The place of the judicial review mechanism in a majoritarian democracy under a regime of presidential absolutism in Francophone Africa: The case of Cameroon

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1 INTRODUCTION

In this paper, I argue that the absence of an objective implementation of a judicial review mechanism in Cameroon's judicial system by the Constitutional Council (CC)[1] has rendered the Parliament and not the Constitution sovereign. In such a circumstance, human rights violation by the executive cannot be overemphasized. This situation has turned the Constitution of Cameroon into a document reinforcing personal powers as opposed to one limiting the powers of the executive and entrenching individual rights as required by the constitutional theory design.[2] The reason for personal power reinforcement of the executive could be attributed to the fact that an ordinary citizen cannot bring a dispute before the Constitutional Council and there exists no evidence in Francophone Africa of any President who ever referred a matter for judicial review before the Constitutional Council.[3] In this paper, I refer to judicial review in the sense of a court's power to nullify statutes sanctioned by the legislative organ by proclaiming them at odds

[1]Organ charged with the determination of the constitutionality of laws. Mbaku J 'The separation of powers, constitutionalism and governance in Africa: The case of modern Cameroon' (2013) http://works.bepress.com/john_mbaku/7. (Accessed 25/06/2013) 48.

[2]Levy J 'Not so novus and ordo: Constitutions without social contracts'(2009) 37 (2) *Political Theory* 191-217 at 192.

[3]Fombad c 'The new Cameroonian Constitutional Council in a comparative perspective: Progress or retrogression?' (1998) 42 (2) *Journal of African Law* 172-186 at 180.

with provisions of the constitution.[4] A governmental act may be ruled unconstitutional and void for the following reason:

- it was not passed in the required manner and form;[5]
- if the act violates guaranteed rights;
- if the act violates or usurps constitutional powers of other organs of government, in this case, those of the courts or administration;
- if the act is an illegal abdication of power to another agency;
- if the act undermines the powers of another government in a federation;
- If the act is inconsistent with another provision of the constitution.[6]

The discourse in this paper shall not however consider only statutes which do not square with the court's reading of the constitution ab initio, but also the review of judicial decisions measured to be unconstitutional. I have circumscribed the scope of this paper to the review of legislation and judicial decisions, thereby excluding administrative acts as practiced under the regime de droit administratif in the French conseil d'état or the Anglo-American administrative law system.[7]

Between 1960 and early 1961, the prevailing jurisprudential doctrine in both Cameroons; La Republic du Cameroun and Southern Cameroon was parliamentary sovereignty[8] following their annexation by France and England as League of Nations mandated territories.[9] However with a change in the political landscape in 1961, the need arose for a new jurisprudential order which had to conform to the new constitutional environment.[10] Given that the new constitutional order

[4]Shapiro M 'Judicial review in France' (1989) 6 *Journal of Law & Politics* 531-548 at 532.

[5]Nwabueze O *Judicialism in commonwealth Africa* (1967) 231.

[6]Nwabueze O *Judicialism in commonwealth Africa* (1967) 231.

[7]Enonchong A *Cameroon constitutional law: Federalism in a mixed common-law and civil-law system* (1967) 32.

[8]Enonchong A *Cameroon constitutional law: Federalism in a mixed common-law and civil-law system* (1967) 33.

[9]Le Vine V *The Cameroon Federal Republic* (1963) 7.

[10]Enonchong A *Cameroon constitutional law: Federalism in a mixed common-law and civil-law system* (1967) 33.

was a federation, had inspired a resort to chart a new legal concept as well. Art 46 of the Federal Constitution was an interception to this idea since it provided that unless any existing federated states laws were inconsistent with the Constitution, they shall remain in operation.[11]

Given that the post-independence judicial traditions embraced by Cameroon were those of England and France which espoused parliamentary supremacy, Cameroon could only make a meaningful outcome from the American experience of 1776 if it understood the causes and effects of the theories of parliamentary sovereignty.[12]

Parliamentary sovereignty is a legal fact and no body or person is qualified to set aside the legislation of Parliament.[13] This paradigm marked the situation in Cameroon before 1961 and still remains.[14] At this juncture, it could be conceivable that the two Cameroons at one point practiced the judicial non-reviewability of legislative acts.[15]It should be noted that when the trusteeship was officially terminated, Cameroon gained its residual sovereignty and became a federation in 1961 when a federal constitution was ushered in and a federal court of justice was established.[16]

It is set out conspicuously in the Constitution of 1961 in articles 14, 29 (3), 33, and 34[17] thus: The Federal Court of Justice is empowered to review (1) a federal law to determine its constitutionality and (2) a state law to ascertain if it is in violation of the Constitution. In either

[11]Enonchong A *Cameroon constitutional law: Federalism in a mixed common-law and civil-law system* (1967) 33.

[12]Enonchong A *Cameroon constitutional law: Federalism in a mixed common-law and civil-law system* (1967) 33.

[13]Dicey A *An introduction to the study of the law of the constitution* (1959) 40-41

[14]Enonchong A *Cameroon constitutional law: Federalism in a mixed common-law and civil-law system* (1967) 37.

[15]Enonchong A *Cameroon constitutional law: Federalism in a mixed common-law and civil-law system* (1967) 38.

[16]Enonchong A *Cameroon constitutional law: Federalism in a mixed common-law and civil-law system* (1967) 38.

[17]The Federal Constitution of Cameroon of 1961.

instance it can only be carried out at the discretionary request of the President.[18]All in all, the conduct of the framers reveals that the Constitution intended to debar individuals' locus standi in judicio altogether from matters touching on the unconstitutionality of a legislative act.[19] The Constitution of 2 June 1972 abolished the federation and introduced the unitary state. Under the unitary state, the mechanism for the determination of constitutionality of laws entrenched in the 1961 Constitution was restructured to enable its continuous exercise by the Supreme Court unlike the Federal Court of Justice in 1961.[20]

In 1996, an amended version of the 1972[21] constitution was ushered in and it made provision for a new body vested with the powers to exercise judicial review of legislative acts amongst other functions called the Constitutional Council.[22] Unlike the French Conseil Constitutionnelle which is a 'court-like' body[23] and a political than juridical organ,[24] the Cameroonian Constitutional Council is a quasi-judicial and quasi-political organ in which legal issues can give way to politically influenced verdicts.[25] It follows that this organ is in **'**bad odour' with the protection of constitutional rights given that Cameroon is one of the few countries in Francophone Africa whose Constitutional Council does not entertain disputes or challenge on the constitutionality of

[18]Enonchong A *Cameroon constitutional law: Federalism in a mixed common-law and civil-law* system (1967) 39.

[19]Enonchong A *Cameroon constitutional law: Federalism in a mixed common-law and civil-law system* (1967) 39.

[20]Fombad C 'The new Cameroonian Constitutional Council in a comparative perspective: Progress or retrogression?' (1998) 42 (2) *Journal of African Law* 172-186 at 174.

[21]Law No 06 of 18 January 1996.

[22]Fombad C 'The new Cameroonian Constitutional Council in a comparative perspective: Progress or retrogression?' (1998) 42 (2) *Journal of African Law* 172-186 at 180.

[23]Sweet A 'The politics of constitutional review in France and Europe' (2007) 5 (1) *I. CON* 69-92 at 81.

[24]Sweet A 'The politics of constitutional review in France and Europe' (2007) 5 (1) *I. CON* 69-92 at 70.

[25]Fombad c 'The new Cameroonian Constitutional Council in a comparative perspective: Progress or retrogression?' (1998) 42 (2) *Journal of African Law*172-186 at 178.

a law from ordinary citizens before the Council unless they were candidates to disputed presidential or parliamentary elections.[26]

Art 47 (2) of the Constitution confers jurisdiction only to a limited number of persons to refer issues to the Council, to wit: President of the Republic, President of the National Assembly, President of the Senate, One-third of the members of the National Assembly or One-third of the senators.[27]An important issue which requires to be sieved through is the raison d'être for which the judicial review mechanism was introduced in the Cameroonian Constitution, whose constitutionality mandate is to protect ordinary citizens from the constant growing and imperious powers of the executive over and above protecting the legislature and judiciary.[28]

In this paper, I intend to ultimately establish the necessity for objectively implementing a genuine judicial review mechanism in Cameroon against an absolute and imperial executive, a Legislature which is subordinated to the executive[29]and a Constitution which entrenches autocratic practices and a feeble parliament in an ostensible majoritarian democracy where elections rigging have become a culture. This paper is divided into three parts. The first part explores the historical foundations and justification of judicial review in the United States of America and France as the existing models copied by African countries. The second part will deal with democracy and presidential absolutism in Cameroon and the importance to safeguard the rights of citizens. In part three, I will argue that the practices of majoritarian democracy and presidential absolutism in Cameroon require a potent judicial review mechanism because such a mechanism will serve like an antidote to the executive's absolute untrammeled powers.

2 FOUNDATIONAL MODELS OF JUDICIAL REVIEW IN AFRICA

[26]Fombad c 'The new Cameroonian Constitutional Council in a comparative perspective: Progress or retrogression?' (1998) 42 (2) *Journal of African Law*172-186 at 179.

[27]The Constitution of Cameroon of 1996.

[28]Fombad C 'The new Cameroonian Constitutional Council in a comparative perspective: Progress or retrogression?' (1998) 42 (2) *Journal of African Law*172-186 at 173.

[29]Etonga M 'An imperial Presidency: A study of presidential power in Cameroon' in Kofele-Kale N *An African experiment in nation building: The bilingual Cameroon Republic since reunification* (1980) 139.

Notwithstanding the federal oddity of Cameroon by 1961,[30] which would have influenced a tilt to the American-type judicial review, the jurisdiction it had in constitutional matters of the Federal Court of Justice resembled more of the French Constitutional Council under the 1958 Constitution and not the US Supreme Court.[31] Both Constitutions of 1961 and 1996 designate the President of the Republic to refer matters to the Federal Court of Justice at his absolute discretion[32] and circuitously confer jurisdiction on the President of the Republic alone as well to refer matters to the Constitutional Council.[33]

Judicial review is carried out by the judiciary as the term implies and there are three types of well recognized reviews:

- Abstract review; which takes place in the absence of a statute[34] as in the case of France which is done a priori or in Germany, done a posteriori.
- Concrete review; the review of legislation forms a different stage in an uncompleted judicial process.[35]
- Individual constitutional procedure; a review where an individual alleges that his/her rights have been infringed by a public and demands a remedy from the court for the violation.[36]

[30]Konings P *Negotiating an Anglophone identity: A study of the politics of recognition and representation in Cameroon* (2003) 41.

[31]Fombad C 'The new Cameroonian Constitutional Council in a comparative perspective: Progress or retrogression?' (1998) 42 (2) *Journal of African Law*172-186 at 174.

[32]Fombad C 'The new Cameroonian Constitutional Council in a comparative perspective: Progress or retrogression?' (1998) 42 (2) *Journal of African Law*172-186 at 174.

[33]The Cameroon Constitution of 1996 art 47 (3).

[34]Dorsen Rosenfeld D Sajo & Baer *Judicial enforcement of the constitution and models of constitutional adjudication, comparative constitutionalism: Cases and materials* (2003) 133.

[35]Dorsen Rosenfeld D Sajo & Baer *Judicial enforcement of the constitution and models of constitutional adjudication, comparative constitutionalism: Cases and materials* (2003) 133.

[36]Dorsen Rosenfeld D Sajo & Baer *Judicial enforcement of the constitution and models of constitutional adjudication, comparative constitutionalism: Cases and materials* (2003) 133.

Africa inherited and adopted two main systems of judicial review. They are the American and French model.[37] The French model inherited by most Francophone and Lusophone African countries remains very restrictive and a fairly unproductive medium of ensuring that governments respect the constitution.[38] In this regard Cameroon's Constitutional Council judicial review system can be seen as ineffective and merely a façade intended to obfuscate the interest to nip constitutional adjudication in the bud.[39]

2.1 Judicial review system in France

2.1.1 Historical foundation

France traditionally followed a model of judicial review which debarred individual participation in the process.[40] Its emergence can be traced from the underlying jurisprudence of parliamentary sovereignty, underpinning the French legal system from the time of the French revolution. There existed no review of parliamentary laws prior to the introduction of the 1958 Constitution of the fifth French Republic, since under the doctrine of parliamentary sovereignty only parliament itself was empowered to enact laws and pass on its constitutionality.[41] As a result, judges were left with no other option but to apply laws with scant regard to their constitutionality.[42] The

[37]Fombad C 'Constitutional reforms and constitutionalism in Africa: Reflections on some current challenges and future prospects' (2011) 59 *Buffalo Law Revue* 1007-1085 at 1063.

[38]Fombad C "Constitutional reforms and constitutionalism in Africa: Reflections on some current challenges and future prospects" (2011) 59 *Buffalo Law Revue* 1007-1085 at 1064.

[39]Fombad C "Constitutional reforms and constitutionalism in Africa: Reflections on some current challenges and future prospects" (2011) 59 *Buffalo Law Revue* 1007-1085 at 1064.

[40]Aucoin L "Judicial review in France: Access of the individual under French and European community law in the aftermath of France's rejection of bicentennial reform" (1992) 15 (2) *Boston College International and Comparative Law Review* 443-469 at 443.

[41]Aucoin L 'Judicial review in France: Access of the individual under French and European community law in the aftermath of France's rejection of bicentennial reform' (1992) 15 (2) *Boston College International and Comparative Law Review* 443-469 at 444.

[42]Aucoin L 'Judicial review in France: Access of the individual under French and European community law in the aftermath of France's rejection of bicentennial reform' (1992) 15 (2) *Boston College International and Comparative Law Review* 443-469 at 444.

underlying fear of judicial review expressed by the French could be attributed to the fact that the minority party could wield power by passing a motion of censure to unseat the chief executive.[43] Political machinations were consequently bound to show up because as French authorities expressed their fear; either the majority or the opposition could invoke judicial review as means of scrutinizing recommended laws and to neutralize the sovereignty of the legislature and thereby provoking political instability.[44] The determination to preserve parliamentary democracy informed the French demonization of judicial review and this explains the reason why Edouard Lambert reverberated his criticism for the United States' judicial review as 'government des juges'[45] The resistance for judicial review in France could be traced as far back as during the pre-revolutionary era when the ancient regime was very assiduous in local administration of laws by institutions dubbed parlements which reinforced the local monarch's authority.[46]

The parlement served as the Supreme Courts in France prior to the 'Revolution' .The continued manipulation of judicial review by the judges of the *ancient regime* led to the neutralization of the powers of judges and parliamentarism was encouraged in the post-revolution era.[47] In taking sides with the monarchy, against the will of the people, the court at the same time retarded and

[43]Aucoin L 'Judicial review in France: Access of the individual under French and European community law in the aftermath of France's rejection of bicentennial reform' (1992) 15 (2) *Boston College International and Comparative Law Review* 443-469 at 448.

[44]Aucoin L 'Judicial review in France: Access of the individual under French and European community law in the aftermath of France's rejection of bicentennial reform' (1992) 15 (2) *Boston College International and Comparative Law Review* 443-469 at 448.

[45]Lambert E *Le gouvernement des juges et la législation sociales au Etats-Unis* (1921) in Aucoin L 'Judicial review in France: Access of the individual under French and European community law in the aftermath of France's rejection of bicentennial reform' (1992) 15 (2) *Boston College International and Comparative Law Review* 443-469 at 447.

[46]Aucoin L 'Judicial review in France: Access of the individual under French and European community law in the aftermath of France's rejection of bicentennial reform' (1992) 15 (2) *Boston College International and Comparative Law Review* 443-469 at 446.

[47]Bothwell M 'Nicolo and the push to 1992- The evolution of judicial review in France' 1990 *Brigham Young University Law Review*; 1649-1665 at 1652.

powered the French Revolution.[48] Given the *ultra vires* power of the parlement, the French resorted to establish a quasi-judicial organ and not a court to rule on constitutional matters to discourage any attempt of a future gouvernement des des juges which is in conflict with the French practice of popular sovereignty.[49]

It is submitted that the rallying cries underpinning Montesquieu's works was that the powers of the judges were to be stripped and the people themselves will rule in their place.[50] One can deduce that the French distrust of the judiciary is the reason why under the Gaullist regime, the 1958 Constitution entrenched in its article 64 that the independence of the judiciary be guaranteed by the executive.[51] The parlement became the first target of abolition by the French revolution and the French have since dissociated themselves with a strong judiciary equating it with a 'government des juges'-government by judges.[52] The emergence of judicial review in the fifth French Republic's Constitution of 1958 could be informed by the executive's desire to diminish the omnicompetence of the legislature.[53]

It should be recalled that the Third and Fourth Republics were both characterized by a parliamentary system with real powers vested in the assemblies who appointed the president and to whom the Government was answerable.[54] In other words, judicial review was first introduced in France under the 1958 Constitution of the fifth French Republic which established the Constitutional Council to protect the executive from the legislature which was considered to be

[48]Bothwell M 'Nicolo and the push to 1992- The evolution of judicial review in France' 1990 *Brigham Young University Law Review*; 1649-1665 at 1651.

[49]Shapiro M 'Judicial review in France' (1989) 6 *Journal of Law & Politics* 531-548 at 543.

[50]Shapiro M 'Judicial review in France' (1989) 6 *Journal of Law & Politics* 531-548 at 543.

[51]The Constitution of the French Republic of 4 October 1958 article 64.

[52]Aucoin L 'Judicial review in France: Access of the individual under French and European community law in the aftermath of France's rejection of bicentennial reform' (1992) 15 (2) Boston *College International and Comparative Law Review* 443-469 at 447.

[53]Bell J *French constitutional law* (1992) 9.

[54]Bell J *French constitutional law* (1992) 11.

very authoritarian under the third and fourth republics.[55] The French Constitutional Council emergence is informed by the political mayhem linked with the birth of the fifth Republic in 1958.[56] The raison d'être of the Council was to limit the power of parliament to the bounds outlined by the new constitution of 1958.[57]

2.1.2 The rationale and modus operandi of judicial review in France

The coming into existence of the French Constitutional Council could be said to be an effort to circumscribe the unchecked parliamentary power in a constitutional system void of a culture of judicial review.[58]The Constitutional Council being the organ through which judicial review was ensued developed as an institution that checked if the required procedures were adhered to, and not an institution that reviewed statutes on facts.[59] The Council is not a real court but an auxiliary of the executive and does not guarantee a fully-fledged set of fundamental rights.[60] The Constitutional Council has no competence over issues of constitutionality as the United States Supreme Court for fear of the question of judicial review, since the French consider judicial review to be in conflict with democracy.[61] According to Stone, this explains the reason why de Tocqueville was alarmed when he discovered that the Americans convert every political question

[55]Fombad c 'The new Cameroonian Constitutional Council in a comparative perspective: Progress or retrogression?' (1998) 42 (2) *Journal of African Law* 172-186 at 173.

[56]Stone A *The birth of judicial politics in France: The Constitutional Council in comparative perspective* (1992) 191.

[57]Stone A *The birth of judicial politics in France: The Constitutional Council in comparative perspective* (1992) 191.

[58]Stone A *The birth of judicial politics in France: The Constitutional Council in comparative perspective* (1992) 191.

[59]Ponthoreau M-C 'What are the justifications for French judicial review? A cultural approach for a deep understanding of national justifications Conference Judicial review: why, where and for whom?' The Hebrew university of Jerusalem (2009) 1.

[60]Ponthoreau M-C 'What are the justifications for French judicial review? A cultural approach for a deep understanding of national justifications Conference Judicial review: why, where and for whom?' The Hebrew university of Jerusalem (2009) 2.

[61]Shapiro M 'Judicial review in France' (1989) 6 *Journal of Law & Politics* 531-48 at 534

into a legal question, coupled with the fact that the French do not also consider the courts as a co-equal branch of government.[62]

Judicial review is however applied only in abstract on the constitutionality of a loi than in a specific outlined context of its execution.[63] In short, judicial review is done in anticipation of circumstances yet to come.[64] Once a loi or legislation is ratified by the President of the Republic, it becomes immune from judicial review by any ordinary courts.[65]

Judicial review in France depends on the will of the opposition and their determination to refer to the Conseil Constitutionnel any loi they deem inappropriate.[66] Judicial review is most often engaged to scrutinize parliamentary standing orders with the ultimate intention of circumscribing parliament from overstepping its confines attributed by the constitution.[67]

2.2 Judicial review system in the United States of America

2.2.1 Origin of judicial review in the US

Unlike the French Constitution which expressly establishes judicial review, one of the idiosyncrasies of American Constitution is that it does not make any explicit reference to judicial review.[68] It could be traced that judicial review was anticipated way back in 1788 when *The Federalist No. 78*was published by Hamilton.[69] In the groundbreaking case of 1803 in *Marbury v. Madison*[70] which has become the locus classicus in this domain, the judges guided by the spirit of the constitution discovered judicial review amidst its unclear provisions.[71] The rationale of

[62]Stone A *The birth of judicial politics in France: The Constitutional Council in comparative perspective* (1992) 191.

[63]Shapiro M 'Judicial review in France' (1989) 6 *Journal of Law & Politics* 531-48 at 534.

[64]Shapiro M 'Judicial review in France' (1989) 6 *Journal of Law & Politics* 531-48 at 539.

[65]Bell J *French constitutional law* (1992) 55.

[66]Bell J *French constitutional law* (1992) 56.

[67]Bell J *French constitutional law* (1992) 33.

[68]Currie D *The constitution of the United States: A primer for the people* (1988) 14.

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

[70]5 U.S. (1 Cranch) 137 (1803).

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

this case reveals that the new secretary of state of President Jefferson, James Madison refused to deliver commissions to newly appointed justices of the peace of the District of Columbia, claiming that their appointments will only be complete after delivery of the commissions. Aggrieved by this outcome, Marbury and the three other appointed justices turned to the Supreme Court for an issuance of a writ of mandamus ordering delivery in the exercise of its original jurisdiction.[72]Justice Marshall observed that it was the right of every injured individual to get judicial redress. The judges had the duty to protect the rights of individuals against encroachment by government.[73]The court had executed exclusively such a function such as considering the constitutionality of section 13 of the Judiciary Act of 1789 interpreted as conferring the primary jurisdiction in court for a specific kind of judicial action known as mandamus.[74] Given the interest of the judges toward the redress of infringed individual rights, it is clear that adjudication commonly occurs in suits between individuals.[75] It is conceded that in direct challenges to official acts or omissions, the defendant is naturally a state or federal official and not actually the state.[76] Finally, the exercise of judicial review came to the fore in the United States of America in the *Marbury* case against a backdrop of serious pressure between the US Supreme Court and the two political branches of the federal government because Jeffersonian Republicans overshadowed both Congress and the Legislature, while the Federalist party appointees manned the Supreme Court and lower federal courts.[77]

2.2.2 Legitimacy and justification of judicial review in the US

> It is, emphatically, the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So, if a law be in

[72]Mason A &Beaney W *American constitutional law: Introductory essays and selected cases* (1968) 25.

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

[74]Kahn P *Legitimacy and history: Self-government in American constitutional theory* (1992) 24

[75]Vazquez C "Judicial review in the United States and in the WTO: Some similarities and differences" (2004) *George Washington International Law Revue* 587-613 at 594

[76]Vazquez C 'Judicial review in the United States and in the WTO: Some similarities and differences' 2004 *George Washington International Law Revue*; 587-613 at 594.

[77]Johnson H *American legal and constitutional history: Cases and materials* (1994) 226.

> opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case, conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of those conflicting rules govern the case: This is of the very essence of the judiciary.[78]

Chief Justice John Marshall expounded on the issue of the authority and justification of the courts to determine the constitutionality of Congressional acts by conceding that in his view all those involved in the enterprise of writing constitutions understood their action as forming the fundamental and supreme law of the nation. By this same token, an act of the legislature which was repugnant to the constitution rendered the act of the former unconstitutional.[79] The Constitution is seen here as the basis of authority and legitimacy of judicial review and not the executive or Congress.

Even though the Constitution expressly confers power on Congress to effectuate 'exceptions' to the Supreme Court's appellate jurisdiction without anticipating lower federal courts at all; given that it vests judicial power exceptionally in the Supreme Court and other inferior courts ordained and established by Congress from time to time, Congress may not however go to the extent of circumscribing the jurisdiction of the courts to require judges to execute statutes which were unconstitutional.[80] Judicial review and its execution by the courts has therefore become an accepted feature of American government.[81]

In this vein, it has been conceded that the second majoritarian model, which emphasizes inter-branch conflict, are not aware of the fact that judicial review was generally welcomed among politicians during the early Republic, including presidents like Jefferson and Jackson, who have too often been linked with democratic purists unsympathetic with judicial review.[82] In the same breathe; majority tyranny would not be easily dismantled by mere popular resistance.[83] It must be understood that the power to validate or nullify legislation was not a discretionary power of the judges or even a usurped power of another

[78]Mason A &Beaney W *American constitutional law: Introductory essays and selected cases* (1968) 27.

[79]Currie D *The constitution of the United States: A primer for the people* (1988) 16.

[80]Currie D *The constitution of the United States: A primer for the people* (1988) 23.

[81]Perry M *The constitution in the courts: Law or politics*? (1994) 24 & 26.

[82]Engel S 'Before the counter majoritarian difficulty: Regime unity, loyal opposition, and hostilities toward judicial authority in early America' 2009 *Studies in American Political Development*; 189-217 at 190.

[83]Engel S 'Before the counter majoritarian difficulty: Regime unity, loyal opposition, and hostilities toward judicial authority in early America' 2009 *Studies in American Political Development*; 189-217 at 194.

government branch, but rather a power resulting from the constitution of their office as judges, intended for the benefit of the whole people and not as mere servants of the Assembly.[84]In a nutshell, it is clear that judicial review's democratic justification reposes on the framers' transfer of sovereignty from the legislature into the hands of the people themselves.[85]

In the next section, I demonstrate how absolute presidential powers and manipulated popular democracy in Cameroon have unconstitutionally thwarted citizenry enjoyment of fundamental rights in light of controversial constitutional amendments, emergency law and human rights or untrammeled powers of the president.

3.0 THE PRACTICE OF MAJORITARIAN DEMOCRACY UNDER A PRESIDENTIALIST REGIME IN CAMEROON

3.1 Presidential absolutism in Cameroon

Since the reunification of Cameroon in 1961, the country has had only two executives: Ahmadou Ahidjo and Paul Biya who have both exercised absolute control over the judiciary[86] and the Legislature has been no more than a malleable institution which simply rubber stamps what Government presents before it.[87] Anyangwe calls the Legislature "a hand clapping chambers and a mere extension of the executive, that executive being the President himself."[88] It is submitted that Mr. Tasi, an erstwhile opposition Member of Parliament made it emphatically clear that the National Assembly in Yaounde is nothing but an extension of the President's office and there even exists a ministry at the Presidency under which the Assembly

[84]Engel S 'Before the counter majoritarian difficulty: Regime unity, loyal opposition, and hostilities toward judicial authority in early America' 2009 *Studies in American Political Development*; 189-217 at 94.

[85]Engel S 'Before the counter majoritarian difficulty: Regime unity, loyal opposition, and hostilities toward judicial authority in early America' 2009 *Studies in American Political Development*; 189-217 at 94.

[86]Mbaku J 'The separation of powers, constitutionalism and governance in Africa: The case of modern Cameroon' (2013) *http://works.bepress.com/john_mbaku/7* (accessed on 25/06/2013) 50.

[87]Fombad CM 'Cameroon introductory notes' (2013) *web.up.ac.za/sitefiles/file/47/15338/Cameroon Constitution.final.pdf.* (accessed 25/07/2013) 16.

[88]Anyangwe C *Imperialistic politics in Cameroon: Resistance & the inception of the restoration of the statehood of Southern Cameroon* (2008) 46.

falls.[89] The head of that ministry is called Ministre Délégué a la Présidence charge des Relations avec les Assemblées.[90] This minister is well known to be the President's eyes and ears in Parliament.[91] In my opinion, there exist therefore only one power in Cameroon and that is the executive power which is all powerful and the President of the Republic wields the reins of power absolutely.

The Federal Constitution of 1961 in its part ii confers the power to ensure respect for the federal constitution, the integrity of the federation and responsibility over the conduct of the affairs of the federal Republic in the hands of the President Head of the Federal state, who also doubles as head of the Federal Government.[92] In addition to this, in art 11, he is empowered to appoint and dismiss ministers and deputy ministers. In art 12 he is attributed a wide range of prerogatives and also powers to ratify treaties, accredit diplomats, represent the Federation in public affairs and promulgate law.[93] In fact the powers of the President are so enormous and cross cutting.

According to art 5 of the Constitution of the United Republic of Cameroon of 1972, aside other vast and sweeping powers conferred on the president of the Republic, he is also a monocephal executive in the absence of a prime minister; he is at the same time head of state and head of Government.[94] Powers are concentrated in the hands of the president and he is not responsible to parliament.[95]

The constitution of 1996 attributes over bearing powers to the President of the Republic to the extent that he exerts influence over every sphere of the state since art 51 of that Constitution grants the President of the Republic the power to appoint members of the Constitutional Council which is the organ that determines the constitutionality of laws[96], to guarantee the independence of the judiciary[97] . This amounts

[89]Anyangwe C *Imperialistic politics in Cameroon: Resistance & the inception of the restoration of the statehood of Southern Cameroon* (2008) 46.

[90]In English it means; Minister Delegate at the Presidency in charge of relations with Parliament.

[91]Anyangwe C *Imperialistic politics in Cameroon: Resistance & the inception of the restoration of the statehood of Southern Cameroon* (2008) 46.

[92]The Federal Constitution of 1961 art 8 (1).

[93]The Federal Constitution of 1961 art 12.

[94]Tamfu YN *Constitutional law and political systems* (1998) 78. And art 5 of the Constitution of the United Republic of Cameroon of 1972.

[95]Tamfu YN *Constitutional law and political systems* (1998) 78.

[96]Mbaku J 'The separation of powers, constitutionalism and governance in Africa: The case of modern Cameroon' (2013) *http://works.bepress.com/john_mbaku/7* (accessed 25/06/2013) 14.

[97]Art 37 (3) of the Cameroon Constitution of 1996.

to mere rhetoric given that the guarantee of that independence is effected through appointment of judges, their promotion and disciplining and these appointees can therefore not be independent of the President's influence.[98] The same Constitution of 1996 fortifies the Gaullist system which was introduced by the 1972 Constitution, evidenced by the establishment of an imperial presidency.[99] The absolutism of the President of the Republic could be discerned by his power to appoint almost all who serve in the government beginning from heads of parastatals to the prime minister and cabinet ministers, he can appoint and dismiss members of the judiciary, the military, other institutions within the country, can veto laws passed by the Legislature and has total control over all state institutions.[100]

Presidential absolutism in Cameroon is even made more conspicuous by the fact that separation of powers has meant little more than a reinforced and unhampered executive and as de facto leader of the legislature, the President has personally introduced almost all bills in parliament.[101] Art 47 (2) of the Constitution equally circuitously elects the President of the Republic to be the only person capable of referring matters or a dispute to the Constitutional Council.[102] Since independence, presidents have governed Cameroon to a great extent by Presidential decrees and laws of 'exception'.[103] The Constitution empowers the President with unchecked or discretionary powers as he can declare a state of emergency through a decree[104] and a state of siege as well by decree and decides all by himself what measures he deems necessary to salvage the situation.[105] The fact that he is accorded the discretion to decide as he deems fit implies that no legislative or judicial oversight shall be applied. Finally, the President of the Republic appoints the members of the National Elections Observatory and does not have to consult with

[98]Fombad C 'Judicial power in Cameroon's amended constitution of 18 January 1996' (1996) 9 (2) *Lesotho Law Journal*1-11 at 8.

[99]Mbaku J 'The separation of powers, constitutionalism and governance in Africa: The case of modern Cameroon' (2013) *http://works.bepress.com/john_mbaku/7* (accessed 25/06/2013) 43.

[100]Mbaku J 'The separation of powers, constitutionalism and governance in Africa: The case of modern Cameroon' (2013) *http://works.bepress.com/john_mbaku/7_at 43* (accessed 25/06/2013) 43, 50.

[101]Fombad C 'The new Cameroonian Constitutional Council in a comparative perspective: Progress or retrogression?' (1998) 42 (2) *Journal of African Law* 172-86 at 179.

[102]The Constitution of Cameroon of 1996.

[103]Eyinga A 'France in Cameroon' in Joseph R Gaullist Africa: Cameroon under Ahmadu Ahidjo (1978) 8.

[104]The Constitution of Cameroon of 1996 art 9 (1).

[105]The Constitution of Cameroon of 1996 art 9 (2).

other political parties, civil society and there is no provision for such under Cameroonian law.[106] In fact the degree of presidential absolutism in Cameroon could be compared to water allowed to leak from a cistern.

3.2 Majoritarian democracy in Cameroon

The concept of democracy has not been well understood or appreciated by contemporary African leaders and the idea of citizenship has constantly been more associated with kingship than with territory.[107] It has been argued that the hatred for multi-partysim or opposition to government in Africa and by extension Cameroon was a relic of the colonial policy which had a penchant for a kind of monarchial republic, in the Fifth French Republic with an overbearing executive and a powerless parliament.[108] The implication is that no foundation for democratic rule was laid; rather the framework for authoritarianism was bequeathed to the colonies at independence.[109]

The hatred for opposition could be explained by the fact that Ahidjo, Cameroon's first independence president did not feel comfortable in a Federation replete with a plethora of political parties especially in West Cameroon.[110] 1962 to 1966 were a prelude to the creation of a single national party and the creation of a unitary state in Cameroon which finally saw the light of day in 1972.[111]It is also conceded that there was a growing ideology in Africa that opposition represents a vehicle of disunity and therefore not part of a democratic system.[112] This belief and attitude had survived into the independence polity in Cameroon through the institution of a single party system but most especially by the way the electorates were

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[106]Fombad C 'Cameroon's 'National Elections Observatory' and prospects of constitutional change of government' in Columbus F (ed) 3 *Politics & Economics of Africa* (2002) 84 n 40.

[107]Busia KA *Africa in search of democracy* (1967) 19.

[108]Busia KA *Africa in search of democracy* (1967) 51.

[109]Busia KA *Africa in search of democracy* (1967) 51.

[110]There existed political parties such as the KNDP, CPNC and UC. Konings P &Nyamnjoh F *Negotiating an Anglophone identity: A study of the politics of recognition and representation in Cameroon* (2003) 58.

[111]Konings P &Nyamnjoh F *Negotiating an Anglophone identity: A study of the politics of recognition and representation in Cameroon* (2003) 66.

[112]Konings P &Nyamnjoh F *Negotiating an Anglophone identity: A study of the politics of recognition and representation in Cameroon* (2003) 101.

disenfranchised of their votes by the incumbent leaders.[113] In order for Ahidjo to tighten his grip on power in Cameroon as the chief executive in 1960, he resorted to manipulation of the 1960 Referendum.[114] He was also able to win the future parliamentary elections later in April that same year by promulgating new electoral laws which served to gerrymander the circumscription of the elections.[115]

In the 1972 Referendum to form a unitary state from West Cameroon (Anglophone) and East Cameroun (Francophone), fear overpowered most Anglophones to express their true interest in the elections.[116] The ballots were hardly secret and elections result was a forgone conclusion.[117] In some regions, the 'NO' ballots to deny support of the draft constitution were not provided and only the 'YES' ballots were provided. The Referendum was entirely stage-controlled by party stalwarts.[118] Ultimately, there was a victory of 99.999 per cent 'YES' in favour of the unitary constitution.[119] The results of the election was fiercely contested by the Anglophone community and ridiculed the entire exercise as a sham process which merely required an option between 'Yes' and 'Oui'[120] One significant issue about elections in Cameroon is that their results are always a manifestation of the regime's autocratic will or nature than the

[113]Bayart J 'The birth of the Ahidjo regime' in Joseph R (ed) *Gaullist Africa: Cameroon under Ahmadu Ahidjo* (1978) 57.

[114]Bayart J 'The birth of the Ahidjo regime' in Joseph R (ed) *Gaullist Africa: Cameroon under Ahmadu Ahidjo* (1978) 57.

[115]Bayart J 'The birth of the Ahidjo regime' in Joseph R (ed) *Gaullist Africa: Cameroon under Ahmadu Ahidjo* (1978) 57.

[116]Anyangwe C *Imperialistic politics in Cameroun: Resistance & the inception of the restoration of the statehood of Southern Cameroons* (2008) 110.

The Anglophone Cameroonians found themselves in an inferior position to bargain, because they were simply absorbed into the already existing French Cameroun polity by Ahidjo. Therefore, the Federal Constitution was an annexationist document, a mere amendment of the 1960 Constitution of La Republique du Cameroun which was modeled on the Fifth French Republic's Constitution of 1958.

[117]Anyangwe C *Imperialistic politics in Cameroun: Resistance & the inception of the restoration of the statehood of Southern Cameroons* (2008) 110.

[118]Anyangwe C *Imperialistic politics in Cameroun: Resistance & the inception of the restoration of the statehood of Southern Cameroons* (2008) 110.

[119]Anyangwe C *Imperialistic politics in Cameroun: Resistance & the inception of the restoration of the statehood of Southern Cameroons* (2008) 110.

[120]Anyangwe C *Imperialistic politics in Cameroun: Resistance & the inception of the restoration of the statehood of Southern Cameroons* (2008) 110. 'Oui' means 'Yes'.

Cameroonian population's democratic support[121]. I therefore agree with Fombad that even though elections are essential, they neither constitute the only means nor the exclusive end of democracy.[122]

The problem with elections as a means to achieving democracy in Cameroon is that the National Elections Observatory (NEO) renders the play field very slippery that the possibility for manipulation and distortion of the electoral process cannot be overlooked.[123] The government of Cameroon made a mockery of democracy given that the predecessor of NEO was the Ministry of Territorial Administration (MINAT) and considered partisan as it is a branch of the ruling regime. In order to give the impression that Government was no longer in charge of elections, NEO was created as an Elections Monitoring Body (EMB). It had to be independent, impartial and professional to sundry political parties.[124] However, controversy becomes apparent with section 3 (1) of the NEO code which designates the President of the Republic as the exclusive person to appoint its members.[125] It cannot be overemphasized that any such appointee will be one that the president is sure will do his bidding given, that maximum incentives reserved for the appointees that cooperate with the president.[126] This apparent reconversion of the old habits into the new institution simply means that the jettisoning of MINAT in preference of NEO has simply paled into insignificance.[127]

Given the already existing stalled democratic transitions from 1961 with a federal constitution to 1972 when a unitary constitution was ushered in and 1992 when irregular elections were conducted by

[121]Konings P &Nyamnjoh F *Negotiating an Anglophone identity: A study of the politics of recognition and representation in Cameroon* (2003) 65.

[122]Fombad C 'Cameroon's National Elections Observatory and the prospects of constitutional change of government' in Columbus F (ed) *Politics & Economics of Africa* 3 (2002) 71.

[123]Fombad CM 'Cameroon's National Elections Observatory and the prospects of constitutional change of government' in Columbus F (ed) *Politics & Economics of Africa* 3 (2002) 85.

[124]Fombad C 'Cameroon's National Elections Observatory and the prospects of constitutional change of government' in Columbus F (ed) *Politics & Economics of Africa* 3 (2002) 87.

[125]Fombad C 'Cameroon's National Elections Observatory and the prospects of constitutional change of government' in Columbus F (ed) *Politics & Economics of Africa* 3 (2002) 86.

[126] Fombad C 'Cameroon's National Elections Observatory and the prospects of constitutional change of government' in Columbus F (ed) *Politics & Economics of Africa* 3 (2002) 86.

[127]Fombad C 'Cameroon's National Elections Observatory and the prospects of constitutional change of government' in Columbus F (ed) *Politics & Economics of Africa* 3 (2002) 85.

President Biya[128], 1996 was yet another period when democracy was brought into disrepute, on the account that the 1996 constitutional amendment was an absolute parody of a citizen-driven process.[129] The process to draft a new constitution started in 1991 when a Technical Committee on Constitutional Matters (TCCM) was set up to design the framework of a 'new' constitution.[130]After going through two stages, in the third and last stage, it was no longer a matter of drafting a new constitution but one of merely amending the 1972 constitution grounded on a proposal from the President.[131] The draft constitution was tabled before parliament at the eleventh hour during an extraordinary session which took place in November 1995.[132] The President promulgated the final constitution on 18 January 1996 as 'Law No. 06 of 18 January 1996 to amend the constitution of 2 June 1972'.[133] The outcome of such a constitutional travesty was that the pre-1996 highly centralized autocratic regime with extensive powers conferred on the president was further reinforced and the creation of an imperial presidency, a feeble legislature and an emasculated judiciary with 'judicial power' for the first time, although nominal in reality.[134]

It is quite conspicuous that the enormous and untrammeled powers conferred on the president are incompatible with the intention of establishing a constitutional democracy.[135] It is therefore right to say that in two consecutive regimes where elections rigging and gerrymandering have become an endemic culture, there is no doubt that majoritarian democratic claims of all ruling parties in Cameroon – two so

[128]Fombad C 'Cameroon's National Elections Observatory and the prospects of constitutional change of government' in Columbus F (ed) *Politics & Economics of Africa* 3 (2002) 72.

[129]Fombad C 'Cameroon's troubled democratic transition and the deconstruction of the federalist problematic' in Columbus F (ed) *Politics & Economics of Africa* 3 (2002) 53.

[130]Fombad C 'Cameroon's troubled democratic transition and the deconstruction of the federalist problematic' in Columbus F (ed) *Politics & Economics of Africa* 3 (2002) 52.

[131]Fombad C 'Cameroon's troubled democratic transition and the deconstruction of the federalist problematic' in Columbus F (ed) *Politics & Economics of Africa* 3 (2002) 53.

[132]Fombad C 'Cameroon's troubled democratic transition and the deconstruction of the federalist problematic' in Columbus F (ed) *Politics & Economics of Africa* 3 (2002) 53.

[133]Fombad C 'Cameroon's troubled democratic transition and the deconstruction of the federalist problematic' in Columbus F (ed) *Politics & Economics of Africa* 3 (2002) 53.

[134]Fombad C 'Cameroon's troubled democratic transition and the deconstruction of the federalist problematic' in Columbus F (ed) *Politics & Economics of Africa* 3 (2002) 54.

[135]Fombad C 'Cameroon's troubled democratic transition and the deconstruction of the federalist problematic' in Columbus F (ed) *Politics & Economics of Africa* 3 (2002) 54.

far, are an ostensible creation of the incumbent regimes. It is against such a backdrop that majoritarian democracy under a regime of presidential absolutism in Cameroon should be understood.

3.3 Antipathy toward judicial review in a majoritarian democracy

The argument advanced by most proponents of majoritarian democracy justifying their onslaught on judicial review is the view that judicial review establishes jurisdiction by an unrepresentative few of an elected majority,[136] or the democratic deficit or counter-majoritarian nature of judicial review. In the subsequent paragraphs, I react to this assertion by first of all opining that democracy is like a horse gone crazy if not restrained[137] and only judicial review serves as its bridle. I substantiate my opinion by drawing from Butle Ritchie's view that contrary to the view of Robert Dahl, who holds that democracy and constitutionalism are contradictory concepts,[138] it should rather be understood, as vehemently delineated by Habermas that they are 'co-original.'[139] The two concepts are complementary but for the fact that for democracy to be dispensed, sets of institutions through which the will of the people can be yoked should be allocated, and for this reason, constitutionalism intervenes to truncate the unbridled nature of democracy by its restrictive and limited notions.[140]

3.1.1 Judicial review as original constituent power

In this part of the paper, I articulate the view that judicial review is not counter-majoritarian and therefore required as a matter of urgency to be objectively implemented in Cameroon's judicial system against the mere façade it has hitherto been. As my point of departure, I establish a clear demarcation between the representatives of the sovereign and the sovereign themselves. I refer here to the vaunted nature of the democratic majority who rely excessively on the will of the representatives as power of the majority to

[136]Garvey J & Aleinikoff T *Modern constitutional theory: A reader* (1989) 12.

[137]Vile M *Constitutionalism and the separation of powers* (1967) 182.

[138]Butle Ritchie D 'The confines of modern constitutionalism' (2004-2005) 1 *Pierce Law Revue* 1-32 at 28.

[139]Butle Ritchie D 'The confines of modern constitutionalism' (2004-2005) 1 *Pierce Law Revue* 1-32 at 28.

[140]Butle Ritchie D 'The confines of modern constitutionalism' (2004-2005) 1 *Pierce Law Revue* 1-32 at 27.

demonize judicial review, rather than the will of the people as the original constituent power.[141]It is submitted that the representatives are not sovereign, they have only been delegated the powers[142] and the review of legislative or governmental acts, conducted by an independent tribunal, respecting the limitations set out by governmental instrument, is the people's own means through which the power they entrusted to their elected representatives is controlled.[143]

Moreover, where the government in place is a minority government as was the case with pre-1994 South Africa and Rhodesia, the counter-majoritarian argument is defeated and judicial review strives.[144] With such repressive minority governments in place, the need and importance of the checking function of judicial review becomes indispensable as the disenfranchised individual's sole avenue for actual participation in government.[145] The South African constitutional crisis of 1952 is an example par excellence of this notion.[146]

4.0 THE ENDS OF IMPLEMENTING AN OBJECTIVE JUDICIAL REVIEW MECHANISM IN THE CAMEROONIAN JUDICIAL SYSTEM

In this section, I refer to the myriad irregularities underpinning majoritarian democracy and presidential absolutism in this paper as flaws caused by presidential absolutism and ostensible majoritarian democracy in Cameroon. The most eminent question that would come up with regard to judicial review at this juncture is; what would the objective implementation of a judicial review mechanism change in the present Cameroonian polity? There are three indispensable issues that the mechanism has the clout to address. Controversial constitutional amendment bills, emergency law and human rights and elections.

4.1 Controversial constitutional amendments

[141]Ponthoreau M-C "What are the justifications for French judicial review? A cultural approach for a deep understanding of national justifications" Conference "Judicial review: why, where and for whom?" The Hebrew university of Jerusalem (2009) 4.

[142]Ponthoreau M-C 'What are the justifications for French judicial review? A cultural approach for a deep understanding of national justifications Conference Judicial review: why, where and for whom?' The Hebrew university of Jerusalem (2009) 6.

[143]Nwabueze O *Judicialism in commonwealth Africa* (1967) 231.

[144]Nwabueze O *Judicialism in commonwealth Africa* (1967) 236.

[145]Nwabueze O *Judicialism in commonwealth Africa* (1967) 236.

[146]Nwabueze O *Judicialism in commonwealth Africa* (1967) 236.

It is submitted that a constitution would be most effective; as long as the mechanism entrenched for ensuring its proper implementation and its violation are regularly sanctioned.[147] With this same token, two fundamental issues underpin modern constitutionalism vis-à-vis its citizens such as: limitations imposed on the state and a clear provision for mechanisms for the legal enforceability of such limitations.[148] Given that amendment of the constitution is one of the control mechanisms of the constitution, the constitution being the will of the people, if allowed to be easily, casually, carelessly by subterfuge amended, then the will of the people will be whitewashed and the whole purpose of a constitution serving as a restrain on governmental power shall be watered down and the prospects of genuine constitutionalism shall be diminished.[149]

Yet Article 30 (2) paragraph 3 of the Constitution provides that 'No amendment shall be admissible, except with the approval of the President of the Republic.[150] Generally, amendments to the constitution may be proposed by the President of the Republic, Parliament or a member of parliament.[151] However, the conditions allowed for the latter two options to comply with the requirement to propose an amendment are very rigid, leaving only the President of the Republic to qualify.[152] The President's party being the

[147]Fombad C 'The new Cameroonian Constitutional Council in a comparative perspective: Progress or retrogression?' (1998) (42) 2 *Journal of African Law* 172-186 at 175.

[148]Fombad C 'Limits on the powers to amend constitutions: Recent trends in Africa and their potential impact on constitutionalism' (2007) http://www.enelsyn.gr/papers/w9/paper%20by%Prof%Charles%20Fombad.pdf (accessed 30/07/2013) 20.

[149]Fombad C 'Limits on the powers to amend constitutions: Recent trends in Africa and their potential impact on constitutionalism' (2007) http://www.enelsyn.gr/papers/w9/paper%20by%Prof%Charles%20Fombad.pdf (accessed 30/07/2013) 20.

[150]The Constitution of Cameroon of 1996.

[151]Fombad C 'Limits on the powers to amend constitutions: Recent trends in Africa and their potential impact on constitutionalism' (2007) *http://www.enelsyn.gr/papers/w9/paper%20by%Prof%Charles%20Fombad.pdf* (accessed 30/07/2013) 9.

[152]Fombad C 'Limits on the powers to amend constitutions: Recent trends in Africa and their potential impact on constitutionalism' (2007) *http://www.enelsyn.gr/papers/w9/paper%20by%Prof%Charles%20Fombad.pdf* (accessed 30/07/2013) 9.

majority party has 152 seats in Parliament out of the 180 seats, leaving the opposition a negligible 28 seats.[153] This has two implications. First, this means without any secondary thought that the party qualifies in any case as a majority, absolute majority or super majority as the case may require. According to the three possibilities required as majority to approve amendments, beginning from the first which requires an absolute majority of both house of parliament meeting in congress, to the instant where when the president requires a second reading, then the approval of 2/3 majority of members of Parliament is needed, or just avoiding parliament all together by submitting the bill to a referendum,[154] the President's party with 152 seats out of 180 still qualifies in any case, given that the last provision is only a choice or an option. Secondly, once the party has had the required majority to amend the constitution, any decision to be taken regarding morality with respect to the implication of the amendment only belongs to the party to decide and not for an individual member of parliament to oppose a decision of the party on the basis of ethics or morality.[155]

To put it in more explicit terms, Paul Abine was a parliamentary member of the Cameroon's People Democratic Movement (CPDM). In such a capacity, he is required to adhere to party discipline in whatever resolution the party comes up with regardless of the content. Having a dissenting voice against the decision taken by the party to amend the Constitution in 2008 to allow the incumbent President to extend his term of office was considered a threat by the other CPDM parliamentarians.[156] He then summarily tabled his resignation.[157] In his opinion it was immoral for him to engage in such a travesty

[153]BBC News Africa 'Big win for Cameroon's ruling party' *news.bbc.co.uk/2/hi/Africa/6913281.stm* (accessed 5/8/2013).

[154]Fombad C "Limits on the powers to amend constitutions: Recent trends in Africa and their potential impact on constitutionalism" (2007) *http://www.enelsyn.gr/papers/w9/paper%20by%Prof%Charles%20Fombad.pdf* (accessed 30/07/2013) 9.

[155]Leger Ntiga Assemblée National: Pour quoi Ayah Paul Abine a jeté l'éponge (National Assembly: Why Ayah Paul Abine dropped the sponge) *http://www.mediaf.org/fr/themes/fiche.php?itm=3328&md=&thm=2* (accessed 28/7/2013).

[156]Leger Ntiga Assemblée National: Pour quoi Ayah Paul Abine a jeté l'éponge (National Assembly: Why Ayah Paul Abine dropped the sponge) *http://www.mediaf.org/fr/themes/fiche.php?itm=3328&md=&thm=2* (accessed 28/7/2013).

[157]Leger Ntiga Assemblée National: Pour quoi Ayah Paul Abine a jeté l'éponge (National Assembly: Why Ayah Paul Abine dropped the sponge) *http://www.mediaf.org/fr/themes/fiche.php?itm=3328&md=&thm=2* (accessed 28/7/2013).

enterprise against the will of the people of Cameroon. Yet the incumbent regime is more interested in party politics than the desires of the people.[158] The opposition held that 'the whole issue is a complete fraud. We do not want to legitimize it by taking part in it' so the opposition members walked out of parliament.[159] In such a circumstance, an objective implementation of the judicial review mechanism by an appropriate court will strike down such a controversial amendment bill in the name of the people.[160]

Rousseau postulated in *The Social Contract* that even though government is vested with the duty of application and implementation of the law to precise circumstances, all law-making authority ultimately belonged to the people themselves.[161] If this view of Rousseau is correct, then the constitutional amendment of 2008 which was against the desire of the people of Cameroon was unconstitutional.[162] The incumbent President Paul Biya wanted to amend the constitutional to extend his 26 years rule over Cameroon to an unlimited term in office; thus the old article 6 (2) said 'The President of the Republic shall be elected for a term of office of 7 years. He shall be eligible for re-election once.'[163] After amendment, the same article read thus 'The President of the Republic shall be elected for a term of 7 years. He shall be eligible for re-election.' This amendment was going to remove the term limits of the President. This sent the people of Cameroon on rampage and the regime ruthlessly quelled the spasmodic uprisings killing about 100 people.[164] A revolt by the people of Cameroon is synonymous with non-approval of the amendment. If the people themselves have to ultimately take the finally decision as per

[158]Leger Ntiga Assemblée National: Pour quoi Ayah Paul Abine a jeté l'éponge (National Assembly: Why Ayah Paul Abine dropped the sponge) *http://www.mediaf.org/fr/themes/fiche.php?itm=3328&md=&thm=2* (accessed 28/7/2013).

[159]Ross W BBC West Africa correspondent, Cameroon makes way for a king, *http://news.bbc.co.uk/1/hi/world/africa/7341358.stm* (accessed 30/07/2013).

[160]Nwabueze O *Judicialism in commonwealth Africa* (1967) 231

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

[162]Musa T Cameroon activists say *riots* kill more than 100, *http://www.reuters.com/article/worldNews/idUSL0521512320080305?pageNumber=2&virtualBrandChannel=0* (accessed 30/07/2013).

[163]The Constitution of Cameroon of 1996 article 6 (2).

[164]Musa T Cameroon activists say riots kill more than 100, *http://www.reuters.com/article/worldNews/idUSL0521512320080305?pageNumber=2&virtualBrandChannel=0* (accessed 30/07/2013).

Rousseau,[165] then the 2008 amendment was an arbitrary one. This arbitrary action was only possible as a result of the lack of a genuinely implemented judicial review mechanism which will act on behalf of the people as their own voice.[166]

The parliamentarians of the CPDM party are using their absolute majority in parliament of 152 members out of the 180[167] members in parliament as leverage to engage in arbitrary action which leads to political delinquency.[168] Yet it is posited that 'at the heart of Dicey's faith in parliamentary sovereignty was his belief that English gentlemen would pass morally acceptable laws'.[169] The conduct of CPDM parliamentarians does not in any way live to the expectation of Dicey's belief. Pushing for a constitutional amendment which is contrary to the will of the people makes the parliamentarians morally irresponsible, if Dicey's analysis are to be followed. An absolute majority by the CPDM party implies parliamentary sovereignty in Cameroon in the absence of a genuinely implemented judicial review mechanism. Given that the supreme law in Cameroon is the Constitution,[170] the need to implement a genuine judicial review mechanism to strike down an unconstitutional amendment like the one of 2008,[171] cannot be overemphasized.

4.2 Emergency law

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

[166]Nwabueze O *Judicialism in commonwealth Africa* (1967) 231.

[167]BBC News Africa 'Big win for Cameroon's ruling party' news.bbc.co.uk/2/hi/Africa/6913281.stm (accessed 5/8/2013).

[168]Ntiga L Assemblée National: Pour quoi Ayah Paul Abine a jeté l'éponge (National Assembly: Why Ayah Paul Abine dropped the sponge) *http://www.mediaf.org/fr/themes/fiche.php?itm=3328&md=&thm=2* (accessed 28/7/2013).

[169]Dicey A *Introduction to the study of the law of the Constitution*, 10 ed (1959) 91, 128.

[170]Enonchong A *Cameroon constitutional law: Federalism in a mixed common-law and civil-law system* (1967) 21-22.

[171]Ross W BBC West Africa correspondent, Cameroon makes way for a king, *http://news.bbc.co.uk/1/hi/world/africa/7341358.stm*

The raison d'être for the emergency law is misconstrued in Cameroon by those who apply it given that they rather use it as a solution to target any opposition to the regime.[172] During most of the period when the emergency law was enforced, there was constant disregard for the rule of law and recurrent human rights violation extending from 1958 when the first state of emergency was implemented until 1992.[173] Yet, it should be understood that focus on stress situations will reveal that in confronting certain contemporary threats, the reinforcement of constitutional rights and not their restriction in the search for maximum security would be best poised in a number of circumstances to protect and strengthen democracy.[174] In other words, the state of emergency is not synonymous with discretionary and prerogative powers for the public good without reference to the law, or sometimes even against the law.[175] The duty of the executive to act within the law even in times of emergency was stressed by Justice Day O'Connor that a 'state of war is not a blank check for the President' after George Bush had asserted that he had unchecked and unilateral authority to indefinitely lock up any person he declared an 'enemy combatant' in the 'global war on terrorism'.[176]

With such an idea of unchecked powers at the back of the mind of the mind of the executive, it is challenging to evoke the argument or theory that judges, as exponents of morality, may strike down acts of parliament.[177] Dicey was clear that whenever there was conflict between legislative supremacy in making law and judicial supremacy in interpreting law, the former will rule.[178] The implementation of an objective and genuine judicial review becomes paramount in Cameroon in

[172]Fombad C 'Cameroon's emergency powers: A recipe for constitutional dictatorship?' (2004) 10 (2) *East African Journal of Peace & Human Rights* 274-93 at 274.

[173]Fombad C 'Cameroon's emergency powers: A recipe for constitutional dictatorship?' (2004) 10 (2) *East African Journal of Peace & Human Rights* 274-93 at 274.

[174]Rosenfeld M 'Should constitutional democracies redefine emergencies and the legal regimes suitable for them?' in Sarat A (ed) *Sovereignty, Emergency, Legality* (2010) 240.

[175]Sarat A 'Introduction: Toward new conceptions of the relationship of law and sovereignty under conditions of emergency' in Sarat A (ed) *Sovereignty, Emergency, Legality* (2010) 1.

[176]Sarat A 'Introduction: Toward new conceptions of the relationship of law and sovereignty under conditions of emergency' in Sarat A (ed) *Sovereignty, Emergency, Legality* (2010) 1.

[177]DyZenhaus D *The constitution of law: Legality in a time of emergency* (2006) 54.

[178]DyZenhaus D *The constitution of law: Legality in a time of emergency* (2006) 54.

this perspective because given the crushing majority of the CPDM ruling party in Cameroon,[179] a bill which gives the President irresponsible and unchecked powers in a state of emergency will succeed.

Two issues account for the difficulty in implementing judicial review in its present state in times of a state of emergency in Cameroon. First, the Constitution of Cameroon has emasculated the powers of the Legislature and the judiciary and rigged them of any clout to judge or evaluate the validity of the declaration of a state of emergency.[180] The process of defining the scope of the emergency control over the constitutionality of laws for judicial review is implemented by a quasi-judicial organ-Constitutional Council before whom matters can only be brought by a restricted group of people.[181] These restricted groups of people are even further circuitously reduced to one person and this person happens to be the same person in whose hands the power to use the emergency law without supervision is granted.[182] It would therefore be illogical to believe that they will challenge the wrong acts they themselves committed.[183]

Secondly, the Cameroonian legal system has had heavy French influence, where two distinct court jurisdictions exist.[184] There exists a jurisdiction of ordinary courts which deals with criminal matters while a separate system exist exclusively for administrative matters.[185] As a result of this rigid separation of courts, state of emergency matters is considered administrative

[179]BBC News Africa 'Big win for Cameroon's ruling party' *news.bbc.co.uk/2/hi/Africa/6913281.stm* (accessed 5/8/2013).

[180]Fombad C 'Cameroon's emergency powers: A recipe for constitutional dictatorship?' (2004) 10 (2) *East African Journal of Peace & Human Rights* 274-93 at 288.

[181]Fombad C 'Cameroon's emergency powers: A recipe for constitutional dictatorship?' (2004) 10 (2) *East African Journal of Peace & Human Rights* 274-93 at 289.

[182]Fombad C 'Cameroon's emergency powers: A recipe for constitutional dictatorship?' (2004) 10 (2) *East African Journal of Peace & Human Rights* 274-93 at 289.

[183]Fombad C 'Cameroon's emergency powers: A recipe for constitutional dictatorship?' (2004) 10 (2) *East African Journal of Peace & Human Rights* 274-93 at 289.

[184]Fombad C 'Cameroon's emergency powers: A recipe for constitutional dictatorship?' (2004) 10 (2) *East African Journal of Peace & Human Rights* 274-93 at 289.

[185]Fombad C 'Cameroon's emergency powers: A recipe for constitutional dictatorship?' (2004) 10 (2) *East African Journal of Peace & Human Rights* 274-93 at 289.

and fall under the jurisdiction of the conseil d'état which is exercised by the administrative bench of the Supreme Court.[186] The Supreme Court itself is far from being an independent body, but one that acts as an agent of the incumbent government in Yaounde.[187] This stratification implies that judicial review cannot be exercised because as it is understood under the doctrine of voie des faits, even in the face of blatant administrative excesses; these cannot be subjected to the jurisdiction of the ordinary courts.[188]

In 1992 Paul Biya was declared winner of the presidential elections under very controversial circumstances, although the Supreme Court actually outlined the various irregularities involved in the polls, it however declared it had no powers to adjudicate on them.[189] The conduct of the Supreme Court in this matter revealed that it cannot be trusted because it has proven to be an ally of the executive. Only a genuine implementation of a judicial review mechanism exercisable by an independent judiciary will objectively evaluate to determine the validity of any declaration of a state of emergency by the executive and its effects.

I refer to an independent judiciary above for the sake of implementing a genuine judicial review because between 1959 and 1970 judges had become instead agents and justifiers of the repressive regime.[190] State of emergency was used by the first independence President Ahmadu Ahidjo to fight his political opponents by passing the draconian legislation dubbed ordonnance 62/OF/18 of 12 March, 1962 on the 'repression of subversion'.[191] He equally made it plain in laws and decrees since then, that judgments passed by tribunals touching on the repression of

[186]Yanou M 'The local courts, decentralisation and good governance: The case of the English speaking provinces of Cameroon' (2009) 13 (5) *International Journal of Human Rights* 689-96 at 694.

[187]Yanou M 'The local courts, decentralisation and good governance: The case of the English speaking provinces of Cameroon' (2009) 13 (5) *International Journal of Human Rights* 689-96 at 693.

[188]Yanou M 'The local courts, decentralisation and good governance: The case of the English speaking provinces of Cameroon' (2009) 13 (5) *International Journal of Human Rights* 689-96 at 695.

[189]Fombad C 'Cameroon's emergency powers: A recipe for constitutional dictatorship?' (2004) 10 (2) *East African Journal of Peace & Human Rights* 274-93 at 292.

[190]Eyinga A 'Government by state of emergency' in Joseph R *Gaullist Africa: Cameroon under Ahmadu Ahidjo* (1978) 102.

[191]Eyinga A 'Government by state of emergency' in Joseph R *Gaullist Africa: Cameroon under Ahmadu Ahidjo* (1978) 103.

subversion were not subject to appeal by those condemned.[192] He employed repressive weapons such as Service de documentation (SEDOC), Brigades Mixtes Mobiles (BMM) and Service de documentation extérieure et de contre-espionnage (SDECE) to silence opposition.[193] The existence of a genuine judicial review mechanism which is exercised aposteriori promulgation, will strike down such an emergency legislation which is a travesty and rather has an ulterior agenda.

4.3 Human rights

In Francophone system executive legislation which poses as the key legislation, is always outside the purview of judicial review.[194] This absence of judicial review accounts for the reason why electoral legislation deliberately designed to entrench incumbent parties in power has met with little resistance.[195] Constitutional provisions imposing presidential term limits have been eliminated in numerous countries.[196] The removal of the old article 6 (2) from the Cameroon Constitution of 1996 which provided that the President 'shall be eligible for re-election once' to the new one which simply says the President 'shall be eligible for re-election' makes the President a de facto president for life.[197] An unlimited term of office is reminiscent of despotism and can facilitate the President's violation of human rights. Only an objective and genuine judicial review mechanism can quash any irresponsible amendment and electoral law which have the conduct of limiting human rights.

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[192]Eyinga A 'Government by state of emergency' in Joseph R *Gaullist Africa: Cameroon under Ahmadu Ahidjo* (1978) 104.

[193]Eyinga A 'Government by state of emergency' in Joseph R Gaullist Africa: *Cameroon under Ahmadu Ahidjo* (1978) 107

[194]Fombad C 'Constitutional reforms and constitutionalism in Africa: Reflections on some current challenges and future prospects' (2011) 59 *Buffalo Law Review* 1007-1085 at 1025.

[195]Fombad C 'Constitutional reforms and constitutionalism in Africa: Reflections on some current challenges and future prospects' (2011) 59 *Buffalo Law Review* 1007-1085 at 1026.

[196]Fombad C 'Constitutional reforms and constitutionalism in Africa: Reflections on some current challenges and future prospects' (2011) 59 *Buffalo Law Review* 1007-1085 at 1026.

[197]Ross W BBC West Africa correspondent, Cameroon makes way for a king, *http://news.bbc.co.uk/1/hi/world/africa/7341358.stm* (accessed 30/07/2013).

The centralisation and personalisation of power and presidential absolutism in general, which has been practiced by both Ahidjo and Biya have led to the institution of the 'big-man' syndrome.[198] The 'big-man' is generally seen by the indigenes as the 'man with power' and look up to him to solve their problems. Thus the 'big-man' is above the law.[199] A negative human rights culture is created where the man with the most power can and actually as a matter of fact does abuse the rights of men and women seen to be inferior to him.[200] In other words, as a 'big-man' in Cameroon, respecting the rights of others is not a priority.[201] If a genuine judicial review is engaged, an individual whose human rights have been abuse by the executive can directly seize the Constitutional Council to redress that right. No case on violation of human rights against the executive has ever been lodged since the creation of the CC more than sixteen years ago, because only the chief executive is empowered to refer such cases. Even though there have been numerous human rights violations.[202]

As a result of the courts' lack of substantive powers to review law, policy and practice in Cameroon, even the most dedicated judges can act only against capricious human rights violation.[203] In the case of *Justice Wakai & 172 Ors v The People*.[204] 173 applicants were arrested in the North West province when a state of emergency was declared in 1992 pursuant to

[198]Dicklitch S 'Failed democratic transition in Cameroon: A human rights explanation' (2004) 24 *Human Rights Quarterly* 152-76 at 166.

[199]Dicklitch S 'Failed democratic transition in Cameroon: A human rights explanation' (2004) 24 *Human Rights Quarterly* 152-76 at 166.

[200]Dicklitch S 'Failed democratic transition in Cameroon: A human rights explanation' (2004) 24 *Human Rights Quarterly* 152-76 at 166.

[201]Dicklitch S 'Failed democratic transition in Cameroon: A human rights explanation' (2004) 24 *Human Rights Quarterly* 152-76 at 166.

[202]Fombad C 'The new Cameroonian Constitutional Council in a comparative perspective: Progress or retrogression?' (1998) 42 (2) *Journal of African Law* 172-86 at 180.

[203]Nkumbe N 'The effectiveness of domestic complaint mechanisms in the protection of human rights in Cameroon' (2011) 5(2) *Cameroon Journal on Democracy and Human Rights* 21-55 at 26.

[204]Nkumbe N 'The effectiveness of domestic complaint mechanisms in the protection of human rights in Cameroon' (2011) 5(2) *Cameroon Journal on Democracy and Human Rights* 21-37 at 38.

post-election uprisings.[205] The High Court of Bamenda in the North West province admitted the applicants to bail pending no charges against the applicants. The Legal Department ignored the court's order to release the applicants and rather moved them to a civil jurisdiction in Yaounde and maintained their detention. This conduct gives a glimpse of how administrative officials in Cameroon make a mockery of the principle of independence of the judiciary and there is really no relief to administrative whims and caprices.[206]

5.0 Conclusion

In a nascent and embryonic democracy such as Cameroon, a judicial review mechanism is indispensable to control and strike down legislation tabled by irresponsible legislators for the purpose of achieving their own ulterior ends. Most often their true intension is masqueraded in order to garner majority and most often, ostensible majority support. This paper is espoused in light of Kavass's theory which purports that constitutional court will promote judicial review as a guardian of the legitimacy of laws in the constitutional world.[207] It is quite clear that contrary to the argument forwarded by opponents of judicial review as being counter-majoritarian, judicial review is absolutely necessary in Cameroon against unscrupulous incumbent legislators who make self-gratifying laws in the guise of serving the peoples' interests. In such a circumstance only judicial review can serve as the true voice of the people by striking down such legislation. The impotence of judicial review hence makes the Parliament sovereign over the Constitution in Cameroon. Government is above the law and above the people who made the constitution. The incumbent government in Yaounde uses Parliament's legislation as a sort of Lettre de cachet[208] to get whatever it desires.

[205]Nkumbe N 'The effectiveness of domestic complaint mechanisms in the protection of human rights in Cameroon' (2011) 5(2) Cameroon *Journal on Democracy and Human Rights* 21-55 at 38.

[206]Nkumbe N 'The effectiveness of domestic complaint mechanisms in the protection of human rights in Cameroon' (2011) 5(2) *Cameroon Journal on Democracy and Human Rights* 21-37 at 39.

[207]Kanvass I *The emergence of constitutional courts in Europe, supranational and constitutional courts in Europe: Functions and sources* (1992) http://www.worldcat.org/isbn/0899417892 (accessed 20/08/2013) 6.

[208]A letter signed by the king of France and counter signed by the Secretary of State. This lettre de cachet *simply ordered the recipient to obey the contents therein without delay, giving no explanation*. The

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