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The Constitutional Council in Cameroon 5 years later. Assessment and challenges

By

By **Dr GATSI TAZO**,

University of Buea

Associate Researcher, Think Tank CEIDES

By Eulalia Amabo,

Political Service, Cameroon Tribune

Febuary 2023

1. **The Constitutional Council has been existing for the past five years. What appreciation do you make of the creation of this institution in contributing to enhance the democratic process of Cameroon?**

The implementation of the Constitutional Council was done by Presidential Decrees No. 2018/105 of the 7 February 2018 appointing the members of the Constitutional Council, and No. 2018/106 of the same day appointing the President of the Constitutional Council. On the 6 March 2018, these members took the oath of office before the Parliament meeting in Congress chaired by the Speaker of the National Assembly. This implementation was appreciated for two reasons. The first reason relates to the then pressing need to complete the institutional architecture of the State as intended by the 1996 Constituent. By way of reminder, the 1996 Constitutional text created new institutions, including the Constitutional Council. This effective establishment was necessary to put an end to the interim period exercised by the Supreme Court, which had already lasted more than 22 years.

The second reason is related to the importance of the Constitutional Council in the institutional architecture of the State. It should be recalled that, as in all the States that have chosen to set up the European model of constitutional justice, i.e. by creating a specially dedicated institution, the constitutional judge plays an essential role as arbiter of the functioning of State institutions. This is true in Cameroon, where the Constitution entrusts the Constitutional Council with a function that can be divided into three categories, namely a contentious function, an advisory function and a right of supervision over the functioning of state institutions:

- The contentious function of the Constitutional Council is that by which the Council settles a dispute. A distinction is made here between: the review of the constitutionality of laws, internal regulations of Parliament's Houses and international conventions; arbitration of conflicts of jurisdiction between organs of the State, whether horizontal or vertical conflicts; and electoral disputes, in particular those concerning national political elections (presidential and parliamentary elections).

- The consultative function of the Constitutional Council allows it to give its opinion and advice to any authority having *locus standi*, on any matter falling within its competence.

- As for its right of supervision over the functioning of the state institutions, it allows the Constitutional Council either to give its opinion before certain decisions of the President of the Republic (dissolution of the National Assembly, abridgement or extension of the term of office of members of the National Assembly, ministerial reshuffle by the interim President of the Republic, etc., tabling of a bill to referendum, dismissal of the president of the regional executive and dissolution of the regional Council); to ascertain the vacancy at the head of the State; or to take part in protocol events (swearing in of the President of the Republic, message of the President of the Republic, etc.).

These functions theoretically place the Constitutional Council at the centre of the functioning of the State. They make it the guarantor of the respect of the Constitution and the achievement of the rule of law, understood as a State where the Constitution is the supreme norm and where human rights are respected by all. It was therefore high time for the Constitutional Council to be set up.

2. **Several judgements have been passed by the Council? How do you rate the rulings?**

The figures of the statistics of the rulings of the Constitutional Council are mitigated. It can indeed be observed that most of the rulings of the Constitutional Council relate to electoral disputes. Since its effective establishment, the Constitutional Council has ensured the dispute of the senatorial elections of 2018, which constituted its baptism of fire, that of the very famous presidential election of 2018 and the legislative elections of February 2020. It is preparing to manage the disputes of the upcoming senatorial elections of the next 12 March. A total of 133 rulings were rendered on electoral disputes by the Constitutional Council, including 8 during the 2018 senatorial elections, 30 during the 2018 presidential elections and 95 during the 2020 legislative elections.

On the other matters falling within its jurisdiction, one can deplore a less high record. Indeed, since its implementation, the Constitutional Council has not rendered any substantive ruling on the constitutionality of laws, nor on the functioning of state institutions. Left aside electoral disputes, all petitions referred to the Council have been sanctioned by rulings of inadmissibility, for lack of standing (See the Case of Global Concern Cameroon (30 July 2018) relating to the constitutionality of the suspension of the Internet in the North-West and South-West regions; the case of Joachim Tabi Owono (AMEC) relating to the suspension of the anti-Covid-19 vaccination campaign (June 7, 2021); the case of Denis Emilien Atangana (Front des Democrates Camerounais (FDC) relating to the illegal retention in office of 18 General Managers of public companies (6 September 2021) and the case of Vincent Engoulou Voundi, on behalf of the association Decentralization Action Life relating to the arbitration on the reframing of the policy for the implementation of the decentralization process in Cameroon (September 6, 2021).

This reality is not new since it simply prolongs the observation already made before the establishment of the Constitutional Council, that is to say in the era of the interim exercised by the Supreme Court which had only known two rulings relating to constitutionality, one of which following a mandatory review, in 22 years. The causes of this state of affairs are known and are essentially linked to the model of constitutional justice practiced in Cameroon, with regard to the control of the constitutionality of laws. They are related to the restriction authorities having *locus standi t*o refer a law to the Council, the exclusive a priori and preventive model of control of constitutionality of laws practiced, etc.

3. **What according to you justifies the fact that all petitions tabled before the institution have ruled not in favour of the petitioner?**

It is not correct to say that all the rulings rendered by the Constitutional Council so far were not in favour of the petitioners. Out of the 133 rulings identified, there are about twenty in favour of the petitioners, all resulting from the dispute of the 2020 legislative elections. Such was the case in the North-West and South-West regions, where elections were cancelled in eleven constituencies, due in particular to the climate of insecurity which prevailed there during the electoral operations. However,, it can be observed that the vast majority of the rulings are indeed not in favour of the petitioner: no favourable ruling was rendered during the first two electoral disputes handled by the Constitutional Council out of 38 petitions filed (8 during the senatorial of 2018 and 30 during the presidential election of 2018); while around 70 rejections were recorded out of the 95 petitions introduced during the 2020 legislative litigation. The observation is clear: judgments of the Constitutional Council record around 17% success against around 83% rejection.

The reasons for these statistics, which are largely unfavourable to the petitioners, are manifold, and can be attributed both to the attitude of the parties involved in the litigation and to the nature of constitutional litigation. Regarding the attitude of the actors, a significant fraction of the rulings of the Constitutional Council is made up of rulings sanctioning formal defects or lack of jurisdiction. For example, during the post-electoral litigation of the 2018 presidential election, out of the 18 appeals lodged for the cancellation of electoral operations, 16 were declared inadmissible, which ironically earned the Council the nickname of "irrecevable Council". This was also the case for the other four petitions cited above filed with the Constitutional Council on other matters, which all ended in rulings of inadmissibility. This is due to a lack of knowledge of the litigation procedures and the formalism in force before the constitutional judge on the part of the applicants who venture into litigation without any real preparation and mastery of the subject matter. They are advised to surround themselves with specialists. But this reality is also attributable to the Constitutional Council which has often been very fussy on formal and procedural issues, to the detriment of substantive issues. In the case of Cabral Libii following the post-electoral dispute of the 2018 presidential election, for instance, the petition was declared inadmissible for having been filed within three days after the closure of the polling stations, and not within 72 hours as prescribed by the law.

On the reasons linked to the nature of constitutional litigation, and in particular electoral litigation, it should be noted that it is a particularly complex litigation where the election has more chance of being maintained than of being annulled. Firstly, the electoral process enjoys a presumption of regularity which it is up to the person who challenges it to overturn. Secondly, electoral fraud is one of the most difficult to establish because of its insidious and pernicious nature. Finally, even if there is evidence of electoral fraud, the election may still be upheld and the petitioner dismissed if it is proven that the fraud did not have a determining effect on the outcome of the election. In other words, if the electoral fraud did not give the winner a decisive advantage that enabled him to win, the election will be upheld.

4. **From your observation, is the population well versed with matters to be brought before the Court, or is the Council not free enough to render equitable justice?**

As we have just said, there is indeed an issue of mastery of the procedures before the Constitutional Council and its jurisdiction by the public. The analysis of the rulings of the Constitutional Council testifies to the fact that several petitions are introduced either in flagrant ignorance of the forms and procedures, or by persons not having standing, or on matters which do not fall within its jurisdiction.

The issue relating to the freedom of the Constitutional Council in the exercise of its functions raises the problem of its independence. On this question, it should be noted that the laws confer on the Constitutional Council a certain status of independence. From the combined reading of the Constitution and Law No. 2004/005 of April 21, 2004 on the status of the members of the Constitutional Council, the guarantees of this independence include: the shared designation of the eleven members of the Council (3 by the PR, 3 by the President of the Senate, 3 by the Speaker of the National Assembly and 2 by the Higher Judicial Council); general immunities (protecting against any measure of arrest or detention, except in flagrante delicto, or waiver of immunity) or special immunities (protecting against any legal proceedings on the basis of opinions expressed during the exercise of their functions); and their irrevocability, except by the Council itself in specific cases.

However, there are reasons to relativize the degree of independence of the Constitutional Council, whether for legal reasons or practical reasons. From a legal point of view, we may cite:

- the short term of 6 years and possibly renewable of its members, which is the work of the constitutional revision of 2008 which abrogated the long term of 9 years non-renewable which was provided for by the initial constitutional text. The possibility of a renewal of the mandate can be perceived as a deterrent to any desire for independence and neutrality by any member aspiring to have his/her term renewed.
- The mitigated administrative and financial autonomy through: the appointment of the Secretary General of the Council by the President of the Republic, the exclusion of the Council from the procedure of designing and adopting its budget and the fixing by presidential decree of the advantages and allowances of its members (see Article 13 of the aforementioned law of 2004). In almost all West African states, the constitutional court budget is prepared by the president of the court, then forwarded to the authorized bodies for inclusion in the general state budget.

From a practical point of view, it should be emphasized that the political dynamics in force in Cameroon and the preponderant place occupied by the President of the Republic within the institutions can help to give him influence over the Council and its members. Indeed, as things currently stand, all the other authorities appointing members of the Constitutional Council are in a position of deference vis-à-vis the President: he is the leader of the party in power which has an ultra-majority in the Parliament and from which sit the presidents of the two Houses with the power to appoint three members each; he is the authority that appointed the current President of the Senate; and he is the president of the Higher Judicial Council which appoints 2 members. In reality, these mechanisms should not affect the independence of the Council

and its members, which is ensured by the exclusion of any power of influence, wherever it may come from, on the Council. These mechanisms could rather pose the problem of neutrality of the members of the Council. Here too, we must not lose sight of the fact that it is neither necessary nor even conceivable to want to have members of the Constitutional Council without ideals and without ideology. In most States (notably in the United States and in France), members of the constitutional jurisdiction are chosen because of their convictions and their ideas. What is needed is their ability to demonstrate an unchallenged democratic culture and a republican sense that transcends their ideological affiliations, that is to say, to demonstrate what Robert Badinter has described as a "duty of ingratitude". to their appointing authorities. For example, Warren Earl Burger, the president of the US Supreme Court who presided over the trial that led to Nixon's resignation in 1974, was appointed by him in 1965.

5. **What in your opinion can be done to make the institution more efficient so as to live up to its missions?**

The actions to be carried out with a view to giving the Constitutional Council the means to play the role of guarantor of the functioning of institutions and protector of fundamental rights, must fall within the framework of a revision of the model of constitutional justice applied in Cameroon.

The first thing to rethink is the *locus standi*, which must be extended. As things currently stand, *locus standi* to refer a bill to the Council is restricted to the President of the Republic, the presidents of the two parliamentary chambers, 1/3 of the members of each of the Houses (60 and 34 members respectively for the National Assembly and the Senate) and the presidents of the regional executives when the interests of their regions are at stake. This restriction of the right of referral makes it more than improbable for bills to be challenged before the Constitutional Council. Indeed, although the Constitution provide that bills may be initiated by the Parliament and the Government, in practice, the bills tabled to the Parliament are all of government origin. It is therefore not expected that the President of the Republic, the presidents of the two Houses and even less the parliamentarians of the majority challenge their own bills. This challenge is therefore more likely to come from opposition parliamentarians. However, since 2002, successive legislatures have given an overwhelming majority to the ruling party, leaving the opposition with only a tiny minority unlikely, even taken as a whole, to constitute the minimum required to bring a bill before the Council (National Assembly: 31 against 149 in 2002, 27 against 153 in 2007, 32 against 148 in 2013 and 28 against 152 in 2020; Senate: 17 against 56 in 2013 and 7 against 63 in 2018, for elected senators). During the 1992-1997 and 1997-2002 legislatures, when the opposition was very representative in the National Assembly (then the only parliamentary House, 92 and 64 representatives respectively), the governing majority endeavoured to sign partnerships with some opposition parties in Parliament. This paucity of the jurisprudence of the Constitutional Council relativizes its role specified above in the functioning of the organs of the State. It is through extensive and abundant case law that the Council will have to impose itself as arbiter of the functioning of the institutions, as guarantor of constitutional supremacy and as protector of fundamental rights.

It should be recalled that the French Constitutional Council, which is today the key and essential piece of the moderation of the functioning of French state institutions, acquired this status from the extension of the right of referral to a minority of the members of the National Assembly and senate in 1974 (60 deputies out of 577, and 60 senators out of 348 senators) A considerable lowering of the minimum number of parliamentarians necessary for referring to the Constitutional Council, to 30 deputies and 15 senators, could boost its jurisprudence.

The second reform relates to the admission of an *a posteriori* control of constitutionality of laws, that is to say their challenge after their promulgation. The current model provides for an exclusive *a priori* constitutionality control, that is to say before the implementation of the laws. Once the formality of promulgation has been completed, the law is no longer challengeable. This preventive option aims to neutralize the unconstitutional provision before the application of the law. However this objective may only be achieved only if the laws are systematically checked before their application, which is the case only for the internal regulations of the assemblies. Because there are possibilities of having unconstitutional laws in the legal market, we must think of a system to remedy them. Hence the need to combine the preventive control currently in force with the possibility of a curative and concrete control, in the form of an exception of unconstitutionality. This would have the advantage of partially solving the problem of the restriction of the right of referral since the *a posteriori* and curative control opens the standing to any citizen who can therefore seize the Council by a well defined mechanism. Many countries including Gabon, Benin, Niger, France apply this combination between preventive control and curative control, with rather satisfactory results.

One could also think of extending the jurisdiction of the Council to certain acts which are currently excluded from its fields of competence. The idea here is to put all three arms of government under the control of the Constitutional Council. Thus, as is the case in certain countries like Benin and Gabon, the acts of the administration could be subject to the control of the constitutional judge if they violate or restrict fundamental rights. Above all, this would make it possible to avoid legislative screen situations where the administrative judge refuses to sanction unconstitutional administrative acts, on the grounds that they comply with a law. Finally, the Council should be more bold in discharging its missions. Without necessarily being a judge who governs, the Council must interpret the constitution in a spirit of democracy and respect for fundamental rights. It is at this price that it will win the place reserved for it in the institutional architecture of the State.

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Centre africain d'Etudes Internationales
Diplomatiques Economiques et Stratégiques

B.P. 35147 Bastos-Yaoundé/Cameroun

Tél : (+237) 243 105 872

www.ceides.org Email :infos@ceides.org

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