

## THE JUDICIARY AS THE LAST HOPE FOR THE PROTECTION OF DEMOCRACY AND HUMAN RIGHTS IN CAMEROON

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### Abstract

The failure of the controlling forces, administrative and parliamentary to effectively protect human rights in Cameroon is evident. Under such circumstances, the judiciary seems to be the last resort for millions of Cameroonians whose human rights and freedoms are violated on a regular basis. As a neutral arbiter, the judiciary stands the best position to protect human rights and check power abuses. Firstly, judges are presumed to be learned, impartial and apolitical, as such they are free to judge without fear or favour. Secondly, the judicial organ is often regarded as the least dangerous branch of government as it neither controls the purse nor the sword. Consequently, it can ensure the delicate power balance. But unfortunately, the effectiveness of this judiciary is limited. Externally, it is a dependent partner surrounded by a docile public. Internally, it is reactive than active, incompetent, corrupt, and succumbs to pressure. So, for the judiciary to play the role incumbent upon it, the environment has to be favourable and judges have to strive to be competent, neutral, impartial, and independent.

**Keywords:** democracy, human rights, judicial power, checks and balances, public participation, judicial independence, executive control, separation of powers.

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## 1. Introduction

The judiciary is that indispensable arm of government which intervenes when all else has failed. It is supposed to be the ultimate protector of democracy, human rights, and the check of power abuse. It is only in a situation of separation of powers that the 'state of law' can be guaranteed. With the separation of powers constitutionally endowed and practised, there is guarantee that law and liberty will be respected. According to MacIver, "none should be entrusted with power without some guarantee against its abuse"<sup>1</sup> for the "temptations of power are too great for it to be left in the discretion of any men".<sup>3</sup>

## 2. The Concept of Separation of Power

By being limited to specialised functions, the different branches of government develop both expertise and a sense of pride in their role. This would not be the case if they were joined together or overlapped to a considerable degree.<sup>4</sup> Moreover, qualities that might be crucial to one function could be ill-suited for another – "energy in the executive", not energy but "deliberation and wisdom" are best qualities for a legislator. Legislators need to conciliate divergent views and interests, and instil confidence in the people. As for the judiciary the qualities wanted are special as well, not the executive's energy and dispatch, not the legislator's responsiveness to popular sentiment or his ability to compromise, but his "integrity and moderation."<sup>5</sup> Separation of powers is therefore a system that harnesses the self-interest of different institutions to check each other that the people so governed are better served than one where there is concentration of powers and responsibility.<sup>6</sup>

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<sup>1</sup> Robert M MacIver, *The Modern State* (1962), p. 373. Oxford University Press.

<sup>3</sup> Ibid. p. 202.

<sup>4</sup> United States Information Agency, *An outline of American Government* (1990) p. 373. Official Document.

<sup>5</sup> Ibid.

<sup>6</sup> E. S Griffiths, *The American System of Government*, 4th ed (1965), p. 113. New York: Frederick A. Praeger Publishers.

In Cameroon, one witness the concentration of powers in the hands of the executive,<sup>7</sup> corruption is endemic,<sup>8</sup> power abuse and the violation of human rights and democratic norms are common currency. Due to parliamentary and extra-parliamentary reasons, the legislative arm of government is weak and has proven incapable to effectively balance executive power.<sup>9</sup> It has bowed down above all to the weight and manipulations of the executive. With psychological and physical violence, the public has been rendered powerless<sup>11</sup>. Also, the masses are disorganised and the majority of them do not know their rights.

The creation of the National Commission of Human Rights and Freedoms in 1990<sup>12</sup> has not saved the situation. This is so because this organ is an administrative body, members are appointed by presidential decree and it depends on the administration for survival. With the failure of preventive measures, it is the place of judges to apply responsive measures in collaboration with the forces of law and order to rescue the situation. The fundamental question therefore is whether the Cameroonian judiciary is the last hope for the country? Given the privileged position it is supposed to have, it is unfortunate that it is subjected to many limitations.

### **3. The Special Status of the Judiciary Branch of Government**

Most democratic governments try to maintain their judicial system's objectivity by deliberately insulating courts from external influence. No doubt, in our country, the judiciary is awarded a special status<sup>13</sup> which makes it the most apt body to

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<sup>7</sup> Thierry Michalon, *Quel Etat pour l'Afrique?* (1984), p. 58. Paris: l'Harmattan, The negro-african presidentialism is a deformation of the parliamentary and presidential systems, in a dictatorial sense.

<sup>8</sup> Godwin B Moye, "An Explanatory Essay on the Continuation of Corruption in Cameroon", unpublished.

<sup>9</sup> Constantin L. Georgopoulos, *La Démocratie en Danger* (1977), Paris: L.G.D.J. The parliament has been variously described as a yessy institution, a house of registration, rubber stamp, hand clappers. One begins to doubt the raison d'être of this institution.

<sup>11</sup> Nfor N Susungi, *Crisis of Unity and Democracy: Can a Country which has Pronounced Itself Dead be Saved by Democracy?* (1991), p. 204. Abidjan: Open University

<sup>12</sup> Decree No. 90/1459 of 8 November 1990.

<sup>13</sup> Decree No. 95/048 of 8 March 1995 on the status of the Magistracy (Magistrates are therefore not governed by the General Rules and Regulations of the Public Service).

apply the “rule of law”. The judiciary is not opened to anybody, and members are given special treatment. Unlike the political branches of government, the members of the judiciary are not elected.

### **3.1. Judges as Well-Educated, Honest, and Even-Headed Individuals**

Judges are respected for their learning, experience, and impartiality. In addition to the general rules of the public service,<sup>14</sup> to be a magistrate the candidate has to be a holder of a “Maîtrise” in law from a Cameroonian University and a diploma of the National School of Administration and Magistracy (Judicial Division). The latter condition may be replaced by adequate professional experience acquired in Cameroon, subsequent to the “Maîtrise” in Law or equivalent qualification or five years as advocate, “Professeur agrégé” in a Law Faculty or holder of Doctorate degree in Laws, Lecturer in the Faculty of Law, Court Registrar, Court Registry Administrator or Notary where the competence and professional activities of the candidate in legal matters qualify him for the exercise of judicial duties<sup>15</sup>. It is therefore not surprising that the judge is seen as a Technician in Law who interprets the law and at times creates it.<sup>16</sup> The fact that justice is rendered publicly and free of charge, reasons given for decisions, and rulings rendered enforceable gives more credence to the judiciary.

Like in any jurisdiction or legal system, judges in Cameroon must take an oath of office. The Cameroonian judicial oath reads thus:

“I, XYZ, swear before God and all men honestly to serve the people of the Republic of Cameroon in my capacity as a magistrate, to render justice impartially to all in accordance with laws, regulations and customs of the Cameroonian people, without fear, favour or malice”.

<sup>14</sup> Décret No 94/1994 du 07 Octobre 1994 portant Statut Général de la Fonction Publique de l'Etat.

<sup>15</sup> Decree No 95/048 (note 13 above), article 11.

<sup>16</sup> Article 5 of Decree n° 95/048 of March 8, 1995. This is also an innovation of the 1996 constitution, article 37(2).

This oath obliges judges to decide cases fearlessly. The judge must ignore any personal consequences, adverse or otherwise that may affect his decision. That is, in his judicial function, the judge must be subject only to the law and his conscience.<sup>17</sup> Any violation of the Oath of office constitutes a disciplinary offence. Djuidje notes that the Cameroonian judge engages to be an “extra-ordinary” being, to resemble God.<sup>18</sup>

To ensure their impartiality, judges are well remunerated as their salaries are in the top echelon of the public service structure. They also have enormous fringe benefits, and those at the top have official cars, twenty-four hour security at residence, free electricity and telephone, free fully-furnished accommodation in the prestigious parts of cities, etc, and their status are subject to review and upgrade.<sup>19</sup> All these are to ensure that they are not subjected to various pressures, and should not fall prey to bribery and corruption. These are to enable them to effectively play their role in the administration of justice. Public confidence in their impartiality in the discharge of their judicial duties is perhaps the greatest bulwark to the resilience of the institution.

Also, judges are expected to be sober, orderly, and discreet in their private lives. Lives that reflect competence, independence, integrity, dignity, and moderation, in fact, exemplary and irreproachable lives. This is emphasised by the statutory provision that “any impropriety, breach of honour and dignity constitutes a disciplinary offence”.<sup>20</sup> Also, duty unconsciousness and professional incompetence are sanctioned. Judges are irremovable, and may not receive another posting, even as a promotion without their consent. To ensure judicial immunity, section 306(3) of the Cameroon Penal Code states that proceedings in court and speeches made and documents produced are absolutely privileged

<sup>17</sup> Brigitte Djuidje. “Le Statut du Juge Judiciaire Camerounais: Un Tableau Contraste”, *Annales de la Faculté des Sciences Juridiques et Politiques*. Université de Dschang: Presses Universitaires d’Afrique, Tome 3 (1999) pp. 54-66.

<sup>18</sup> Ibid, p. 48.

<sup>19</sup> See decree No 97/016 of 22 January 1997, awarding advantages to certain Magistrates (duty allowance, lodging, housing, water, electricity, telephone).

<sup>20</sup> Decree No 95/048 (note 13 above), article 46.

and cannot ground an action for defamation.<sup>21</sup> The procedure of taking judges to court is very complicated.

It is because of the reputed position of judges that they are often asked to serve in a variety of public capacities. They have been appointed to head various commissions and institutions where they have played very significant roles.<sup>22</sup> They therefore have a multiplicity of ways to mobilise public opinion. In this regard, they have to remember the immortal words of Louis Jaffe that:

“... the power of the parliament and of its executive in theory unqualified, will in practice be limited by the constitution as currently expounded and by the public opinion which can be mobilised to reinforce it. In this area there is no organ so competent to expound and so potent to mobilise public opinion as the judiciary. If the judges are complaisant towards governmental power, government will of course take what it is given. If the judiciary is prepared to provide leadership, its voice will be listened to with respect and gratitude”.<sup>23</sup>

For the functioning of the judiciary in Cameroon to stand the test of time, the constitution, the grundnorm, must be properly worded and reasonably constructed. This is because the constitution is a legal instrument giving rise, *inter alia*, to individual rights capable of enforcement in a Court of Law.<sup>24</sup> The constitution must be constructed to meet the changing economic conditions and habits of thought to render their provisions meaningful in a heterogeneous and evolving society like that of Cameroon.<sup>25</sup>

### 3.2. Judges as Apolitical Personalities

It is generally accepted that the judiciary is by nature apolitical. “Much of the legitimacy of the court’s decisions rests upon the fiction that it is not a political

<sup>21</sup> Rodel vs. Worsley (1969) 1 A.C. 191, The People vs. Gorji-Dinka (1968-70) U.Y.L.R 112, Mukwelle Ngoh vs. The People (1977). C.L.R. 188, Nkili Abessolo c/. Ministère Public (1970) Bulletin n° 23, P. 2769.

<sup>22</sup> Laurent Ezzo (Minister of Health, Justice, Armed Forces, etc) Mbella Mbappe (Minister of National Education, Justice, etc).

<sup>23</sup> Louis L Jaffe, *English and American Judges as Law Makers* (1969), p. 19.

<sup>24</sup> Ibid.

<sup>25</sup> Lord Reid in Myers vs. D.P.P. (1965) A.C. 100. See Senator Adesanya vs. The President, Federal Republic of Nigeria and Anor (1981) 5 S.C. 112.

institution but exclusively a legal one”.<sup>26</sup> Judges are non-political appointees, recruited through a competitive examination and follow special training. Consequently, as arbiters, they are not expected to participate in politics. This is because judicial independence implies independence from political influence. Therefore participating in politics will arouse doubts as to the judges’ ability to be impartial. Moreover, in theory at least, it is a criminal offence punishable with up to five years imprisonment for anyone who is a representative of the executive authority to issue an order or prohibition to any court. Thus, the Minister, Governor or Prefect who does so plays foul of the law and can be properly convicted and sentenced. This shields judges from orders of the political organ.<sup>27</sup>

Sometimes, judges have a difficult, embarrassing, and occasionally odious task, which may involve harsh statements, the imposition of serious penalties, or the adoption of unpopular and unpalatable decisions. Because judges are not elected, they can focus on what is “right” even if that is not necessarily popular.<sup>28</sup> The majority is not always right especially in the less developed countries where the citizens do not know their rights. With the relative instability of the politicians, a permanent and learned judicial corps is needed to serve as guide to the disorganised and ignorant masses.

The counter majoritarian nature of the judiciary is actually an advantage and not a flaw. To ignore the wishes of a minority is democratic enough, but there is the risk of the “tyranny of the majority”.<sup>30</sup> The minority, according to democratic principles, must always bow to the wishes of the majority, though the majority must respect and protect the rights of the minority. In a constitutional democracy, therefore, there should be majority rule balanced with minority rights.<sup>31</sup> Limits on

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<sup>26</sup> Carlson Anyangwe, *The Magistracy and The Bar in Cameroon* (1989), p. 56. Yaoundé: CEPER, quoting Robert Dahl.

<sup>27</sup> Cameroon Penal Code, Section 126(a).

<sup>28</sup> S. S Lagon “The Role of the Independent Judiciary”, *Freedom Papers*, United States Information Agency (July 1993), p. 9.

<sup>30</sup> Alexis de Tocqueville, *Democracy in America* (1945), New York (analyses the dangers of democracy).

<sup>31</sup> Carlson Anyangwe (note 26 above), p. 70.

governmental power and guarantees of individual rights will be meaningless without some institutional means of curbing the power of the majority. While the other branches of government are more responsive to the majority, the judiciary remains the perfect vehicle for protecting minority rights. Unlike other authorities, judges have no constituencies; they represent the constitution and derive their authority from it.<sup>32</sup> They are therefore free to judge without fear or favour.

#### **4. The Judiciary as the Least Dangerous Arm of Government**

Generally, the judiciary is often regarded as the weakest branch of government since it neither controls the purse nor the sword.<sup>33</sup> But this is an advantage, for it becomes the least dangerous to human rights and consequently, can serve as an unbiased arbiter to the other branches. Human rights have always been threatened by politics and money.<sup>34</sup> In Cameroon, the budget is prepared and executed by the executive,<sup>35</sup> and voted by the parliament. The judiciary plays an insignificant role of control when the preventive controls of the political organs have failed or have detected criminals. The forces of law and order (gendarmes, police, and army) that have been violating human rights are part of the executive branch. It is often stated that they are at the disposal of administrators. The judiciary, therefore, stands free and isolated from these dangers.

The famous passage written by Alexander Hamilton more than a century ago is still accepted as a valid observation that:

“Whoever attentively considers the different departments of power must perceive that in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous branch to the political rights of the Constitution; because it will be least in the capacity to annoy or injure them. The Executive not only dispenses the honours, but holds the swords of the community. The Legislature not only commands the purse but

<sup>32</sup> S. S Lagon (note 28 above), p. 3.

<sup>33</sup> A. G Karibi-Whyte, “The Relevance of the Judiciary in the Polity – In Historical Perspective”, *Nigerian Institute of Advanced Legal Studies* (1987), p. 25. Lagos.

<sup>34</sup> Luc S Mpouma, *Libertés Publiques*. Université de Yaoundé, F.D.S.E. (Cours Polycopié), p. 1.

<sup>35</sup> Article 48 of Ordinance No. 62-CF-4 of 07<sup>th</sup> February, 1962 regulating budgetary Law, states that “under the authority of the President of the Republic, the Minister of Finance prepares the Finance Bills”. The vote holders who execute the budget are mostly administrators.

prescribes the roles by which the duties and rights of every citizen are to be regulated. The Judiciary on the contrary has no influence, over either the sword or the purse; no direction either of the strength of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither force nor will but merely judgement”.<sup>36</sup>

It is because of this “harmless” position occupied by judiciary that judges can endeavour to apply the laws rigorously and avoid the unjust ones so as to achieve real justice. In the words of Hon. Dr. Akinola Aguda, “Our courts must regard themselves as courts of justice, not merely courts of law especially where human freedom and dignity are concerned”.<sup>37</sup> This judiciary is posited as an unbiased arbiter, not only between the people and the government, but also between the governmental branches themselves.

## 5. The Role of the Judiciary as a Delicate Power Broker

In 1996, the Cameroonian judiciary was up-graded from a mere authority to a power.<sup>39</sup> As a separate branch of government, it can therefore, guarantee democratic freedoms by preventing the concentration of powers in Government.<sup>40</sup> The Magistracy constitutes a controlling force against abuse and arbitrary exercise of power.<sup>41</sup> Administrative judges in Cameroon can apply two remedies to maladministration. The annulment of the injurious act and/or if the act causes injury, there is an action for indemnification. The administrative authorities are therefore aware of the fact that they are not above the law, as they can be controlled by the specialists of law.

<sup>36</sup> A. G Karibi-Whyte (note 33 above), p. 25; S. S Lagon (note 28 above), p. 3.

<sup>37</sup> J. A Aguda, “The Judiciary and the Democracy – The Nigerian Experience”, *Judiciary in the Government of Nigeria* (1983), Chapter 2, Ibadan: The New Press Ltd.

<sup>39</sup> Law No. 96/06 of 18 January 1996 on the Revision of the 1972 Constitution. That notwithstanding, the Cameroonian judiciary, like the piper, plays to the tune dictated by the executive and it is a farce to talk of the independence of judicial power in Cameroon today, for, what has in effect happened is that the judiciary has been reduced into allies or partners of the executive: Charles M Fombad, “Judicial Power in Cameroon’s amended Constitution of 18 January 1996”. *Juridis Périodique*, No. 34 (1998), p. 68.

<sup>40</sup> S. S Lagon (note 28 above), p. 3.

<sup>41</sup> Fabian Kemkeleng, “The Protection of Human Rights by the Magistrate in Cameroon”, *Maîtrise Memoire*, F.S.J.P., Dschang University, Cameroon (1997/1998), pp. 3-4.

The institutions of the judiciary can serve as a check to the other branches of government: the Supreme Court is the highest jurisdiction of the state in administrative, judicial, and audit matters, that is why it has benches dealing with all these matters.<sup>42</sup> The first bench is responsible for administrative matters and the third bench has to control and rule on issues concerning public accounts. Through the Court of Impeachment, the judiciary has the ability to scrutinise the actions of the highest government authorities, including the President in the case of high treason, the Prime Minister, members of Government, and other high authorities in the case of conspiracy against the security of the state.<sup>43</sup>

The Constitutional Council is a mixed organ which is competent in constitutional matters.<sup>44</sup> It has powers of judicial reviews and is the regulatory organ in the functioning of the state institutions. Though it is a mixed organ (political and judicial), the fact that members should have recognised professional reputation implies that the law specialists are favoured. Technically, it is empowered to declare laws, treaties and procedural rules as unconstitutional. It also decides on the regularity of presidential and parliamentary elections, referendum consultations, and declares the results.

However, all these roles are still being performed by the Supreme Court as the Constitutional Council continues to exist on paper only. According to the American Chief Justice Marshall, judicial review is the “very essence of judicial duty”.<sup>45</sup> Although some people argue that it violates the principle of separation of power, it allows the judiciary to be a counterweight to the other branches. A breach of the Constitution renders the resulting act illegal and invalid. Judicial review, or saying “no” to other branches of government is valuable as deterrent.<sup>46</sup>

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<sup>42</sup> Law No. 96/06 (note 39 above), article 38(1).

<sup>43</sup> Ibid, article 53(1).

<sup>44</sup> Ibid, articles 46-52.

<sup>45</sup> Donald A Ritchie, *Heritage of Freedom History of the United States* (1985), pp. 217-218. Macmillan Publishing Company (in the famous case of Marburg v. Madison in 1803).

<sup>46</sup> S. S Lagon (note 28 above), pp. 7-8.

## 6. Limitations on the Cameroonian Judiciary

There has been general disappointment with the institution generally seen as the last resort when things are not moving well. There is no doubt that the ability of the judiciary to effectively play the role incumbent upon it depends on some external and internal factors. For the judiciary to protect human rights effectively, the environment should be favourable. However, the environment under which the judiciary operate in Cameroon is not very conducive. This judiciary is an actor within a system. It is a neutral referee between the governors and the governed. The importance of the political and social situations of Cameroon cannot be over-emphasised. An analysis of this situation reveals that judges are dependent and the citizens are inactive.

### 6.1. The Judiciary as a Dependent Partner

For the Judiciary to perform its strategic role effectively, it must be independent of all manipulation by an organ, group, or person. It should be free from intimidation, coercion, or pressure.<sup>47</sup> The 1996 constitution attributes judicial power only to the classical judiciary jurisdictions, that is, “the Supreme Court, the Courts of Appeal and the Magistrates Courts”. According to Professor Kamto,<sup>48</sup> this is a very restrictive view; for the judiciary to really check the other powers, it should effect judicial review, control administrative acts and even impeach culprits.<sup>49</sup> Without this, we doubt the effectiveness and independence of justice as a power. No doubt, the American Supreme Court Judge is at the same time judiciary judge, administrative judge, and constitutional judge.

Also, the Cameroonian political regime, as most African regimes, is presidential. This implies that the pivot of power is a man, the President of the Republic who concentrates in his hands the essential if not all of the powers. He is the Head of

<sup>47</sup> Bernard Muna, *Cameroon and the Challenges of the 21<sup>st</sup> Century* (1993), p. 67. Yaoundé: Tama Books.

<sup>48</sup> Maurice Kamto, “Les Mutations de la Justice Camerounaise à la Lumière des Développements Constitutionnels de 1996”, *Revue Africaine des Sciences Juridiques*. Faculté des Sciences Juridiques et Politiques, Université de Yaoundé II, Vol.1, N°1, 2000, pp. 10-14.

<sup>49</sup> In Cameroon, the Constitutional Council and Court of Impeachment notably are not treated under the Judiciary Power.

State, Head of the Armed Forces, indeed the Head of Government and, above all, Head of the Magistracy. No doubt, he guarantees the independence of the Judiciary, assisted in this task by the Higher Judicial Council.<sup>50</sup> Kamto poses the questions – why does the executive guarantee only the independence of the judiciary and not that of the legislative? Who guarantees the independence of the executive itself?<sup>51</sup> Politicians whose positions are threatened mostly by judicial impartiality should have been the last to be trusted with genuinely guaranteeing such impartiality.<sup>52</sup>

The 1996 constitution of Cameroon, therefore, as its predecessor of 1972 fails to formally recognise and protect the judiciary power. The expression “Judiciary Power” on its own cannot transform our judiciary into a separate branch of government as is the case in America.<sup>53</sup> It is irrational that this constitution refers to electoral disputes concerning regional and council elections to administrative courts, but reserves the most important disputes concerning presidential and parliamentary elections as well as referendum operations to the constitutional council for advice. This is surprising because the constitutional council is composed of presidential nominees who are not necessarily jurists and who simply give “advice”<sup>54</sup> on the polity of the nation.

The constitution further provides that the President of the Republic shall make judicial appointments and pronounce disciplinary sanctions concerning judges.<sup>55</sup> He is assisted in this task by the Higher Judicial Council which he presides himself. This can lead to politicisation for the President faces the temptation to reward loyalty and conformity. No doubt there’s a creeping politicisation of the judicial profession; a fact that has led to apathy, frustration, fawning and the

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<sup>50</sup> Law No. 96/06 (note 39 above), article 37(3). It should be noted that the Higher Judicial Council has no proper powers, as it gives only its opinion. Is it not paradoxical that this organ has more powers in France where the judiciary is an authority than in Cameroon where it is a “power”?

<sup>51</sup> Maurice Kamto (note 48 above), p. 15.

<sup>52</sup> Charles M Fombad (note 39 above), p. 68.

<sup>53</sup> Ibid, p. 65.

<sup>54</sup> See articles 47(4), 48(1), and 50 of the 1996 Constitution.

<sup>55</sup> Ibid, article 37(3).

longing for favours exhibited by many judicial and legal officers.<sup>56</sup> The judiciary, like the legal department, is under the control and supervision of the Minister of Justice who is not a Chief Justice. The salary of judges does not, as in England, come from a special fund voted by Parliament. It is the executive which provides funds for the judiciary and the legislature approves its expenditure. Unlike the case in America, the Cameroonian judges are not irremovable for they are faced with the problems of arbitrary measures as suspension, inopportune transfers, and retrogradation. For example, the transfer of judges is not only frequent,<sup>57</sup> but it is possible for a member of the bench to be appointed to the legal department and vice versa.<sup>58</sup> There is also budgetary dependence of the judiciary on the legal department.<sup>59</sup> The Cameroonian Judiciary therefore functions like a branch of the executive and it is a farce to talk of judicial independence in Cameroon.

There also exist possibilities for the interference of the administration in the course of justice. The Minister of Justice can intervene with any civil or criminal matter under judicial consideration. This is acceptable if this discretion is used judiciously and for public good only, but it leads to the undermining of the authority of the courts.<sup>60</sup> This is not surprising for the judiciary lacks independent machinery for enforcing judgements. The state's repressive apparatus (the police, gendarmerie, and the army) form part of the executive, "by whom their administration and operational use is controlled".<sup>61</sup> The bailiffs or process-servers for the execution of decisions rely on these "forces". Also, the President of the Republic has the power of granting pardons/clemencies to judicial sentences. As if its competence in the judicial organisation and the creation of jurisdictional

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<sup>56</sup> Carlson Anyangwe (note 26 above), p. 21.

<sup>57</sup> Frequent transfers are detrimental to service as they kill incentive, zeal to work, disrupt family life and encourage indolence and inefficiency.

<sup>58</sup> This is the application of the concept of "Le Magistrat Polyvalent" in the Cameroonian Magistracy.

<sup>59</sup> It was formerly the Procureur Général who controlled the budget and he was made to appear stronger than and superior to the Judge. He has had the possibility of making things difficult for the judge.

<sup>60</sup> Carlson Anyangwe (note 26 above), pp. 50-54.

<sup>61</sup> Ibid. p. 35.

orders<sup>62</sup> are not enough, parliament has another possibility in intervening in the functioning of the magistracy through legislative validations. Furthermore as is the case in America with the existence of “political questions”, the Cameroonian judges, like the French, are forbidden to rule on cases of “Act of State”.<sup>63</sup>

## **6.2. Lack of Public Engagement of the Judiciary**

We measure the effectiveness of the submission of the administration to the law through the appeals made by the public against the administration. Despite the multiplicity of ills (public or private) in Cameroon, there are few appeals to the Courts. The lack of a viable public engagement can be explained by illiteracy and poverty. Law is a difficult science to master; the majority of Cameroonians do not know the law or their rights. It is in part necessary to know the law or recognise a violation to request redress.<sup>64</sup> You cannot protect your rights without knowing them, for you will not be aware of their violation if you are not conscious of their legal irregularity. As Bipoun-Woum rightly puts it, the problem of legal education is an obstacle to administrative control and legality in general.<sup>65</sup> It is therefore not surprising that the majority of court cases concern civil servants and private organisations. This is so because civil servants constitute the most integrated, economically viable and intellectually matured class within the system.<sup>66</sup>

As regards administrative cases, the would-be-plaintiffs fear reprisals.<sup>67</sup> Citizens are afraid of instituting proceedings against public officials or institutions because the administration can turn against them and refuse providing them with public services. The creation of the Court of Impeachment is merely a formality;

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<sup>62</sup> Article 26(1)(5) of the 1996 Constitution..

<sup>63</sup> This concept is based on two criteria: the relations between the executive and Legislative and Diplomatic Relations. Confirmed in the following ruling: CS/CA 31<sup>st</sup> may 1979 KOUANG Guillaume. CS/CA 29 November 1979 Essomba Antoine c/Etat du Cameroun : CS/CA 29 may 1980 MONKAM TIENTCHEU.

<sup>64</sup> Luc S. Mpouma (note 34 above), p. 107.

<sup>65</sup> Ibid, pp. 107-108.

<sup>66</sup> Ibid, p. 109.

<sup>67</sup> Ibid, p. 109.

generally, the “big ones” remain untouchable and the citizens helpless<sup>68</sup>. More so, the receivability of cases before the administrative court is not simple. The rules are complex and the procedure costly. To take a case to the administrative bench, the pre-litigation complaint (“recours gracieux préalable”) is compulsory.<sup>69</sup> Besides the strictness of this rule, there are many complications as regards the competent authorities and the time-limit. A mistake made by an authority is punished severely by the Cameroonian Law. The time-limit is followed strictly on pain of foreclosure,<sup>70</sup> and few Cameroonians can master these complexities.

One is tempted to conclude that the complexity and legal technicalities of bring administrative actions in Cameroon is simply a legal instrument aimed at restricting administrative litigations to a minimum. The judge is contented to be playing an incarnatory role, following the wishes of the executive, its master. This certainly discourages the would-be-plaintiffs for they believe it is a waste of time and money. Worse still, after the rejection of pre-litigation complaint under foreclosure,<sup>71</sup> the appeal against the administrative decisions is still subjected to complicated conditions.<sup>72</sup> As if these were not enough, the administrative jurisdiction is centralised<sup>73</sup> in major towns. Only the rich, courageous, free, and patient can leave the suburbs, hundreds of kilometres away, to follow up a case in the nation’s capital. The others stay disillusioned and frustrated.

### **6.3. Intrinsic Weaknesses of the Judicial Process**

Reduced to their most basic purpose, all courts in all political systems exist to resolve disputes. Consequently, their decisions must be based on recognised

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<sup>68</sup> Unlike the American Supreme Court which has intervened in impeachment cases (as the Watergate Scandal), there has never been any impeachment proceedings in Cameroon.

<sup>69</sup> Article 12 of Ordinance No. 72/6 fixing the organisation of the Supreme Court.

<sup>70</sup> Jean C Kamdem, *Institutions Administratives et Droit Administratif* (1988/89), pp. 105-113, Reading Pack, University of Yaoundé.

<sup>71</sup> *Ibid.* p. 114.

<sup>72</sup> Law No. 75/17 of 8 December 1975 fixing the procedure before the Supreme Court in Administrative matters (especially article 7).

<sup>73</sup> Law No. 96/06 foresees the creation of inferior administrative benches (article 40) which have not yet been operational.

and approved standards if they are to endure.<sup>74</sup> Following the principle of power separation, the legislature makes law,<sup>75</sup> the executive applies the laws, and the judiciary adjudicates. It is true that to adjudicate the law, judges can interpret and create it<sup>76</sup> but this is exceptional. The fact is that unlike the other two branches, the Judiciary has to wait for cases to come before it and normally should not initiate legislation.<sup>77</sup> Concomitant with the fact that the judge is expected to live a cloistered existence, uninterested in the world outside the Court, is the view that he must be self denying, exercise self-restraint and not show any initiative.<sup>78</sup> Moreover, the judge should not initiate proceedings, except in the case of *contempto sedante curia*, that is, the court cannot intervene on its own to initiate and commence proceedings against a wrongdoer. It must wait until it is moved by somebody.<sup>79</sup> This has the advantage of providing a “cooling period” so that inflammatory issues may be considered more rationally. But this blocks the judge, for he may see things go wrong, but must wait for action to be initiated by a plaintiff, who might not do so for one reason or the other. And even if the case is brought to Court, there are conditions of receivability to be followed.

In the case of the Cameroonian administrative judge, the situation is even worse. Montesquieu had warned that laws have to be proper to the people for whom they are made, and it will be a great coincidence if those of a nation fit in another. But our judges lack originality and prefer to copy what has been established by the French judge. Due to the inertness of our administrative judges, the Cameroonian administrative law is more legislative than judge-made, more receptive than innovative. By depending in a spontaneous manner on French cases, concepts and rules, these judges cannot give appropriate solutions to

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<sup>74</sup> S. S Lagon (note 28 above), p. 12.

<sup>75</sup> Even the Judicial organisation and the creation of new jurisdictional orders are the competence of the Legislature (Law n° 96/06, op. cit. art. 26(1) c).

<sup>76</sup> Shaw vs. DPP (1962) A.C. 220.

<sup>77</sup> S. S Lagon (note 28 above), p. 11.

<sup>78</sup> In Cameroon, it is a criminal offence punishable by sections 125 (a) and 126 (b) of the Penal Code if he purports to do so.

<sup>79</sup> Carlson Anyangwe (note 26 above), pp. 25-26.

Cameroonians cases in the light of national realities.<sup>80</sup> Yet, justice must not only be done, but must be seen to be done.

No matter the judicial process, whether inquisitorial or adversarial, the judge simply reacts<sup>81</sup> and the judge decides on the basis of given facts. With the inquisitorial, there is no presumption of innocence in Court.<sup>82</sup> The judge investigates and decides if there is sufficient evidence to warrant a trial and if so, conducts it and interrogates witnesses. The adversarial system is based on partisan presentation of evidence most favourable to each side and assumes that self-interest will prevent any relevant facts and arguments from being overlooked, with the judge being a neutral umpire. In fact, in the English Court of Appeal case of *Jones vs. National Coal Board*,<sup>83</sup> Lord Denning was categorical that the judge must not intervene unduly at the trial. In both civil and criminal cases, the judge enforces strict rules about what evidence is allowable and how cases are conducted, and rules on objections raised by either litigant.<sup>84</sup> In criminal cases, the burden of proof rests on the state (the prosecution); the accused is presumed innocent until proven guilty beyond reasonable doubt.

The willingness to assure valuable witnessing shows a radical difference between the English procedure in which the system of cross-examination obliges the witness to answer only the questions posed to him, and the French procedure which stands essentially for spontaneous evidence which should not be interrupted.<sup>85</sup> A continental advocate does not ordinarily examine or cross-examine witnesses. If witnesses are examined orally, the judge plays the

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<sup>80</sup> Opinions of Mon Marcel Nguini and Professor Joseph Bipoum-Woum cited by Jean C. Kamdem (note 70 above), p. 33.

<sup>81</sup> S. S. Lagon (note 28 above), pp. 3-4.

<sup>82</sup> The rule on presumption of innocence was affirmed by Lord Sankey in *Woolmington vs. DPP* (1935) A C. 462 by Bairamain S.P.J. in *Goni Kinnani vs. Bornu Native Authority* (1957) N.R.N.L.R 40, and by Kester Ag. J in *Cyril Areh vs. commissioners of Police* (1959) N.R.N.L.R. 230, p. 231.

<sup>83</sup> (1957) 2 Q.B. 55.

<sup>84</sup> S. S Lagon (note 28 above), p. 4

<sup>85</sup> Article 331 of the "Code de Procédure de Pénal" see Robert Vouin, "L'évolution de la Procédure Pénal Française et les Enseignements du Droit Etranger", FDSE, Paris, p. 287.

principal role. Under French procedure, the judge is empowered to order four kinds of investigations in civil proceedings, to wit, expertise, the personal investigations of the judge, his questioning of the parties and his recording of the testimony of witnesses.<sup>86</sup> These investigations are known in French Law as “mèures d'instructions” or just “instructions”. The purpose of “instructions” is to clarify the facts and provide the evidence necessary to decide the case, but which has not been made available by the parties. This kind of court intervention in civil proceedings is an outstanding feature of the investigatory system.<sup>87</sup>

The judge in the investigatory system comes to court fully acquainted with all the facts and evidence got during the preliminary inquiry. He is an active participant in the whole trial, asking questions and calling anybody as witness whom he feels may help him arrive at the truth. Counsel for defense can question a witness only through the judge's intermediary. The latter has the discretion whether or not to ask such questions to the witness. The prosecution in this case is not required to prove the guilt of the accused. The practice is to presume the guilt of the accused unless he exonerates himself, which means that the burden of providing his innocence lies on the accused himself. The inquisitorial system does not, therefore, see any need for cross-examination and re-examination of witnesses. It has been submitted that a judge who comes to court already convinced that the accused is guilty of an offence would hardly change his mind at the end of the day, as his decision would not only be based on the evidence adduced in court, but also on the former dispositions of the witnesses<sup>88</sup>.

#### **6.4. Self-Imposed Limitations**

Judges, consciously or not, succumb to socio-cultural (familial attachments, sex, sentimental and class prejudices) and socio-economic (poor working conditions

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<sup>86</sup> C. N Ngwasiri, “Some Problems of expertise in French Civil Proceedings”, *Civil Justice Quarterly*, (1989), p. 168: Sweet of Maxwell.

<sup>87</sup> Ibid

<sup>88</sup> Andrew S Ewang, “The Test for Criminal Liability is Proof Beyond all Reasonable Doubt: Any Doubt must be Resolved in Favour of Accused”, *Juridis Périodique*, No. 27 (1996), p. 59.

especially poverty) environmental pressures.<sup>89</sup> Judges have to be respected and appreciated by the society,<sup>90</sup> and as stated by Ehrlich, “there is no guarantee of justice except the personality of the judge”.<sup>91</sup> There is a general belief in Cameroon that judges are not upright, not honest, and that in order to go through a case, you have to “meet” the magistrate concerned. Since they are always corrupted, their decisions are not free from suspicion of bias, prejudice and partiality. As such, justice becomes an affair of the rich, the powerful, who can use it as an instrument of exploitation and repression.

At times, judges succumb not only to pressures, but also to threats. Consciously or unconsciously, some of their decisions on delicate issues are self-censored. This can be explained by belonging to a group or having sentiments or being afraid of the sword of Damocles. It has been discovered that judges are usually afraid of attack on the administration, that is, on power or declare decisions against it. That judges are psychologically affected by the penal warning that “whoever, being a legal or judicial officer, issues an order or prohibition to any executive or administrative authority - shall be punished”.<sup>92</sup> Therefore fear has led to a situation of discriminatory justice, crime protection, and impunity. The fact that the “sweating” President of the Supreme Court declared while proclaiming the results of the 1992 Presidential Elections that there were many irregularities but that the Courts were not competent to rule on them, was therefore not surprising to many Cameroonians.

While judges are presumed to be learned members of the society, entry into the National School of Administration and Magistracy (ENAM),<sup>93</sup> which trains judges has for long been tainted with malpractices. Despite the existence of competitive entrance exams, admissions has often been through the “back door” and

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<sup>89</sup> Brigitte Djuidje (note 17 above), pp. 48-53

<sup>90</sup> Bernard Muna (note 47 above), p. 110.

<sup>91</sup> Robert M MacIver (note 4 above), p. 266.

<sup>92</sup> Article 126(b) of the Cameroonian Penal Code.

<sup>93</sup> French acronym for “Ecole National d’Administration et de la Magistrature”.

promotions based on reasons which have nothing to do with competence,<sup>94</sup> rendering the ability of some judges in doubt. Also, from the personnel point of view, jurisdictional duality is more a principle than a reality. Most often, it is the judiciary judges who rule accessorially on administrative litigations.<sup>95</sup> Many of these judges do not master the general principles of administrative law and justice<sup>96</sup>. They cannot disown the spirit, techniques and methods of reasoning so acquired from their training, and tend to impose them on administrative cases. Yet, the administration is supposed to be governed by special rules.<sup>97</sup> The fact that they are not specialised, accounts for their extreme prudence, lack of audacity and courage.<sup>98</sup> Generally therefore, corruption, fear, and at times incompetence of the Cameroonian judge serve as adverse publicity. There is therefore the inactiveness of the institution due the public's lack of confidence.

## 7. Conclusion

It is not enough to proclaim rights, they have to be protected.<sup>99</sup> To declare that we are a "state of law" or "democratic" does not make us one. There is generalised lawlessness in our society and with the weaknesses of the other controlling forces; the courts have to be the last resort for the guarantee of the "rule of law". The judiciary is supposed to be a valuable asset for the protection of human rights and to check power abuse. However, extrinsic and intrinsic factors have made it unable to play this role effectively. The danger is that, the citizens are usually helpless with the impotence of the justice system and can resort to other means like mob justice and manifestations in a bid to obtain satisfaction.

Constitutional government is above all, judicial government. Respect for the law and for the work of the courts is crucial to the survival of any democracy .An

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<sup>94</sup> In the Anglo-Saxon countries, it is the experienced and successful legal practitioners who are appointed as judges.

<sup>95</sup> Professor Alain Bockel, cf. Jean C Kamdem, *op. cit.* p. 32.

<sup>96</sup> We hope that the section of Administrative Judges created in ENAM will solve the problem in future.

<sup>97</sup> As confirmed in the French Arrêt Blanco. (Rules exorbitant to common or civil law).

<sup>98</sup> Jean C. Kamdem (note 70 above), p. 34.

<sup>99</sup> Bernard Muna (note 47 above), p. 86.

effective judiciary is therefore of vital importance as it inspires confidence in the people. It serves as a check by preventing the concentration of power in government and its subsequent abuse. When courts challenge governmental action, they validate the government's status and legitimacy and provide an important element of political stability.<sup>100</sup> The fact is that there should be "checks and balances" and when things are not moving, judges as extra-ordinary citizens should play a fundamental role. But for them to play the role incumbent on them, judges have to be competent and be guided by the law and their consciences. The mentality of the judges must change; they have to be aware of the sacredness and the strategic place of their mission. They have to be competent, neutral, impartial, in a nutshell, independent. It is only through these conditions that they can be the last hope to Cameroonians of all works of life.

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<sup>100</sup> S. S. Lagon (note 28 above), p. 9.