent judiciary, however, the same constitution grants the President virtually unlimited power to appoint and dismiss judicial officers. The Constitutional Council (CC), provided for in the 1996 Constitution, was granted the power to determine the constitutionality of laws. Nevertheless, the CC cannot be expected to function independently and effectively since the same 1996 Constitution, at Article 51, grants the President of the Republic the power to appoint its members and, in addition, can only work on issues referred to it by the government.

Regarding decentralization, the 1996 Constitution made allowance for the creation of regional and local authorities (RLAs) but the provisions did not call for decentralization but for something called “deconcentration”—a process in which the President of the Republic was basically granted the power to determine how and when these RLAs would be created. Perhaps, more importantly is the fact that the President also has the power to “determine their [the RLAs’s] powers and can dissolve them and dismiss their officials when he/she deems it proper.”

Since its inception on January 18, 1996, the 1996 Constitution has generated a lot of controversy in Cameroon. In addition to the fact that it was brought into being through an elite-driven, top-down, and non-participatory process, it turned out to be inferior to the 1972 Constitution, itself an equally inferior set of rules. While Anglophones have criticized the 1996 Constitution for the fact that it further marginalized them and their region of the country, their most important “beef” with the constitution is that they were never consulted nor provided the opportunity to participate in its drafting. The 1996 Constitution, like earlier versions, was drafted without their input or participation. Additionally, most of the innovations made by the 1996 Constitution have remained essentially on paper only—a Senate and a Constitutional Council are yet to be established and made fully functional.

327 Id.
329 Article 46 of Law No. 96-6 of 18 January 1996 to amend the Constitution of 2 June 1972 states as follows: “The Constitutional Council shall have jurisdiction in matters pertaining to the Constitution. It shall rule on the constitutionality of laws. It shall be the organ regulating the functioning of the institutions.”
331 Fombad, supra note 263, at 32.
332 Id.
334 The government did enact Law No. 2004/004 of 21 April 2004, to provide for the organization and functioning of the Constitutional Council and Law No. 2004/005 of 21 April 2004 to provide the rules and regulations for determining membership in the Constitutional Council. On February 27, 2013, Paul Biya signed a decree setting the date (April 14, 2013) for elections to the Senate. The Senate is expected to have 100 members, of which 70 would be elected by voters and the other 30 would be appointed by the President. See, e.g., Cameroon’s Ageing Biya Gets Long Overdue Senate Vote, at

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In 2008, Cameroon’s constitution was amended again. The amendment was not motivated by any effort to improve governance but by the desire of incumbent president Paul Biya to extend his term as President of the Republic. The 1996 Constitution, which was approved by Paul Biya, limits the president to two terms of seven years in office. Paul Biya became President of Cameroon in 1982 following the resignation of the country’s then president, Ahmadou Ahidjo. Thus, when on January 18, 1996, Paul Biya signed Law 96-06 to produce the 1996 Constitution, he had been in power as President of the Republic for almost fourteen (14) years. In 2008, Biya knew that under the terms of the 1996 Constitution, he would have to leave the presidency in 2011 and thus, he and his political party, the CPDM, launched a campaign against Article 6 and sought to amend it so that the president could stand for another term in office. The National Assembly, dominated by the CPDM—the CPDM in 2008 held 153 seats in the 180-seat chamber—voted to amend the constitution and grant Biya the right to contest the presidential elections due to take place in October 2011.

In October 2011, Paul Biya contested the presidential elections and secured another term in office. By the time this present term of office ends in 2018, Biya would have been president of Cameroon continuously for almost forty (40) years.


A. Traces of the Separation of Powers in Cameroon’s Constitutional History

In the Cameroon Constitution of 1972, which is the foundation for the 2008 Constitution, Article 10 provided for a rudimentary form of the separation of powers—it provided for an executive (The President of the Republic), a legislative assembly (The National Assembly), and a judiciary. Article 10 of the Cameroon Constitution of 1972 states as follows: “The President of the Republic shall refer to the Supreme Court under the conditions prescribed by law provided for in Article 32 any law which he considers to be


335 The 1996 Constitution, know officially as LAW NO. 96-06 OF 18 JANUARY 1996 TO AMEND THE CONSTITUTION OF 2 JUNE 1972, states as follows in Article 6(2): “The President of the Republic shall be elected for a term of 7 (seven) years. He shall be eligible for re-election once.”

336 JOHN MUKUM MBAKU, CULTURE AND CUSTOMS OF CAMEROON 34 (Greenwood, 2005).

337 The amendment was effected by LAW NO. 2008/001 OF 14 APRIL 2008 TO AMEND AND SUPPLEMENT SOME PROVISIONS OF LAW NO. 96/6 OF 18 JANUARY 1996 TO AMEND THE CONSTITUTION OF 2 JUNE 1972. Article 6(2) of the Constitution of 1996 (see fn. 333) was replaced by the following: “Article 6(2) (new) The President of the Republic shall be elected for a term of office of 7 (seven) years. He shall be eligible for re-election.”


contrary to the Constitution.”\textsuperscript{342} The Supreme Court, whose duties are specified in Article 32, was, inter alia, to deal with issues assigned or referred to it by the President of the Republic.\textsuperscript{343} Such issues were limited to those related to the constitutionality of laws. This, incidentally, was the only provision in the 1972 Constitution that dealt with the constitutionality of laws.\textsuperscript{344}

In addition to the fact that the Supreme Court could only engage in the review of laws to determine their constitutionality if the President of the Republic referred such matters to the Court, the President of the Republic was also granted the power by the Constitution to “ensure the independence of the judiciary,” as well as, appoint members to the “Bench and to the legal service.”\textsuperscript{345} Granting the President such power to function as an overseer of the judiciary system effectively neutralized judicial independence and rendered ineffective the ability of the judiciary to function as a coequal branch of government.

On January 18, 1996, the President signed Law No. 96-6, effectively amending the Constitution of 2 June 1972 and producing a new constitution for the country.\textsuperscript{346} The 1996 Constitution created a Constitutional Council and transferred the duties prescribed for the Supreme Court in the Constitution of 1972, including the determination of the constitutionality of laws, to it.\textsuperscript{347} According to Article 46, \textsuperscript{348} “The Constitutional Council shall have jurisdiction in matters pertaining to the Constitution. It shall rule on the constitutionality of laws. It shall be the organ regulating the functioning of the institutions.”\textsuperscript{349}

The 1996 Constitution replaces the expression “Judiciary,”\textsuperscript{350} with “Judicial Power,”\textsuperscript{351} Article 37 of the Constitution of 1996 states that judicial power in Cameroon is to be exercised by the Supreme Court and other lesser courts “in the name of the people of Cameroon.”\textsuperscript{352} Students of Cameroon constitutional history have debated this change to determine if it had any material impact on the functioning of the country’s judiciary. The conclusion of many of these studies is that the “substitution of the expression ‘judiciary’ with ‘judicial power’” has added “little or nothing to the status quo ante.”\textsuperscript{353}

Unlike the 1972 Constitution, the 1996 Constitution expressly provides for judicial independence. Article 37(2) states as follows: “The Judicial Power shall be independent of the Executive and Legislative Powers.”\textsuperscript{354} In addition, Article 37(2) states further that

\textsuperscript{342} Article 10, Cameroon Constitution of 2 June 1972.
\textsuperscript{343} Article 32, Cameroon Constitution of 2 June 1972.
\textsuperscript{344} See generally Cameroon Constitution of 2 June 1972 & Fombad, \textit{supra} note 263, at 33.
\textsuperscript{345} Article 31, Cameroon Constitution of 2 June 1972.
\textsuperscript{346} Law No. 96-6 of 18 January 1996 to Amend the Constitution of 2 June 1972 or Constitution of the Republic of Cameroon 1996.
\textsuperscript{347} \textit{See} Articles 46-52, Law No. 96-6 of 18 January 1996 to Amend the Constitution of 2 June 1972, Articles 46-52 (“Cameroon Constitution of 1996”).
\textsuperscript{348} \textit{Id.} at Article 46.
\textsuperscript{349} \textit{Id.} \textit{See also} Article 47.
\textsuperscript{350} Part V, Constitution of 2 June 1972.
\textsuperscript{351} Part V, Constitution of 1996.
\textsuperscript{352} Cameroon Constitution of 1996, Article 37.
\textsuperscript{354} Article 37(2), Cameroon Constitution of 1996.
“[m]agistrates of the bench shall, in the discharge of their duties, be governed only by the law and their conscience.” Many scholars have questioned whether these provisions are enough to guarantee the independence of the judiciary in Cameroon.

Most of today’s modern legal systems recognize that judges cannot perform their jobs effectively unless they are guaranteed a certain level of independence. As argued by the Constitutional Court (CC) of South Africa, “judicial independence . . . is foundational to and indispensable for the discharge of the judicial function in a constitutional democracy based on the rule of law.” The CC, in its ruling, went on to endorse the view of the Supreme Court of Canada in its ruling in *R. v. Valente* regarding the minimum requirements for judicial independence: “security of tenure,” “financial security” free from “arbitrary interference by the Executive in a manner that could affect judicial independence,” and “institutional independence with respect to matters of administration bearing directly on the exercise of the judicial function . . . judicial control over the administrative decisions that bear directly and immediately on the exercise of the judicial function.” In the developed economies of the West, particularly in the United States, the UK, Canada, Australia and New Zealand, the independence of the judiciary is guaranteed not only by constitutional provisions and court decisions (i.e., case law) but also by a history and tradition of non-interference with the independence of the judiciary. Additionally, judicial officers in these much matured legal systems are provided enough resources to perform their constitutionally assigned functions—for example, according to Article III(1) of the Constitution of the United States, “The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.” Hence, the executive branch of government cannot use the threat of a diminution in salary to exercise extra-constitutional control over the judiciary.

What is the extent of judicial independence in Cameroon’s 1996 Constitution? According to Article 37(3),

The President of the Republic shall guarantee the independence of the Judicial Power. He shall appoint members of the bench and of the legal department.

He shall be assisted in this task by the Higher Judicial Council which shall give him its opinion on all nominations for the bench and on disciplinary action against judicial and legal officers. The organization and functioning of the Higher Judicial Council shall be defined by law.
The significant amount of powers granted the President of the Republic by Article 37(3) of the Constitution of 1996 do not augur well for either the maintenance of judicial independence or the operation of the separation of powers in Cameroon.\footnote{See generally Fombad, supra note 263, at 34.}

\section*{B. The Separation of Powers in Cameroon}

Many of today’s constitutional scholars argue that the strict separation of powers propounded by Baron de Montesquieu is not currently being practiced in any legal system.\footnote{See generally A. W. BRADLEY & K. D. EWING, CONSTITUTIONAL AND ADMINISTRATIVE LAW 89-98 (Longman, 1997); S. DE SMITH & R. BRAZIER, CONSTITUTIONAL AND ADMINISTRATIVE LAW 17-22 (Penguin Books, 1994). \textit{See also} BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS, TRANSLATED BY THOMAS NUGENT, WITH AN INTRODUCTION BY FRANZ NEUMANN (Hafner Press, 1949).} Whether a country adopts the U.S. system, where there is, for example, constitutional separation of the judiciary from the other branches of the government, or the French system, where there is partial fusion, the most important and desirable goal, especially in countries that want to assure themselves of a fully functioning democratic system, is that “the three organs of State, namely, the legislature, the executive and the judiciary, should be so structured that none should dominate the other and they should be able to operate in such close cooperation that each should act as a check on the other.”\footnote{Fombad, \textit{supra} note 263, at 36.}

\subsection*{1. The Judiciary}

The system of government established by the 1996 Constitution\footnote{Law No. 96-6 of 18 January 1996 to Amend the Constitution of 2 June 1972.} in Cameroon is a hybrid between France’s limited separation of powers\footnote{French Constitution of October 4, 1958.} and that in the United States,\footnote{The Constitution of the United States of America of March 4, 1789.} which is characterized by a semi-rigid separation of powers. Law No. 96-6 of 18 January 1996 to Amend the Constitution of 2 June 1972, which created the 1996 Constitution of Cameroon, recognized the principle of the separation of powers. Accordingly, each of the three branches of government is given separate treatment in the Constitution. First, the 1996 Constitution recognizes “executive power” in Part II; “legislative power” in Part III; and “judicial power” in Part V. But, does this treatment of the various branches of government in the Cameroon Constitution of 1996 imply that the principle of the separation of powers exists in Cameroon’s political system? First, although the constitution does assign the judiciary duties separate from those assigned the executive, it nevertheless expressly excludes the doctrine of \textit{judicial review}, a critical and important feature of modern separation of powers practice. In Part VII, the Constitution creates a Constitutional Council (CC) and grants it the job of determining the “constitutionality of laws, treaties and international agreements.”\footnote{Article 47(1), Law No. 96-6 of 18 January 1996 to Amend the Constitution of 2 June 1972.} The CC, thus, is assigned duties that traditionally are within the purview of the judiciary in
most democracies where the doctrine of the separation of powers is practiced. 373 Second, the 1996 Constitution’s primary mechanism for assuring judicial independence in Cameroon is to state in Article 37(2) that “[t]he judicial power shall be independent of the Executive and Legislative Powers.” 374 However, the same constitution then proceeds to assign the President of the Republic, a member of the executive, the power to guarantee the independence of the judiciary. In Article 37(3), the Constitution states as follows: “The President of the Republic shall guarantee the independence of the Judicial Power.” 375 The President of the Republic is supposed to perform this function of guaranteeing the independence of the judicial power by appointing “members of the bench and of the legal department” 376 and by taking “disciplinary action against judicial and legal officers.” 377 In performing these duties, the President of the Republic will be assisted by the Higher Judicial Council. 378

The Constitution does attempt to enhance judicial independence when it declares that “Magistrates of the bench shall, in the discharge of their duties, be governed only by the law and their conscience.” 379 However, it is doubtful that this section of the Constitution has any positive impact on judicial independence especially considering the enormous powers vested in the executive in Article 37(3) and in other parts of the Constitution. Those powers effectively render the concept of judicial independence unworkable.

Like judicial officers in other countries, those in Cameroon have to take an oath before they can commence service. Presidential Decree No. 75/596 of 25 August 1975 sets out the oath that Cameroon magistrates have to take:

I . . . swear before God and all men honestly to serve the people of the Republic of Cameroon in any capacity as a member of the judicial and legal service, to render justice impartially to all in accordance with the laws, regulations and customs of the Cameroonian people, without fear, favor or malice and in all ways, in all places and at all times to bear myself as a worthy and faithful member of the service. 380

This oath requires judicial officers to be impartial when they render justice—they are to perform their jobs “without fear, favor or malice.” 381 Charles Manga Fombad, an expert on Cameroon constitutional law, argues that “[b]esides this oath which requires justice to be rendered impartially, section 126(a) of the Cameroonian Penal Code sanctions in rather vague terms, ‘the representative of the executive authority’ who ‘issues any order or prohibition to any court.’” 382

374 Law No. 96-6 of 18 January 1996 to Amend the Constitution of 2 June 1972, Article 37(2).
375 Id. at Article 37(2).
376 Id. at Article 37(3).
377 Id.
378 Id.
379 Id. at Article 37(2).
381 Id.
382 Id. at 9.
In Cameroon today, despite the provisions of the Constitution of 1996, the President of the Republic continues to “appoint, transfer, dismiss, suspend and can interfere with the so-called judicial power with no constitutional provisions to control and ensure that this is done in a fair, rational, objective and predictable manner.” In addition, the Supreme Court, the country’s highest court, is actually under the Ministry of Justice, a cabinet department within the Presidency of the Republic, and thus, under the control of the executive. As argued by Fombad, “[a] careful analysis of the constitutional provisions,” show[s] that the 1996 amendment did not add anything substantive to the pre-existing practice which would lend any credence to the existence of a separate and independent judiciary in Cameroon.” Fombad argues further that all of Cameroon’s executives—the country has had only two of them since reunification in 1961: Ahmadou Ahidjo and Paul Biya—have had absolute control over the judiciary branch of government through the control of (i) appointments and dismissal of judiciary officers; and (ii) control of the budgets of the judiciary department. As an example of how the executive manipulates the judiciary in Cameroon, Fombad recalls that before the elections of 1996 and 1997, the President of the Republic, Paul Biya, decreed the doubling of the salaries of judicial officers and increased the salaries of justices of the Supreme Court by almost 200 percent. The Supreme Court retains the power to certify the results of each election, including the presidential election. As ruled by the Supreme Court of Canada and the Constitutional Court of South Africa, “financial security” free from “arbitrary interference by the Executive in a manner that could affect judicial independence” is one of the three minimum requirements for judicial independence.

In its annual assessment of human rights in Cameroon for the year 2011, the U.S. State Department had this to say about the Cameroon judiciary:

The constitution and law provide for an independent judiciary, but the judiciary remained corrupt, inefficient, and subject to political influence. The court system

383 Id.
387 Id.
388 Id. at 247-248.
389 Id.
393 The others are “security of tenure” and “institutional independence with respect to matters of administration bearing directly on the exercise of the judicial function . . . judicial control over the administrative decisions that bear directly and immediately on the exercise of the judicial function.” Id. at paras. 47 & 52.
is subordinate to the Ministry of Justice. The constitution names the president as “first magistrate,” thus “chief” of the judiciary and theoretical arbiter of any sanctions against the judiciary, although the president has not played this role publicly. The report goes on to state further that “[j]udges were susceptible to executive influence and often stopped or delayed judicial proceedings in response to government pressure.” Also, according to the report, “[m]any powerful political or business interests had virtual immunity from prosecution, and politically sensitive cases sometimes were settled through bribes.” The truth of the matter is that Cameroon’s judiciary is subservient to the executive and only in rare cases does it exercise any independent judgment.

2. The Legislature

Essentially, Cameroon’s president has the power to control legislation, as well as rule by decree. The Constitution grants the President of the Republic power to legislate in two ways: the president may legislate through issuance of “rules and regulations” if empowered to do so by Parliament. The president, once empowered by Parliament, is free to legislate by way of ordinances on matters, which have been specifically reserved under the Constitution’s Article 26 to Parliament. Nevertheless, Article 14 of the Constitution states that “Legislative power shall be exercised by the Parliament which shall comprise 2 (two) Houses: (a) The National Assembly, and (b) The Senate.” Prior to 1996, Cameroon had a unicameral system. The amended constitution introduced the concept of bicameralism into the country through Article 14.

Article 14(2) assigns the job of enacting laws (i.e., “legislating”) and overseeing the function of government (“controlling government action”) to Parliament—the National Assembly and the Senate. Although it appears from the above that both chambers have equal powers to legislate and control the government, the National Assembly has significantly more powers and in practice, is more influential. Of course, one can attribute the National Assembly’s greater influence to the fact that members of this chamber are

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395 Id. at 9-10.
396 Id. at 24.
397 Id.
398 In September 2011, the Supreme Court confirmed its judgment that the culture ministry had erred when it dissolved the Cameroon Music Corporation. The Court then ordered the culture ministry to reinstate the CMC to its previous status. See id. at 10.
399 1996 Constitution of Cameroon, Article 27. These rules and regulations usually appear in the form of presidential decrees.
400 Id. at Article 28.
401 Article 14, 1996 Constitution of Cameroon.
402 Note, however, that the Southern Cameroons, which became the Federated State of West Cameroon, had a legislature that consisted of two chambers—a House of Assembly and a House of Chiefs. See, e.g., CHARLES MANGA FOMBAD, CONSTITUTIONAL LAW IN CAMEROON 86 (Wolters Kluwer, 2012).
404 Fombad, supra note 400, at 86.
“elected by direct and secret universal suffrage and represent the entire nation.”

Senators, however, represent the regional and local authorities (RLAs). In addition, senators are not elected by direct and secret universal suffrage, as is the case with members of the National Assembly. Instead, senators are elected by “indirect universal suffrage” and by appointment by the President of the Republic. According to Article 20(2), “Each region shall be represented in the Senate by 10 (ten) Senators of whom 7 (seven) shall be elected by indirect suffrage on a regional basis and 3 (three) appointed by the President of the Republic.”

Although each bill must pass through the National Assembly and the Senate before it is placed before the President of the Republic for subsequent enactment, “the Senate can amend a Bill submitted to it by the National Assembly, but the National Assembly is not bound to accept or adopt any amendments proposed by the Senate.” While both Houses can control government action through “oral or written questions and by setting committees of inquiry with specific terms of reference,” only the National Assembly can employ a “vote of confidence” or a “motion of censure” to question the responsibility of government.

The National Assembly was established during the years in which Cameroon was officially governed only by a single political party, first, the Cameroon National Union (CNU) and then, the Cameroon People’s Democratic Movement (CPDM). Ahidjo, the country’s first president, and his successor, Paul Biya, have had complete control over the National Assembly, with the latter serving as an institution that merely “rubber-stamps what the Government presents to it and therefore of little relevance to the problems that the ordinary citizen faces daily.” When competitive politics were introduced into the country in 1990, most of the rules governing the National Assembly and its relations with the executive that were established during the one-party era were not changed. In addition, since the advent of multiparty politics, the party of the President of the Republic (i.e., the ruling CPDM) has enjoyed a substantial majority in the National Assembly, resulting in the inability of the opposition to force any changes in parliamentary procedure. Hence, the President of the Republic has retained his ability to dominate the National Assembly.

405 Id.
406 Id. Article 20(1) of 1996 Constitution of Cameroon states as follows: “The Senate shall represent the regional and local authorities.”
407 Id. at Article 20(2) & 20(3).
408 Id. at Article 20(2).
409 Id. at Article 30(3)(b): “The amendment proposed by the Senate shall be passed or rejected by a simple majority of the members of the National Assembly.”
410 Id. at Article 35(1).
411 Id. at Article 34(2-6).
412 Fombad, supra note 400, at 87.
413 Id.
414 Id.
415 Since multiparty elections began in 1992, the CPDM has consistently won the majority of seats in the National Assembly. During the legislative elections of 2007, the CPDM captured 153 seats out of 180 to grant it an absolute majority. Since the CPDM exists exclusively to serve and support Biya and his policies, legislative independence in Cameroon has become nothing but a joke. In the early years of multiparty politics, the CPDM relied on smaller parties to grant it the majority that it needed. During those periods, the opposition was
The 1996 Constitution authorized the establishment of a second chamber in the legislature called the “Senate.” However, it was not until 2013 that the President of the Republic signed a decree authorizing its establishment. On February 27, 2013, Paul Biya signed a decree setting April 14, 2013 as the date for selecting members of the Senate. The latter will consist of 100 members, 70 of whom would be elected by the people through indirect suffrage and the other 30 would be appointed by the President of the Republic. Most Cameroonian citizens believe that these elections would not change the power dynamics in the country—Paul Biya would continue to dominate both the economic and political systems in the country, even after a second chamber is established in Parliament and made functional.

3. The Executive

A lot has already been said about the President of the Republic and the extraordinary powers granted him by the amended Constitution of 1996. The 1996 Constitution extended the presidential term from 5 (five) years to 7 (seven) years. However, the President was limited to only two terms of service. But, on April 10, 2008 and at the request of President Biya, the National Assembly approved amendments that radically changed Article 6. During the deliberations, the opposition walked out but the amendments were still approved given the fact that the ruling CPDM party has an overwhelming majority in the National Assembly. On April 14, 2008, President Paul Biya signed Law No. 2008/001 of 14 April 2008 to Amend and Supplement Some Provisions of Law No. 96/6 of 18 January 1996 to Amend the Constitution of 2 June 1972 and effectively created a new Article 6(2): “The President of the Republic shall be elected for a term of office of 7 (seven) years. He shall be eligible for re-election.” Thus, the amendment effectively abolished the two-term limit and set the stage for Biya to remain President for life. As the legislators deliberated the constitutional changes, Cameroonian demonstrated against them. However, the protesters were brutally repressed by the government and with heavy losses of life and property.

As if imposing a President-for-Life on Cameroonian was not bad enough, the 2008 amendments also granted Biya immunity from criminal prosecution. According to Article relatively strong and performed quite well in elections. However, since 1997, as the opposition has weakened, the CPDM has gradually increased its poll successes, winning outright majorities and not needing to seek support from minority parties.

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417 Id.
418 See, e.g., Law No. 96-6 of 18 January 1996 to Amend the Constitution of 2 June 1972, Part II.
419 Id. at Article 6(2).
420 According to Article 6(3), “The President of the Republic shall be elected for a term of office of 7 (seven) years. He shall be eligible for re-election once.”
421 Fombad, supra note 400, at 111.
53(1) of the Constitution of 1996, the only “ground on which the President of the Republic may be held accountable for acts committed in the exercise of his/her function is high treason.” A further reading of Article 53(1) of the Constitution of 1996 appears to reveal that the President was not liable for offenses other than treason committed while in office. What the 2008 amendment did was effectively remove all doubts about the President’s liability for criminal offenses. Thus, while the new Article 53(1) still holds the President liable for treasonable offenses, Article 53(3) states that any 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.” In 2008, then, Cameroon’s National Assembly amended the country’s constitution to effectively grant the President immunity from prosecution for any and all criminal acts committed while in office.

VI. Conclusion

At the beginning of this paper, the following question was posed: “Why government?” A plausible answer is that individuals living within a society form a government to protect their rights, which have been defined by them and elaborated in a constitution. Nevertheless, limits must be placed on those who serve in government—that is, civil servants and political elites (or state custodians)—to prevent them from abusing their public positions and acting with impunity. The principle of the separation of powers is supposed to serve as one of several constraints placed on the state so that its custodians do not become the source of violence and tyranny directed at citizens. As was argued by the early proponents of the doctrine of the separation of powers, in order to prevent government tyranny, individuals who make laws should not also be the same ones who execute those laws.

At the independence of the UN Trust Territory of Cameroons under French administration in 1960 and during the 1961 preparations for reunification between the UN Trust Territory of Southern Cameroons under British administration and the République du Cameroun, Cameroonians had the opportunity to set up a constitutionally well-constrained government. The latter would be granted enough power to perform its constitutionally assigned functions but would be constrained enough to minimize the chances that its custodians would become an important source of violence directed at citizens. Introducing the principle of the separation of powers into the country’s constitutional system would then enhance the ability of citizens to constrain the government and minimize state-induced tyranny. Specifically, the principle of the separation of powers would guarantee the rule of

423 Fombad, *supra* note 400, at 117.
424 *Id.*
426 Some scholars have argued that the grant of immunity to the president for all crimes committed while in office is in line with the reasons why Cameroon has refused to ratify the Rome Statute of the International Criminal Court. According to Article 27 of the Rome Statute, no constitutional immunity can protect any President against the competence of the Court. Cameroon signed the Treaty of Rome on July 17, 1998 but has not ratified it. See, e.g., Fombad, *supra* note 263, at 117.
427 *See, e.g.*, JOHN LOCKE, TWO TREATIES OF GOVERNMENT: A CRITICAL EDITION WITH AN INTRODUCTION AND APPARATUS CRITICUS BY PETER LASLETT (Cambridge, 1970).
law and hence, force government officials to be accountable to the constitution and by implication, to the people; it would allow for checks and balances; and provide for an efficiently functioning government. Unfortunately for Cameroonian, due to their failure to insist on drafting their constitution through a democratic process, they failed to provide themselves with a constitution capable of effectively promoting the principle of the separation of powers. Hence, existing laws and institutions in Cameroon do not sufficiently constrain government officials, and as a consequence, the latter continue to act with impunity and there is little accountability in government, and the public sector remains extremely inefficient and is pervaded by venality.

As is evident from the preceding analysis, the doctrine of the separation of powers is not really a prominent feature of the constitutional system in Cameroon today. It is, on the other hand, an abstract constitutional construct, which has virtually no practical application in the country. While the separation of powers does not have to follow the rigid construct suggested by Montesquieu and other scholars and thinkers, it must be one that minimizes the type of concentration of power that enhances corruption and other forms of opportunism. There are a lot of dangers inherent in the concentration of power in the center, as evidenced by the extraordinary levels of venality found in Cameroon’s present public sectors, as well as the amount of state-sanctioned violence directed at various groups within the country. While there are many variables that explain corruption and impunity in Cameroon, one of the most important determinants of venality in the country is the concentration of power in a few hands and institutions.

Cameroon’s executive is extremely powerful—the 1960 Constitution created an imperial presidency in the country. Subsequent amendments to the constitution (1961, 1972, 1996, and 2008) only reinforced the power of that presidency, granting it the wherewithal to

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428 As has been made clear in this paper, Cameroon’s present constitution traces its origins to the 1960 Constitution of the République du Cameroun, which was a copy of the French Constitution of 1958 and not a document procured through a democratic process.

429 Montesquieu, supra note 365.


431 Since the time of Ahmadou Ahidjo, the Cameroon state has always treated its critics brutally. That approach to dealing with those who do not agree with government policies did not change under Paul Biya. In fact, Biya’s regime has been just as brutal or even more so as Biya fights to prolong his stay in power. Consider, for example, the brutal treatment of Anglophones in the Northwest city of Bamenda during the early years of the struggle for competitive politics in the country. See, e.g., Charles Manga Fombad & Jonie Banyong Fonyam, The Social Democratic Front, the Opposition, and Political Transition in Cameroon, in The Leadership Challenge in Africa: Cameroon Under Paul Biya 453, 462 (John Mukum Mbaku & Joseph Takougang eds., Africa World Press, 2004).


dominate and control other branches of government. The République du Cameroun, which became East Cameroon in the Federal Republic of Cameroon, like other francophone countries in sub-Saharan Africa, adopted the French model of the separation of powers, which is characterized by a very limited version of judicial independence. Due to the fact that Southern Cameroons political elites did not insist on democratic constitution making at reunification in 1961, that French model was transferred to the federation and today, remains essentially, the country’s constitutional model. Of course, the ability of this French model to promote government tyranny in Cameroon is further enhanced by the brutality of colonialism, which destroyed Cameroon’s traditional forms of governance and conflict resolution, many of which were quite democratic in nature.434

Obviously, Cameroon’s version of the separation of powers has failed to achieve the goal of safeguarding liberty, the most important reason why countries adopt this approach to constitutional practice. Although Cameroon’s present constitution does provide for a separation of powers, it nevertheless, fails to provide mechanisms for making certain that one branch of government does not usurp the powers of another or dominate another. Under the present constitutional arrangement in Cameroon, the President of the Republic totally dominates both the judiciary and the legislature and hence, is able to behave with impunity. In order to establish laws and institutions in Cameroon that guarantee the rule of law and minimize tyranny, Cameroonians must insist on democratic (i.e., bottom-up, people-driven, inclusive and participatory) constitution making to replace their present dysfunctional and anachronistic constitution with one that actually reflects the true principle of the separation of powers.

434 Many of Cameroon’s grasslands kingdoms, for example, maintained relatively democratic systems of government—the kings derived their powers to govern from the people; the kings were fully accountable to the people and maintained relatively open and transparent systems of governance; and the kings could lose the right to govern if they engaged in opportunistic behaviors or failed to promote the kingdom’s interests. See JOHN MUKUM MBAKU, CULTURE AND CUSTOMS OF CAMEROON (Greenwood, 2005) (examining, inter alia, the destruction of Bamoun traditions and customs by the French colonial government).