Article

Vol 35 No 2 (2021)
Published 31 October 2021

ISSN 2523-2177

University of Fort Hare
Together in Excellence

Cite as: Wanki "'L'État c'est moi': The Controversial Insulation of the Presidential Appointment Powers in the Republic of Cameroon" 2021 (35) Spec Juris 194

"L'État c'est moi": The Controversial Insulation of the Presidential Appointment Powers in the Republic of Cameroon

Justin Ngambu Wanki*
Post-doctoral research fellow, South African Institute for Advanced Constitutional, Public, Human Rights and International Law (SAIFAC), a centre of the University of Johannesburg.

Abstract

The article discusses general theoretical problems of the rule of law and their effects on constitutional democracy in Cameroon. Acts of State have been highlighted as one strategy to enable the government of Cameroon to evade the application of the rule of law. This device encourages the usurpation of the authority of the judiciary by the executive in two ways: immunity of Acts of State from judicial scrutiny; and encroachment on the independence of the judiciary through the presidential appointment of members of the judiciary. This device has submitted the judiciary and the legislature under direct executive control. This control is possible because the principle of legality, which requires substantive executive acts to be subjected to judicial scrutiny, is ignored in Cameroon. The non-consideration of this principle has resulted in executive authoritarianism sanctioned by a constitutional provision. Given that the application of the rule of law has been considerably compromised with the assistance of this constitutional device, the article navigates alternative measures from Anglophone jurisdictions in Africa, given that Cameroon as well as other Francophone states in Africa subscribe to the same doctrine, which is a legacy of the former French colonial administration in Francophone Africa. Anglophone jurisdictions such as Uganda and South Africa have been juxtaposed with Cameroon. This juxtaposition is intended to demonstrate that although the jurisprudence of impunity previously existed in these jurisdictions as well, with their transition to greater democracy, these jurisdictions have since experienced a radical shift from these devices (not necessarily the entire rule of law system in these countries) which encourage the disregard for the rule of law, irrespective

* DEUG, Licence en droit, Maitrise en droit (Yaounde II) LL.M, LL. D (Pretoria) DSER (Abo Akademi, Finland). wanketons@gmail.com

of Uganda's general bad governance record presently.

Keywords: Rule of law; constitutional authoritarianism; presidential appointment powers; Acts of State; judicial review; separation of powers; independence of the judiciary; checks and balances

1 INTRODUCTION

Numerous devices exist to frustrate the application of the rule of law in Cameroon. One of these is the Acts-of-State doctrine. Acts of State in Cameroon are considered political questions and, therefore, vested with judicial immunity. They are also not susceptible to parliamentary endorsement. In this article, I examine this doctrine, its origins, and how it has been used to entrench authoritarianism in Cameroon.[1]

The constitutional attribution of such immunity to the executive in Cameroon can, however, be contested as a theoretical problem with the rule of law given that certain prohibited acts under international human rights law cannot be legally permissible even by a legitimate law-making authority.[2] More so, the fact that such a provision is constitutionally enshrined is challenging because when a constitution enforces an authoritarian order or antagonistic set of values on the populace, as epitomized by Acts of State in Cameroon[3] –, then such a law becomes a fearsome weapon.[4] In such an instance, the rule of law is necessary, but also sufficiently unfair in many instances and cannot qualify as a just system.[5] The argument in this article is thus to realign the rule of law in Cameroon to its conventional justice and fairness mandate.

Generally, the article seeks to question the legitimacy of an absolute presidential power of appointment, which is backed by and encourages judicial passivity[6] in Cameroon. In doing so, the article argues first that the rule of law requires, at least, that all administrative and executive authority be reviewed by the judiciary to avoid the exercise of *ultra vires* powers.[7] Commitment to the principle of legality is necessary to ensure that the executive does not "effectively become a power unto itself."[8]

Second, I argue that Acts of State, which are insulated from judicial review, are invasive[9] and therefore encroach on human rights and the independence of the judiciary.[10] Even more disturbing is the fact that the operation of these Acts of State impinge on and downplay the capacity of judges in Cameroon to apply the law "without fear and favour." The reason for this lies in the fact that appointments to the judiciary are regarded as Acts of State. Consequently, the effect of this doctrine is that, in Cameroon, the judiciary has been captured by the executive.

Generally, colonial-era mentalities of governance in Cameroon negatively affect the rule of law. One of them is constitutional authoritarianism. It also breeds impunity and unaccountability, condones the arrogance of public officials and the violation of basic human rights.[11] These vices give a reason to the population to distrust public authority.[12] Such characteristics are

---

1 This article is a revised version of a paper that was presented at the bi-annual African Network of Constitutional Lawyers' Conference at the University of Gaborone, Botswana in 2018. I am grateful to Professor David Bilchitz for going through the initial drafts of this article.
Taylor "France à Fric: the CFA Zone in Africa and Neocolonialism" 2019 *Third World Quarterly* 1078. Staniland "Francophone Africa: the Enduring French Connection" 1987 *The Annals of the American Academy of International Affairs in Africa* 57–58.

2 Tamanaha "A Concise Guide to the Rule of Law" 2007 Legal Studies Research Paper Series 07-0082 http://ssrn.com/abstract=1012051 4–5 (accessed date?).

3 Law No 2006/022 of 29 December 2006 and Article 53.

4 *Ibid*, 18.

5 *Ibid*.

6 Okere "Judicial Activism or Passivity in Interpreting the Nigerian Constitution" 1987 *The International and Comparative Law Quarterly* 788.

7 Hoexter *Administrative Law in South Africa* (2012) 139.

8 Neo "All Power has Legal Limits: The Principle of Legality as a Constitutional Principle of Judicial Review" 2017 *Singapore Academy of Law Journal* 683.

9 For instance, the declaration of an emergency in Cameroon is an Act of State. It is open-ended – the president can do anything with those powers with the pretense of salvaging a nation under threat. Such acts can invade all spheres of authority without restraint, given that by their nature they are not reviewable.

10 The human rights infringed amongst others are generally civil and political rights: the presumption of innocence; free and fair trial; freedom of speech and extra-judicial execution.

11 *Ibid*.

12 Mutua "Africa and the Rule of Law: the Problematic Rebirth of Liberalism in Africa and why the Rule of Law

evidence that the rule of law in Cameroon has not been divorced from imperialist origins and uses. As a result, such a mechanism, which concentrates powers in the hands of the president, facilitates the emergence of a patrimonial State, resulting in the disregard for the rule of law and only promotes authoritarianism. When this happens, judiciaries, which are supposed to promote justice and equality, rather remain beholden to powerful stakes in politics.[13]

The argument of this article takes the following structure: first, I focus on defining Acts of State and their relationship with the presidential power of appointment – I set out the judicial system and culture as a prelude for a better understanding of the appointment power. I then move to discuss the effects of Acts of State *vis-à-vis* executive (administrative) and Supreme Court judges' appointments and then substantiate fundamental assumptions of French influence in Cameroon – highlighting the origins of the doctrine of Acts of State as an attempt by France to exercise control over Cameroon. The third part discusses a comparative perspective of the presidential power of appointment and the effects of Acts of State in Anglophone jurisdictions in Africa. The conclusion then provides some useful recommendations.

2 WHAT ARE ACTS OF STATE, AND ITS RELATIONSHIP WITH THE PRESIDENTIAL POWER OF APPOINTMENT IN CAMEROON?

2 1 Acts of State and the Legal Culture in Cameroon

2 1 1 Acts of State in Cameroon

In this section, I attempt to define Acts of State and discuss the controversy surrounding two provisions in the constitution, which are at the root of the conflict between the executive and the judiciary relating to these Acts. Acts of State are proclamations issued by the State president or executive against which no court is competent to inquire and give judgment on their validity.[14] The reason behind their insulation is that they are considered political questions outside the jurisdiction of the judiciary. Nonetheless, the basic idea behind Acts of State is to stymie the powers of the judiciary so that the executive is able to rule without restraint. On top of this, when the independence of the judiciary has been compromised, the executive is able to exercise autocratic, paternalistic tendencies and unrestrained powers.[15]

The law authorising the non-reviewability of Acts of State in Cameroon is section 22 of Ordinance No.72/6 of 26 August 1972 on the organisation of the Supreme Court, which reads: "No court or tribunal is entitled to rule on acts of state." This law was updated in section 4 of law No 2006/022 of 29 December 2006 on the organisation of courts: "No court is entitled to rule on acts of state." Acts of State were defined in Cameroon in *Kouang Guillaume Charles v State of Cameroon*,[16] to include, amongst others, legislative acts, diplomatic relationships with foreign countries, presidential acts convening the Electoral College and the presidential act declaring a state of emergency. Nevertheless, Article 53(3) of the 2008 amendment of the 1996 Constitution has further expanded these acts to include, amongst others, the presidential power of appointment outlined in Articles 8-(10) and 10. Article 8-(10) relates to civil and military appointments by the president. However, for the purposes of this article, I have limited my examination to civilian appointments – namely, judicial and administrative appointments. Article 10 also relates to the appointment of the Prime Minister and members of government.

At this juncture, it will be logical to engage with the question: how are the Acts of State in question related to the appointment of judges? Article 37(3) of the Cameroonian Constitution states: "The president of the Republic shall guarantee the independence of the judicial power. He shall appoint members of the bench and for the Legal Department." The constitutional provision that actually links the appointment process with the operation of Acts of State is Article 53(3) of the Constitution. It states that "Acts committed by the president of the Republic in pursuance of Articles 5, 8, 9 and 10[17] above shall be covered by immunity and he shall

must be Reconsidered to Achieve Sustainable Development" 2016 *SUR – International Journal on Human Rights* 168.

13 *Ibid*, 163.

14 Section 4 of law no 2006/022 of 29 December 2006 on the organisation of courts.

15 Reyntjens "The Winds of Change: Political and Constitutional Evolution in Francophone Africa, 1990-1991" 1991 *Journal of African Law* 52.

16 *Kouang Guillaume Charles contre Etat du Cameroon* Jugdment no 66 ADD/CS/CA du 31 MAI 1979.

17 Article 5 is about the role of the president and his fundamental duties, art 8 is on his State functions including appointments to official positions, art 9 is on the absolute presidential power to declare an emergency and art

not be accountable for them after the exercise of his functions." By virtue of the inclusion of Article 8 and 10 in this provision, the power of appointment (of judges) as highlighted in Article 37(3) is insulated from judicial review. Article 37(3) is therefore relevant here simply because it constitutes part of civilian appointments as stipulated by Article 8 as shown above to be a constituent of Article 53. Nfobin has argued that Article 5 of the Constitution puts the task of defining the policy of the nation in the hands of the president and that policy includes judicial policy.[18] He heads the judiciary, which includes the Legal Department responsible for prosecutions.[19] This includes appointments into the judiciary. In terms of the Acts-of-State doctrine, these appointments envisaged by Article 37(3) cannot be reviewed. In essence, the president lays down the ground rules upon which the judiciary must operate. Nevertheless, it is strange that the president being a member of the executive, concurrently exercises powers over another parallel branch of government, the judiciary.

Article 3 (2) states: "Judicial power shall be exercised by the Supreme Court, Courts of Appeal and Tribunals. The judicial power shall be independent of the executive and legislative powers. Magistrates on the bench shall, in the discharge of their duties, be governed only by the law and their consciences." This appears to entail the following ideas: first, the judiciary shall not be inhibited in any way from discharging its constitutional functions; second, judges will not be influenced by the executive on the outcome of their rulings. But much more important is the fact that the judge in Cameroon depends on the executive for their promotion or advancement on the job and are liable to be disciplined for misconduct by the president. As a result, it would be asking too much from a judge to pass a judgment according to the law and his/her conscience when their job and livelihood would be on the line in situations where their judgment challenges the executive. This view where the judge[20] could be disciplined in consequence for acting on the law and their conscience at the expense of the executive is captured in the *People* v *Nya Henry* as examined in section 212 ahead.

Another question is, if the judicial power is independent of the executive and legislative powers, will the presidential appointment of judges not undermine the independence of the judiciary and will the insulation of Acts of State from judicial scrutiny in terms of Article 53(3) not amount to usurpation of another branch of government's authority? My view is that if the judicial power is independent of the other two organs, then the judiciary should be allowed to determine whether presidential acts are constitutional or not, instead of shielding the executive from judicial review.[21] It simply means that the executive has usurped the authority of the judiciary. This is an affront to the separation of powers and independence of the judiciary as outlined above. Democratic governance and constitutionalism cannot certainly function efficiently in such an environment. The *raison d'être* of Acts of State is supposedly to enforce the separation of powers. Curiously, denying the judiciary the right to review Acts of State simply means that the executive is abusing the separation of powers.[22] At this juncture, the article further asks the question: what are the origins of Acts of State in Cameroon?

The idea of Acts of State remains part of the legacy of French colonialism developed by the jurisprudence of the *Conseil d'État*, *ORD*, 1 Mai 1882, Laffite.[23] This mechanism is understood

10 is on the appointment of the Prime Minister, members of government and attribution of their duties.

18 Nfobin "The Push to Protect the Oneness of English as a Judicial Language in the Southern Cameroons Jurisdiction of Cameroon" 2019 *International Journal on Minority and Group Rights* 66.

19 *Ibid*.

20 Judge is used in this article as a generic term for magistrates, judges, and justices.

21 Absolute presidential discretion inhibits adequate protection of judges. What exacerbates the whole matter is that the executive has captured the judiciary. The executive is the president of the Higher Judicial Council (HJC), the vice president is the minister of justice and keeper of seals, and the Secretary General is a judge, appointed by the executive. In other words, the HJC does not enjoy the degree of independence the Judicial Service Commission (JSC) of South Africa for instance, enjoys. The South African president only appoints from the list provided to him/her by the JSC and the president cannot unilaterally dismiss, transfer or discipline the judges as the case is with Cameroon. As a result, the judges do not owe their survival to the president of South Africa. More so, the HJC in Cameroon only advises the president and has no powers to enjoin him/her to take their advice. In other words, though presidential appointment of judges appears to be a common practice in democracies across the globe, the degree of control the president exercises over judges and the judiciary in Cameroon makes the difference. This can simply be explained by the fact that the powers and role of the HJC are ostensible *vis-à-vis* those of the JSC in South Africa.

22 Kleinman "The Act of State Doctrine – From Abstention to Activism" 1984 *Journal of Comparative Business and Capital Market Law* 122.

23 Revue Générale du droit requête numéro 5363, Rec. 1821–1825 p 202, Kamga "Starting the Emergency Process: Some Reflections on Presidential Prerogatives in South Africa and Cameroon in Time of Turmoil"

to have been developed by France as a bulwark to "Le government des juges" in the *Ancien Regime* where the judiciary exercised unrestrained powers.[24] In the post-revolutionary era in France, the revolutionary government aimed at defeating the power of the court, which was considered retrogressive.[25]

Even though it was a French legacy, over time, the *Conseil d'État* has progressively abandoned its political questions doctrine, which shielded acts of government from legal challenge.[26] French liberal rules now ensure that all administrative and executive action are judicially scrutinised.[27] Despite the transition in France, the conduct of the Cameroon post-independence government is continuously shaped by this outdated French doctrine. The Cameroon Constitution replicated most of the provisions of the Constitution of the Fifth French Republic but excluded all liberal and democratic clauses in preference for the authoritarian ones.[28] The controversial attribution of arbitrary and discretionary powers to a president in a democratic dispensation is contrary to the principle of legality, which is an essential feature of the rule of law in a democracy. This constitution reinforced the discretionary powers of the president without adequate checks and balances.

These powers enable the president to appoint judges[29] on the basis of their ideology to the Supreme and Appeal Courts to sustain the objectives of the regime.[30] For instance, judges trained in the civil-law system have constantly been deployed to the Anglo-Saxon common-law jurisdiction of the country.[31] This is seen by the Anglophone community as an attempt to "francophonise" the Anglophones and invade their common-law system with civil law.[32] The Anglophone lawyers have hitherto claimed that by appointing Justice Oyono Abah as the president of the Court of Appeal of the North West province and the Procureur General who both hail from the civil-law tradition, the president of the Republic assigned them on a specific mission, which they fear might be to destroy their Anglo-Saxon heritage.[33]

If that view is correct, then the ambition of the president has the potential of stifling the possibility of a real separation of powers, and the concomitant independence of the judiciary, judicial review and respect for the rule of law.[34] The colonial executive centralised the functions of the legislature, the administration, and the judiciary. Given that constitutional and administrative law were reasonably underdeveloped during the colonial period, this resulted in colonial law consequently serving as a self-sufficient body of rules attributing unrestrained powers to the officials to reign over the people.[35] In a transformed constitutional dispensation, the duty of the judiciary is to ensure that government policy is consistent with the Constitution. In achieving this goal, a standoff is unavoidable between politicians and judges when the former's powers are curtailed, or their strategic appointments are invalidated or fettered by the judiciary.[36]

The rule of law invests the responsibility of determining the boundaries of the principle

---

2016 *Law and Politics in Africa/Asia/Latin America* 93.

24 Kim "Gouvernement des juges" ou "Juges du gouvernement"? The Revolutionary Tradition and Judicial Independence in France 1998 *Korean Journal of International & Comparative Law* 1.

25 *Ibid*.

26 Dyevre "The Rule of Law in France" in Koetter *Understandings of the Rule of Law in Various Legal Orders of the World, Rule of Law Working Series No 14* http://wikis.fuberlin.de/download/attachments/_21823972/Dyevre+France.pdf.

27 *Ibid*.

28 Awasom "Politics and Constitution-making in Francophone Cameroon, 1959-1960" 2002 *Africa Today* 24.

29 Forejohn, Rosenbluth, and Shipan "Comparative Judicial Politics" in Boix and Stokes *The Oxford Handbook of Comparative Politics* (2009) 6.

30 Nforbin, 2019 *IJMGR* 4–5 and 55.

31 *Ibid*.

32 *Ibid*.

33 *Ibid* 5, 55 and 67.

34 Article 53 of the 1996 constitution which makes presidential appointment powers unreviewable, equally puts the president above the law as he cannot be prosecuted for any reason whatsoever. This is an affront to the rule of law. The fact that article 37(3) empowers the president of the Republic, a politician, to guarantee the independence of the judiciary by appointing, promoting and disciplining judges evinces the disregard for separation of powers in Cameroon. Judicial review in Cameroon is attributed to the Constitutional Council in article 46, a body replete with presidential appointees, and to which the only people with *locus standi* are those who do not have any interest in reviewing presidential acts in article 47(2). This is evidence of the absence of judicial review in Cameroon.

35 Shivji "Contradictory Perspectives on Rights and Justice in the Context of Land Tenure Reform in Tanzania" in Mamdani (ed) *Comparative Essays on the Politics of Rights and Culture* (2000) 39.

36 Fombad "Appointment of Constitutional Adjudicators in Africa: Some Perspectives on How Different Systems

of legality in the judiciary. The fundamental idea the principle of legality expresses is that power can only be legitimately exercised where it is lawful.[37] The detailed content of the power exercised should be rooted in the Constitution.[38] Nevertheless, the question of the legitimacy of the Cameroon Constitution renders the exercise of absolute discretionary powers attributed to the president questionable.[39]

Moreover, the principle of legality discourages the application of ouster clauses such as section 4 of law No 2006/022 of 29 December 2006 and Article 53 of the Constitution. Such ouster clauses are inconsistent with the rule of law, since it is precisely the role of the courts to declare the legal limits of discretionary powers.[40] The principle of legality therefore conflicts directly with the Acts- of-State doctrine in Cameroon. The bi-jural and divergent nature of operation of the judicial system accounts for this, which I elaborate upon in the next section.

2 1 2 The Judicial System and Legal Culture in Cameroon

To understand the relationship between Acts of State, the appointment of judges and the independence of the judiciary in Cameroon, it is necessary to examine and understand how the legal system and culture function. In Cameroon, two legal traditions coexist within a single State: there exist both common and civil law traditions in Cameroon.[41] The history of this bi-jural legal system goes back to the colonial era when France administered East Cameroon or the current French-speaking part of Cameroon, and the current English-speaking part was administered by Britain as part of Nigeria.[42] The unification of French and English Cameroons in 1961 resulted in the Cameroon bi-jural legal systems.[43] This unification offered the civil-law system an advantage[44] over the common-law system with both bodies of law coexisting in an unstable union.[45] The protracted inequality of the two legal systems has been one of the fundamental issues affecting the proper functioning of the judicial system in Cameroon.[46] For instance, in terms of legal culture, the law and judicial authority is respected more in the English-speaking part of Cameroon than the French. The manner in which the law and judiciary are regarded and treated mirrors the functioning of the two legal cultures originating from the French civil law and English common-law traditions.[47] In commenting on the application of the rule-of-law notion in the United Kingdom and in France, Dicey carefully spelled out where the difference lies. His focus is on the place of the *Droit Administratif* (administrative law) in French civil law as opposed to English law. *Droit Administratif* is invested with autocratic features that shield government officials from the acts they commit.[48] When the State is performing its affairs, ordinary courts do not undertake to supervise its activities to ascertain the constitutionality of such acts, irrespective of whether it was carried out in obedience to superiors.[49] This separation of courts differentiates the manner in which the rule of law is applied in France (civil law system) and the United Kingdom (common-law system). In the common-law system, the rule of law is applied uniformly to the State, government officials, and ordinary citizens.[50]

Considering the contradiction in the manner in which the rule of law is applied in common law as opposed to civil law jurisdictions, one can confidently state that this particular civil law heritage has predominantly influenced the constitutional system in Cameroon,[51] especially as

Yield Similar Outcomes" 2014 *The Journal of Legal Pluralism and Unofficial Law* 252–253.

37 Hoexter 2012 122.

38 *Ibid.*

39 Article 53, which gives the president absolute discretionary powers was entrenched in the Constitution after a controversial government-driven amendment process. The circumstances leading to the inclusion of this provision in the constitution have raised the question of its legitimacy.

40 Neo 2017 *SingALJ* 685.

41 Ndifor "The Politicization of the Cameroon Judicial System 2014 *Journal of Global Justice & Public Policy* 31.

42 Sams "The Legal Aspects of doing Business in Cameroon 1983 *International Law* 490.

43 Ndifor 2014 *JGJ&PP* 31.

44 The common-law system was joined to the civil-law system, which was already an established system since 1960.

45 *Ibid* 32.

46 *Ibid.*

47 Joireman "Inherited Legal Systems and Effective Rule of Law: Africa and the Colonial Legacy" 2001 *University of Richmond Scholarship Repository* 7–9.

48 Cosgrove *The Rule of Law: Albert Venn Dicey, Victorian Jurist* (1980) 92.

49 *Ibid.*

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

51 Enonchong "Judicial Independence and Accountability in Cameroon: Balancing a Tenuous Relationship" 2012 *African Journal of Legal Studies* fn 16 of 317.

this system fails to hold public power to account. Judges in these two legal systems therefore operate differently. While judges in the English-speaking part of Cameroon attempt to discharge their duties according to the law and their conscience, as briefly discussed below with the help of jurisprudence, judges in the French-speaking part are demonstrably more executive-minded. As a result, judges from the common-law system in Cameroon are always in conflict with the executive regarding the manner in which they apply the law.

A quintessential case in this regard that highlights the difference in cultures but also executive interference with the judiciary is the case of *The People v Nya Henry*.[52] In this case, the defendants were arrested for orchestrating uprisings through a perceived secessionist organisation called the Southern Cameroon National Congress (SCNC) from Anglophone Cameroon. The organisation was fighting for self-determination from the French-speaking part and from the civil law jurisdiction of Cameroon. The defendants applied for an order admitting them to bail. The presiding magistrate granted them bail and ordered their release. This court order was not respected by the Legal Department, who are administrative officials.[53] The magistrate refused to give in to executive pressure – to deny bail to the defendants – but instead decided the case according to the law and his conscience.[54] In order to discourage other magistrates from being independent or ever attempting to disregard the authority of the executive, the executive responded by removing the magistrate from the bench and sending him to the South West Region in a remote area to serve in an inferior capacity as a legal officer.[55] This was a strong message to other common-law judges to willfully align with the executive in subsequent similar cases or face executive displeasure. In Cameroon, a judge or magistrate may be transferred to remote areas as a legal officer in an attempt to humble the judge for ruling inconsistently with the objectives of the executive.[56] Hence, while this is not an isolated case to reach my conclusion it is apparent that the system of appointment, promotion, and transfer of Cameroonian judges is one that ensures that judges are answerable to the executive. Thus, the judiciary in Cameroon unequivocally lacks independence and "the source of this judicial submissiveness is enshrined in art 37 (3) of the Cameroon constitution."[57]

By virtue of the track record of the independence of judges hailing from this common-law legal culture, which suggests that they rarely succumb to regime loyalty, they have hardly ever been appointed to influential positions in the Supreme Court.[58] Yet, civil law judges who are more executive-minded are preferred appointees to this court, given that their executive proclivity suggests that they will do the bidding of the executive. As an Act of State, these appointments cannot be challenged. Consequently, only judges sympathetic to the regime's ideology will be appointed to the Supreme Court to facilitate the entrenchment of the regime in power through their rulings which more often than not absolve administrative officials of accountability. Tabe contends that with the advent of multi-party politics in Cameroon, some judges have supported the ideologies of some political parties and even become members. Such a judge will often devote his loyalty to the party, including his judgments at the expense of the independence of the judiciary.[59]

52 (2005) 1 CCLR, 61–66.

53 Enonchong "Human Rights Violations by the Executive: Complicity of the Judiciary in Cameroon? *The People v. Nya Henry* and *the People v. Dr. Martin Luma*" 2003 *Journal of African Law* 265–266.

54 *Ibid* 270.

55 In Cameroon, the Legal Department is the equivalence of the Public Prosecutor or (National Prosecuting Authority) elsewhere.

56 Enonchong 2003 JAL 265–270.

57 The Constitution of Cameroon, 1996.

58 Bipoun-Woum "Recherches sur les aspects actuelles de la reception du juge administrative dans les Etats d'Afrique noire d'expression francaise. Le cas du Cameroun" 1972 RJPIC 379–380. Ever since the creation of the Supreme Court and even with the operation of the Constitutional Council presently, no common-law judge has ever been appointed as president. Common-law judges have been appointed to other apparently top-ranking positions such as advocate general of the court and others, but not to positions where they have crucial decision-making authority. In terms of art 38 of the 1996 Constitution of Cameroon, the Supreme Court is the highest court in the land.

59 Tabe "Reflections on Judicial Independence in Cameroon's Public Administration" 2011 *Law and Politics in Africa, Asia and Latin America* 437.

Another case that typifies the executive-mindedness of the civil law system was the case of *Justice Wakai v The People*.[60] In this case, the applicants were brought before the High Court of the Mezam Division[61] following a state of emergency pronounced pursuant to post-election violence. The High Court proceeded to release the applicants on bail, as there were no charges against them. The Legal Department, which is an administrative organ, simply ignored the order to release the applicants and rather transferred them to Yaounde, a civil law jurisdiction that provides special treatment for administrative officials in matters relating to the State. As a result, the Legal Department was able to maintain the detention of the applicants in this civil law jurisdiction with impunity. This act amounted to a mockery of the rule of law and exposes the shortcomings of the civil law jurisdiction in Cameroon. It tolerates administrative excesses and executive caprices.

To uphold judicial independence then in the Cameroonian legal system, which is plagued by irregular and unaccountable transfer of judges, is a mere aspiration.[62] Usually, in theory, the Cameroonian judge is thought to be protected because Article 5(2) of the old Rules and Regulations of the Judicial and Legal Service outlines his/her protection. This provision notes that the judge is irremovable and is not susceptible to transfer, without his/her accord, even if it were to be a promotion.[63] However, this only remains a provision in theory, because despite the existence of such rules and regulations, the president of the Republic has always transferred or removed judges at will. This position was formalised with the subsequent removal of this provision in 1995 when the statute of the magistracy was amended. In this regard, separation of powers has been gravely undermined, and, in many instances, the executive acts defy the rule of law by promoting or transferring without prior consultation. Even so, the executive cannot be held to justify its action, given that the presidential appointment power is an Act of State.

2 2 The Relationship between Acts of State and Presidential Appointments in Cameroon

2 2 1 Government and Acts of State in Cameroon

This section discusses the effects of the non-reviewability of the president's appointment powers.[64] Actually, any unrestricted power is problematic in a constitutional democracy. In Cameroon, this overlaps with entrenching only one branch as dominant while making the other two branches subservient to it, given that the system undermines any independence.

2 2 1 1 Effects of Acts of State in Administrative Appointments (Executive)

Articles 8(10) addresses presidential appointments to civil positions in general, including the judicial fraternity which is a civilian body and civil administrators who also carry out political functions. However, Article 37(3) specifically addresses presidential appointments of judicial officers and Article 10 specifically addresses presidential appointments of members of government with the Prime Minister at the helm. These appointments are Acts of State and insulated from judicial review. The effects of such appointments in a supposedly rule-of-law jurisdiction like Cameroon are numerous and far reaching. For instance, duly appointed administrative officers, including members of government are empowered by the president through their appointment with delegated authority to govern through executive decree.[65] Irrespective of the necessity of this device to govern, government officials have since the dawn of independence exploited and employed it as a weapon to rule with scant regard for the law-making process, respect of court decisions and the Constitution itself.[66] This kind of attitude by the administration completely disregards the rule of law and it is facilitated by the enforcement of Acts of State, which allow the governing authorities to use unacceptable

60 (1997) 1CCLR 127.

61 Part of the North West region which is an English-speaking part of Cameroon. This particular region (North West and South West regions are currently clamouring for a return to its pre-1961 status which was a British trusteeship territory known as Southern Cameroon.

62 Anyangwe *The Magistracy and the Bar in Cameroon* (1989) 37.

63 *Ibid* 28.

64 In this article, I also refer to members of government as (civil) Administrators.

65 Ndifor 2014 *JGJ&PP* 38.

66 *Ibid.*

methods and authority to govern with no court having the competence to challenge political acts. Worse still, administrators with notoriously poor records of accomplishment of upholding the rule of law could be reappointed by the president and courts lack the authority to interfere. As Delavignette noted, such excesses go unpunished because the same administrative core, which permitted unconstrained governance under colonial rule – lack of checks and balances and separation of powers – was retained at independence.[67] Cameroon has changed from having white civil servants to black ones, but the structure of the administration has remained intact.[68]

2 2 1 2 Effects of Acts of State on the Appointment of Supreme Court Judges

It has become a tradition that only executive-minded judges are appointed onto the Supreme Court since such appointments are Acts of State. Mbaku and Yanou[69] have observed that the Supreme Court sitting in the place of the yet to be constituted Constitutional Council[70] is the exclusive authority empowered to declare the results of elections in Cameroon. Sadly, they observe that the executive controls this court.[71] If this assertion is correct, then the appointment of ideological judges is essential to legitimizing the regime and to keep it perpetually in power. This culture has been reinforced with the implementation of the Constitutional Council in 2018.[72]

Yanou further observed that the Supreme Court, which is at the apex of the judiciary in Cameroon, is under the control of the executive and further holds that the Supreme Court was:

> Put in place to legitimize the rigging of the 2011 elections that has already occurred. It is not for nothing that shortly after establishing this structure, Biya, by decree, extended the term of office of two retiring judges at the head of the Supreme Court way after the 2011 elections, and who over the years have kept him in power despite admitting fraud but justifying it on the grounds that their hands were tied.[73]

67 Doepp "The Rule of Law and Courts" in Cheeseman, Anderson, Scheibler *Routledge Handbook of African Politics* (2013) 41.

68 Delavignette "On the French Empire: Selected Writings (ed) Cohen (1977) 130.

69 *The Post Newspaper*, 17 October 2004 in Yanou "Democracy in Cameroon: A Socio-legal Appraisal" 2013 *Law and Politics in Africa, Asia and Latin America* 315.

70 The Constitutional Council is not part of the judiciary in Cameroon. The judiciary is in part V of the Constitution, while the Constitutional Council is in part VII. The Supreme Court is the highest court in Cameroon.

71 Yanou 2013 *LPAALA* 315.

72 All members of the Constitutional Council are direct presidential appointees. While they have a fixed term of nine years, they are liable to be redeployed at the end of their term by the Head of State to other positions of influence in the State depending on their loyalty to the executive as perceived through their rulings. The eleven new members appointed to the Constitutional Council were sworn in on 6 March 2018 before parliament. Some of the appointees were either still influential members or close to the ruling party at the time of their appointments. International Crisis Group - Briefing No 142/Africa "Cameroon: Divisions Widen ahead of Presidential Vote" (2018) https://www.crisisgroup.org/africa/central-africa/cameroon/b142-election-presidentielle-au-cameroun-les-fractures-se-multiplient (accessed 10-05-2020).
More so, the appointment process of these members leaves the members of the council beholden to the president of the Republic. This perspective could be perceived in the manner in which the president of the Constitutional Council in Cameroon spectacularly rejected the application of the main opposition leader for the cancellation of the 2018 presidential elections results amid widespread claims of fraud. Amabo "Cameroon: Constitutional Council – Pioneer Members Take Oath of Office" Cameroon Tribune - 07/03/2018 and https://allafrica.com/stories/201803070394.html (accessed 10-4-2020).

73 Yanou 2013 *LPAALA* 316.

These series of events are suggestive of the fact that the judiciary is still loyal to the executive and there is no separation of powers. Moreover, what really makes the authority of the judiciary and particularly the Supreme Court questionable is the fact that the president of the Republic by means of a decree extended the mandate of this same judge president twice since 2008 after he had reached the required age limit for retirement.[74] This decision has revealed that the president can invoke his presidential decree powers to undermine the Constitution.[75] This is an indication that the essence of Acts of State is to shield the president and permit him to exercise authority beyond his constitutional powers. Acts of State facilitate the undermining of constitutional values, which is an affront to the rule of law.

2 2 1 3 Wider Effects of Acts of State in Cameroon

Conclusively, in the common-law system in Cameroon, everyone is equal before the law including administrative authorities. This is different with the civil law system in Cameroon where administrative actions involving administrative authorities can be challenged only by the administrative bench of the Supreme Court in the capital city.[76] The challenge with the civil law approach in Cameroon where administrative action must only be entertained by a branch of the Supreme Court is that it is not an independent organisation but one that serves the interest of the regime.[77] Moreover, administrative officials themselves hold the perception that local courts are subservient to the executive and therefore could not review their actions. This is clearly demonstrated by the case of *National Union of Teachers of Higher Education (SYNES) v Dr. Dorothy Njeuma*.[78] In this case, the former Vice Chancellor of the University of Buea and a politburo member of the ruling party was sued in the Fako High Court and she argued that this court did not have the jurisdiction to entertain any matter against her because she was appointed by a presidential decree.[79] She rejected the jurisdiction of this court arguing that by virtue of her appointment by a presidential decree, she was insulated from review by ordinary courts and only the Supreme Court had competence in any matter concerning her. Even so, this matter has never reached the Supreme Court.

Even though Cameroon does not permit the review of Acts of State, the African Commission has entertained communications to address such challenges. Cameroon has ratified the treaty establishing the African Charter on Human and Peoples' Rights and thus is amenable to the jurisdiction of its Commission.[80] At the African Commission, the view that an executive decree is a political act insulated from review as practiced in Cameroon was disputed in the decision of *Civil Liberties Organization v Nigeria*.[81] In this case, the Nigerian government through [(Amendment)] Decree No 21 of 1993 established a new governing body of the Nigerian Bar Association where out of 128 members, only 31 were nominated by the bar and the rest by the government. This decree was retrospective, forbade recourse to court, and made it an offence for any legal action to be taken against the decree. The commission held that the ousting of the jurisdiction of the courts from enquiring into the validity of executive decrees amounted to an infringement on the right to have one's case heard.[82] If this ruling were to be applied in Cameroon, it would be clear that the very wide remit of Acts of State and their unreviewability are not consistent with the African Charter.[83]

To understand the wide application of the Acts-of-State doctrine, it is important to go back to its origins that lie in French law. The application of such a doctrine in Cameroon could be very harmful to the operation of the rule of law given the nascent state of democracy in Cameroon. The next section outlines how the influence of France and doctrines drawn from its law only

74 Camerounweb "Cameroon Names New Supreme Court President" (2014) https://www.camerounweb.com/CameroonHomePage/NewsArchive/Cameroon-names-new-Supreme-Court-president-316468 (accessed 10-9-2018).
75 While the Constitution attributes decree powers in specific circumstances, extending the tenure of a Supreme Court judge does not consist any such circumstances.
76 Yanou "The Local Courts, Decentralisation and Good Governance: the Case of the English-speaking Provinces of Cameroon" 2009 *The International Journal of Human Rights* 693.
77 *Ibid* 694.
78 No HCF/120/04-05 Unreported decision.
79 Yanou 2009 *TIJHR* 694.
80 Ratified the treaty on 18/12/1989 https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800cb09f (accessed 25-7-2020).
81 Communication 129/94 African Commission.
82 Yanou 2009 *TIJHR* 694.
83 The African Charter on Human and Peoples' Rights of 1981 entered into force in 1986.

serve French interests and continues to harm the development of a proper constitutional State in Cameroon.

2 3 Substantiating the Fundamental Assumptions of French Influence in Cameroon

It is important to start, first, with the recognition that France maintains influence over its former colonial territories and most especially Cameroon through independent secret agreements.[84] Though Cameroon was never technically a French colony, these secret cooperation agreements tied Cameroon to France.[85] In 1978, Cameroon was one of three countries providing over two-thirds of French imports from Africa and concurrently purchasing 60 per cent of French exports to Africa.[86] France has helped President Paul Biya to maintain power in order to protect its economic interest in Cameroon and he has now been at the helm for 38 years.[87] It is now admitted by some of the senior officials of the ruling party that Biya actually rigged the 1992 presidential elections with French complicity.[88]

Second, for this French-backed regime to stay in power and do France's bidding, the judiciary must endorse the incumbent government as democratically elected to establish its legitimacy to the international community. Consequently, the judiciary becomes instrumental and strategic.[89] The judiciary in Cameroon and the Higher Judicial Council were designed following the Fifth French Republic's constitutional model.[90] Moreover, the appointment procedure of judges in Cameroon has followed the French constitutional design. Candidates are trained at the magistracy institute and at the end of their training they are appointed by a presidential decree for distinct purposes.[91] Some of the graduates are posted to the Legal Department of the judiciary to serve as prosecutors and others are posted to the bench as magistrates. As has been mentioned, the system permits excessive executive control of the judiciary especially in the context of the repressive nature of executive responses against judges who attempt to exercise decisional independence.[92] Consequently, as a matter of fact, and by devices that were documented in the above sections, the executive has succeeded in subjugating the judiciary to avoid any restraint or review of its authority.

Third, only colonial regime-minded Cameroonian elites and the colonial administration participated in the original constitution-drafting process.[93] The 1960 Constitution has been replicated in the current 1996 Constitution with all its weaknesses. The Higher Judicial Council (HJC) in Cameroon is responsible for vetting judges prior to their being appointed by the President. Nonetheless, this body has been heavily politicised.[94] Consequently, the independence of such a vetting body is a travesty. By implication, this model was adopted to fulfil a specific strategic purpose. Judges are simply reduced to a subservient position to the executive. The government of Cameroon went as far as clarifying in its Fourth Periodic Report to the Human Rights Committee that the "court is not accountable to the public as far as their decisions are concerned."[95] The executive has completely captured the judiciary to a degree that judges have resorted to applying creative and strained interpretations of the law in order

84 *Negotiations des accords de cooperation avec la Republique du Cameroun*. Even though statehood was attributed to Cameroon initially, the control over currency, foreign trade, customs, defense, diplomacy, penal code, administrative litigation, and commercial legislation was still in the hands of the French. These cooperation agreements were concluded before Cameroon proclaimed its independence and joined the United Nations. They are currently still in force, albeit in a transmuted state.

85 Cameroon was a UN mandated territory (until 1960 at independence) entrusted to the administration of France and England. Even though *de facto* Cameroon was treated by France like a colony, *de jure* it has never been. It was not an ex-French colony as in the case of Senegal, Cote d'Ivoire, Burkina Faso, Algeria, and many others.

86 Rousselot "The Impact of French Influence on the State of Democracy and Human Rights in Cameroon" 2010 *Cameroon Journal on Democracy and Human Rights* 64.

87 *BBC News* "Cameroon presidential elections" (2011) https://www.bbc.com/news/world-africa-15219543. (accessed 10-10-2019).

88 *Ibid*.

89 Ferejohn, Rosenbluth and Shipan 2009 *Oxford Handbook* 8.

90 Article 64 of the French Constitution of 1958.

91 Articles 11(1)(a)(b) and 6(1), Status of the Magistracy, decree no. 95/048, 8 March 1995, as amended by decree no. 2004/080, 13 April 2004. They could be appointed to serve as a civil servant at the Ministry of Justice, judges on the bench or as State counsels.

92 *Ibid* 328.

93 Awasom 2002 *Africa Today* 21 and 24.

94 Tabe 2011 *LPAALA* 423 in its fn 15.

95 Enonchong 2012 AJLS 331.

to avoid a backlash from the executive.[96]

Moreover, there exists a relationship between the French government, the president of Cameroon and the judiciary, which explains why the judiciary should be excluded from the appointment process. At independence in 1960, the French handpicked Ahmadou Ahidjo, the first post-independence president to do their bidding in Cameroon.[97] His successor, Paul Biya, was equally not elected. Ahidjo resigned in 1982 and handed over power to Biya at the instruction of the French.[98] Granted, by reason of the French government being instrumental in choosing presidents in Cameroon, it can be extrapolated that the executive authority in Cameroon is answerable to France exclusively and not the Constitution because the trend has revealed that executive authority does not stem from the people. Given these circumstances, it can be confirmed that, "he who pays the piper dictates the tune." It would certainly be challenging for the executive in such circumstances to be independent and to be capable of upholding the rule of law by not interfering with an independent judiciary and allowing it to respect international principles guiding the independence of the judiciary.[99] These principles are the Mt Scopus International Standards of Judicial Independence 2008 as amended in 2011 and 2012, the New Delhi Code of Minimum Standards of Judicial Independence 1982, and the Montreal Declaration on the Independence of Justice 1983.

While France was only forced to grant independence to all its former colonies around 1960, their constitutional construction was such that France's political, economic and cultural domination over its former African territories, were more often than not reinterpreted to suit French priorities.[100] As a result, despite the political reforms for independence, the essential goal was to preserve French post-colonial domination.[101] In order to achieve this, elitist politics was encouraged so that the colonial relationship appeared to be breaking from yet ultimately reinforcing the French colonial traditions, which became the outstanding features of nationalist politics in these territories.[102] Therefore, the post-World War II French colonial policy was to stymie the expansion of any group sympathetic to separatist sentiments.[103] This systematic urge to preserve control over Cameroon and ex-colonies by France is evidenced by its manipulation of the independent constitution-making process of Cameroon, which only permitted the input of colonial-minded elites and the colonial administration, while a significant cross section of the population which propounded anticolonial sentiments were excluded from the process.[104]

The executive power-grab in Cameroon has always focused more on the judiciary, given that parliament already appears to exist entirely to rubber stamp executive decisions.[105] To bolster the objective of emasculating the judicial power, Acts of State in Cameroon are categorised as political matters not susceptible to judicial review. Consequently, the presidential power of appointment to the judiciary is an Act of State.

This view dates back to the time of Marcel Nguini, the then president of the Supreme Court of Cameroon. At the opening of the judiciary year of 1966, he confidently claimed that:

"The duty of discretion and reserve of the magistrate implies that he should be and remain faithful and loyal to the regime; that this loyalty can be shown in all his actions and behaviour, as regards his judicial function as well as his public and private life."[106]

Having identified why the Act-of-State doctrine has become prevalent in Cameroon, and outlined its corrosive effect on constitutional democracy, I now turn to ask what prospects exist to allow for a shift whereby presidential powers of appointment become reviewable in

96 *Ibid* 325.
97 Le Vine "Leadership and Regime Changes in Perspective" in Shatzberg and Zartman (eds) *The Political Economy of Cameroon* (1986) 30.
98 Fowler "Ahmadou Ahidjo of Cameroon Dies; Ex Leader was 65" 1989 *New York Times* Archives https://www.nytimes.com/1989/12/02/obituaries/ahmadou-ahidjo-of-cameroon-dies-ex-leader-was-65.html
99 Judges must also enjoy both personal and substantive independence, enjoy collective independence, autonomy in relation with the executive, judicial appointment must not threaten judicial independence, and judicial appointments should be for life. Not all these features are respected in Cameroon.
100 Joseph "National Politics inPpostwar Cameroun: The Difficult Birth of the UPC" 1975 *Journal of African Studies* 202.
101 *Ibid*.
102 *Ibid* 201
103 *Ibid* 215.
104 Awasom 2002 *Africa Today* 5.
105 Bongyu "Democracy in Cameroon During the Monolithic Period: A Contradiction" 2008 *Cameroon Journal on Democracy and Human Rights* 11.
106 Eyinga *Introduction à la politique Camerounaise* (1984) 286, 298.

Cameroon.

3 A COMPARATIVE PERSPECTIVE OF THE PRESIDENTIAL POWER OF APPOINTMENT AND ACTS OF STATE

It is useful to analyse Acts of State in other African jurisdictions in terms of presidential powers in general and appointments in particular. Francophone states in Africa are identified with the continuous application of the Act-of-State doctrine even after France has discontinued its application. Benin being a Francophone jurisdiction permits the operation of Acts of State in terms of Article 68 powers of the Constitution.[107] Nonetheless, Article 69 has carefully regulated presidential powers related to Acts of State, thereby limiting its invasive demeanor,[108] as opposed to the situation in Cameroon where Acts of State *vis-à-vis* presidential powers are open-ended. Even so, much is left to be desired in terms of resolving the challenge posed by the enforcement of Acts of State in Francophone Africa.[109] The majority of post-independence Francophone Africa constitutions have entrenched the doctrine because they were designed following the French Constitution of 1958. As a result, to consider a different approach, this article considers certain Anglophone jurisdictions in Africa, which to a reasonable degree review presidential appointment power.

In many Anglophone jurisdictions, there has been a progression from where presidential powers could not be reviewed – especially in an emergency – to a state of affairs where they are currently subjected to judicial review. I start with a case from Uganda. While Uganda has recently been in the spotlight for reasons of bad governance,[110] my intention for evoking the Ugandan jurisdiction is solely for reasons of demonstrating the strides realised through the shift to presidential power in the 2015 case examined. In *Uganda v Commissioner of Prisons, ex parte Matovu*, just like in a case mentioned in connection with Cameroon currently, Matovu was detained under new Emergency Regulations applicable only in Buganda, and *habeas corpus* proceedings were instituted to have him released. He was rightly brought before the court in terms of Article 32 of the 1962 Constitution.[111] The determining question was whether the emergency powers invoked to detain Matovu were in conformity with the Constitution. The most important issue raised by the court was regarding the validity of the 1966 Constitution, which the court felt compelled to inquire into given the circumstances in which the application had landed before them. The court agreed that Matovu was entitled to be heard on the merits of his application, but on the more fundamental issue of the legality of the Constitution and the validity of the government, the court was careful not to rule against the executive.[112] This was because the court wanted to avoid executive backlash given that such acts were considered unreviewable at the time. The Chief Justice evoked the American case of *Marbury v Madison* and *Backer v Carr*,[113] to address the extent to which courts could review Acts of State and the difference between the court's duty to interpret the constitution versus providing an opinion on the validity of the extra-legally established Obote government.[114]

In finding that the 1966 Constitution had been properly introduced, the decision in *Matovu* ultimately upheld the extra-constitutional usurpation of power by the Obote government and gave it judicial validity and legal cover.[115] The verdict of this case is liable to be criticised. However, given the constraints under which the court operated, the consequences would have been dire for the judges in the event where they failed to cooperate with the executive.[116] This case thus made subsequent challenging of executive power, including appointment powers

107 This innovation in Benin is lacking in most of Francophone Africa.

108 Adjolohoum "Between Presidentialism and a Human Rights Approach to Constitutionalism: Twenty Years of Practice and the Dilemma of Revising the 1990 Constitution of Benin" in Mbondenyi and Ojienda (eds) *Constitutionalism and Democratic Governance in Africa: Contemporary Perspectives from sub-Saharan Africa* (2013) 263.

109 This system has not been completely transformed in Francophone Africa. For instance, in Benin it still exists, even though it has been reformed to give directives on how the power should be exercised.

110 It is alleged that President Museveni of Uganda lost the 2021 presidential elections to the opposition leader Bobi Wine, but fraudulently stole his victory) *BBC News* "Uganda Elections 2021: Museveni Takes Lead as Bobi Wine Cries Fowl https://www.bbc.com/news/world africa 55675887 (accessed 20/5/2012).

111 Oloka-Onyango *Ghost & the Law: An Inaugural Lecture* (2015) 26.

112 *Ibid.*

113 369 U.S. 186 (1962).

114 Oloka-Onyango 2015 *Ghost and the Law* 27.

115 *Ibid.*

116 *Ibid* 27.

very difficult in Uganda.

In the case of *Center for Health Human Rights and Development (CEHURD) v Attorney General*,[117] petitioners in 2012 challenged the adequacy of maternal health care in Uganda. The petitioners sought remedies ranging from a judicial declaration of the unconstitutionality of executive policies on the award of compensation to families who suffered loss due to poor maternal health care.[118] The Ugandan Constitutional Court dismissed the matter on the basis that matters of executive health policy are political questions beyond the competence of courts.[119] However, in 2015, on appeal to the Supreme Court of Uganda, it ordered the Constitutional Court to hear the petition on its merits.[120] The Supreme Court held that "the political questions doctrine has limited application in Uganda's current Constitutional order and only extends to shield both the Executive arm of Government as well [as] Parliament from judicial scrutiny where either institution is properly exercising its mandate, duly vested in it by the Constitution."[121] The significance of this case is that it has reversed the firm reliance on the political questions doctrine as established in *Ex Parte Matovu*. This same renewed spirit of asserting the justiciability of presidential/executive acts has also been emulated in post-apartheid South Africa.

In the case of *Democratic Alliance v The President of South Africa*,[122] the Supreme Court of Appeal of South Africa declared the 2009 appointment by the President of the Director of Public Prosecutions (NDPP), Mr. Menzi Simelane, invalid.[123] This matter went on appeal from the North Gauteng High Court (Pretoria). In terms of section 179 of the 1996 Constitution of South Africa read with sections 9 and 10 of the National Prosecution Authority's Act 1998, prosecutorial independence must be safeguarded.

The Democratic Alliance (DA) argued that the president of the Republic of South Africa who has the powers to make the appointment of the NDPP did not apply his mind to the appointment. That the occupier of such an office is required to be "a fit and proper person with due regard to his experience, conscientiousness and integrity"[124], and the DA, via various submissions, demonstrated how Simelane does not meet these requirements. There were findings against him for failing to disclose the truth. The Supreme Court of Appeal (SCA) held that the President of the Republic erred in four specific ways in his appointment of the NDPP. These failures rendered the president's decision to appoint Mr. Simelane as the NDPP irrational and invalid.[125] The Constitutional Court (CC) confirmed the SCA's ruling by holding that the president did not respect the rules set forth for the appointment of the NDPP and instead solely depended on his *curriculum vitae*.[126]

Factors relating to prosecutorial independence; indicating that the prosecutor would exercise his/her authority without "fear or favour" were not assessed by the president, as the Constitution requires. Simelane's appointment was set aside and he was given special leave by the president until later when his removal was confirmed. This is a demonstration of how the CC (and other courts) and its application of judicial review can challenge the misuse of executive powers. The CC held that it is impossible for the separation of powers to be undermined by the rationality test. This means that the fact that the executive makes a decision does not determine whether it is rational or irrational.[127]

In another case, *Justice Alliance of South Africa v President of the Republic of South Africa*,[128] a new Chief Justice of South Africa had to be appointed to replace the incumbent whose tenure was about to come to an end. The president overlooked the Deputy Chief Justice

117 Constitutional Petition No. 16 of 2011, UGCC 4.
118 Dennison "The Political Question Doctrine in Uganda: A Reassessment in the Wake of CEHURD" 2014 *Law Democracy & Development* 264–265.
119 *Ibid* 265.
120 In Uganda, the Highest Court is the Supreme Court. The Constitutional Court is constituted exclusively for the purpose of addressing a human rights issue.
121 *Centre for Health, Human Rights and Development v Attorney General* (2015), Constitutional Appeal No. 1 of 2013 ESCR-NET https://www.escr-net.org/caselaw/2015/centre-health-human-rights-and-development-3-others-v-attorney-general-2015 (accessed 2-10-2018).
122 2013 (1) SA 248 (CC).
123 De Vos (2011) http://constitutionallyspeaking.co.za/2011/12/ (accessed 20-6-2020).
124 Paragraph 13 of judgment *Democratic Alliance v President of the Republic of South Africa.*
125 Judgment Case CCT 122/11 [2012] ZACC 24 *Democratic Alliance v President of the Republic of South Africa* 6.
126 *Ibid* 32.
127 Judgment Case CCT 122/11 [2012] ZACC para 44.
128 2011 ZACC 23.

who should have naturally replaced him which it is suspected widely was for reasons of his being fearful that he was too independent minded for the liking of the ruling African National Congress (ANC).[129] As a result, president Zuma decided instead to extend the incumbent Chief Justice's tenure by five years. This extension was in line with section 8(a) of the Judges' Remuneration and Conditions of Employment Act. However, this decision was supposed to be based on section 176(1) of the Constitution which permitted Parliament to extend the term of office of a Constitutional Court judge.[130] The court pointed out that section 8(a) of the Act upon which the president relied was unconstitutional because it effectively allowed the president to usurp the authority of Parliament. Therefore, the court rejected the declaration holding that it could not render "valid an extension that [was] invalid."[131] These two cases have demonstrated that the presidential power of appointments in post-apartheid South Africa is subject to judicial review and where any appointment is inconsistent with the constitution, it will simply be invalidated. This principle was established in *Pharmaceutical Manufacturers of South Africa: In re ex parte President of the Republic of South Africa* case.[132] Here Chaskalson P held that: "…there is only one system of law. It is shaped by the Constitution, which is the supreme law and all law, including the common law, derives its force from the Constitution and is subject to constitutional control."[133]

4 CONCLUSION

In conclusion, this article has exposed the theoretical problems of the rule of law and their effects on constitutional democracy in Cameroon. The article argues that the Acts-of-State doctrine thrives within the compromised rule of law system in Cameroon. This doctrine permits and facilitates the insulation of presidential appointment powers so that only regime-oriented judges are appointed to top positions in the Supreme Court and the Constitutional Council in Cameroon without opposition. This strategy aims at maintaining the regime in power and in many other ways to sustain France's neo-colonial relationship with the country. In other words, the presidential power of appointment has enabled the perpetration of the neo-colonial regime in Cameroon through the appointment of (neo)colonial-oriented elites to rule and exercise power in post-independence Cameroon by means of unreviewable acts. These acts are in conflict with the principle of legality. Acts of State being a colonial legacy are inconsistent with a democratic dispensation whereby the virtue of the rule of law, administrative and executive authority or their acts must undergo review in order to avoid the abuse of powers. The French policy in Francophone Africa in general and Cameroon in particular is of a nature that encourages executive impunity in return for the protection of French interests. Be that as it may, in order to render the rule of law real in Cameroon, two things must be done. First, the Constitution must be amended to scrap Article 53. Second, section 4 of law No 2006/022 of 29 December 2006 on the organisation of courts, which insulates presidential acts from judicial review, must be repealed. By applying these provisions, judicial power is usurped by the executive and the latter shielded from judicial scrutiny rendering the judicial branch redundant and unable to exercise the powers conferred on it by the Constitution. These provisions also disregard international standards on the independence of the judiciary as previously mentioned.

Through the examination of some other jurisdictions in Africa, especially Anglophone Africa it has been demonstrated that Acts of State undermine the independence of the judiciary and encourage judicial passivity. The case of *Justice Alliance of South Africa v President of the Republic of South Africa* demonstrates that instances exist where the appointment of senior judges could be reviewed to ensure their conformity with the law. The case of *Ex parte Matovu* has been evoked only to acknowledge the fact that Anglophone Africa also had a jurisprudence of impunity in this regard. Nevertheless, some recent developments have recalibrated this orientation as numerous cases have been decided against obstinate presidents where presidential appointments and acts are now subject to judicial review. Given that Acts of State come with numerous adverse effects on a democratic and constitutional order, it would be appropriate to provide a number of solutions on how to fix the problem.

The most urgent change needed is that the Acts-of-State doctrine in Cameroon should

129 Fombad 2014 *JLPUL* 252
130 *Ibid.*
131 *Ibid.*
132 2000 (2) SA 674 (CC).
133 CCT31/99 [2000] ZACC1; 2000 (2) SA 674; 2000 (3) BCLR 2241 (25/02/2000) para 44.

be overturned. However, given the ubiquity of this doctrine in Cameroon, and its rootedness in key features of the state, a large-scale constitutional overhaul will be necessary. This constitutional overhaul is inevitable because Acts of State pose both a constitutional and legislative challenge. However, given that legislation is a product of a constitutional order, Acts of State are born from the spirit and the letter of the Constitution. Repealing the provisions or amending them will only produce a placebo and not a panacea to the problem. A sustainable manner of addressing the problem will be to revise the entire constitution and reconceive a new constitutional order from scratch founded on the spirit of the rule of law, fundamental principles of constitutionalism, constitutional supremacy, the separation of powers, independence of the judiciary and respect for constitutional rights. Then, it will be necessary to recognise that presidential acts are subject to judicial review. In so doing, it is important that a future Constitution should expressly enjoin executive deference to judicial rulings. Acts of State can thrive in a constitutional order where the executive is able to make unfair and inequitable decisions without any ability to overturn them. The new Constitution simply needs to expressly re-affirm the final authority of the judiciary after crafting a means to implement its authority. The current Constitution implicitly empowers the executive to employ raw power to achieve its purpose.[134] It is recognised that this proposal will require widespread political reform in Cameroon – that, in my view, is the only way in which Cameroon will be able to establish itself as a viable constitutional democracy in the future.

134 Alexander and Schauer "On Extrajudicial Constitutional Interpretation" 1997 *Harvard Law Review* 1366.