

# A Rigid, Pure Tripartite Separation of the Arms of the Government and the Cameroonian Constitution: A Critical Appraisal

Ama Ambo Chefor\*

## Abstract

*The concept of separation of powers in its true and original sense is very rigid. It means that the three arms of the government should be completely independent, and one organ should not control or interfere with the exercise of its function by another organ. Unfortunately, this principle in its strict sense has not been accepted by a large number of countries in the world because it is hematic, watertight and renders administration of the State inflexible. Practically, the delegations of powers within the administration, relation or corporation between the three organs of the government in most contemporary democracies have made the theory of separation of powers in its strict sense more of a fiction, illusionary than a reality. The objective of this article is to examine the applicability of the rigid, pure tripartite separation of the arms of the government in the 2008 Cameroonian Constitution and Cameroon in general. In undertaking this analysis, the article unveils an understanding of what a tripartite separation of powers is, the principle establishing it, its importance and criticisms. Further, it brings out an application of this principle in the Cameroonian Constitution and a general appraisal of its applicability in the Constitution and the Republic of Cameroon. We adopted a doctrinal methodology, a satisfied analysis of primary and secondary data. Our findings reveal that, though the 2008 Cameroonian Constitution structurally adopts the composition of the tripartite separation of powers; the executive, the legislative and judicial powers, it is in practice operational in its liberal and not the strict sense. Chiefly, in the sphere of law-making. We recommend the creation of a separate organ to reconcile the three organs where differences arise or in cases where skirmishes surface amongst them.*

**Keywords:** Delegations of powers, administration, law-making, Cameroon, democracies

## INTRODUCTION

The French Declaration of the Rights of man [1] states that “a society where rights are not secured, or the separation of powers established has no constitution [2]. The separation of powers, not a legal, but a political theory, [3] and mainly, a principle of modern constitutionalism is dissociated from the name Montesquieu. Though Montesquieu formulated the doctrine systematically and scientifically, he

was not the pioneer of the doctrine. Montesquieu, the French jurist, who envisioned this theory, found that concentration of powers in one person or group of persons can lead to tyranny. Its rationale was based on the natural law philosophy traceable back to Plato and Aristotle and later articulated by the 16<sup>th</sup> and 17<sup>th</sup> centuries French Philosopher; Jean Bodin and British politician, John Lock. The tripartite separation of powers concerns the division of State power as between the executive, the legislature and judiciary [4]. In pursuant to this theory, each organ of the

### \*Author for Correspondence

Ama Ambo Chefor  
E-mail: [amaahchefor@yahoo.com](mailto:amaahchefor@yahoo.com)

Assistant Lecturer, Faculty of Law and Political Science,  
University of Dschang, Dschang, Cameroon

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government should be independent of the other. In other words, no one arm of the state should perform the functions that belong to the other. According to Montesquieu, this means that there must be a division on the following basis: the legislature should enact the laws but not administer or enforce them. It is mandatory for the executive arm of the government to administer the made laws but neither influence the legislative body in the law-making process nor stand in judgment of the same. The judiciary on the other hand is to determine and uphold justice without taking over the functions of law-making or administration. It also means that one arm of the government should not interfere with other organ and thirdly, one arm of the government should not exercise the functions assigned to another arm [5].

Adopting a doctrinal and critical analysis, we discovered that a water-tight application of the doctrine is not possible, making it a major problem in practically applying the principle. In other words, there is nothing like a strict or rigid separation of powers. The concept of a pure tripartite separation of the organs of the government is more of thought than practice. More of fiction than reality. Practically, in most democratic States, foreign and African, the functions of the three organs of the state do overlap and we, in a consistent manner, see the members of the executive performing functions of the legislative powers in areas of law-making via delegated or subordinate legislation. Another factor observed which we esteem most institutions have ignored including the 2008 Constitution of Cameroon is the fact that the non-political executive is completely excluded within the membership of executives. Wholly excluding them, may lead to inflexibility and inefficiency of the management of the State as well.

The aim of this article therefore is to examine the applicability of the theory of the rigid, pure tripartite separation of the organs of the government in the 2008 Cameroonian Constitution and the Republic of Cameroon. In doing so, the article will examine the theory, bringing out its advantages and criticisms. It will also assess the application of this principle in the Cameroonian Constitution and the State of Cameroon. But before this, a word needs to be said on the definition of a tripartite separation of the organs of the government.

## **DEFINITION OF A TRIPARTITE SEPARATION OF THE ORGANS OF THE GOVERNMENT**

In democratic systems of governance based on *trias politica*, the three arms of the state are largely independent: the executive, legislative assembly and the judiciary [6].

### **The Legislative Arm of the Government**

The legislature or parliament is that organ of the government which performs the function of law-making via deliberations. In a nutshell, this organ of the government has law-making functions which includes making and passing of new laws and amending and repealing of old laws. A modern legislature is either bicameral or unicameral. Of the three arms of the government, this branch of the government has a place of primacy [7]. It is also tasked with the duty of writing bills which may benefit the people as a whole.

### **The Executive Arm of the Government**

It is that branch of the state which implements the laws passed by the legislative body and the policies of the government. The term executive has been defined in its broad and narrow forms. In its broad form, it refers to all the functionaries, political, powerholders (political executive) and permanent civil servants who undertake the execution of laws and policies and run the administration of state. In its narrowed sense, it is taken to mean only the executive heads, that is the ministers who are an embodiment of the political executive. They head the government departments, formulate policies and supervise the implementation of the laws and policies of the government. Traditionally, only the narrow meaning used to be embraced by political scientists. However, in the contemporary

world, the executive is defined in its political permanent executive. The political executive is the historic core of the government. In a democratic country, the prime minister and council of ministers are an example. They are more powerful and take all the final decisions. Civil servants fall in the category of the permanent executives (non-political executive) [8]. They are less powerful and assist the political executive in carrying out day-to-day administration.

### **The Judiciary**

The judiciary is simply described as the arm of government whose primary role is to interpret the law.

### **PRINCIPLE GOVERNING THE TRIPARTITE SEPARATION OF THE ORGANS OF GOVERNMENT**

The principle governing the pure tripartite separation of the arms of the government is the principle of separation of powers. In its strict sense, separation of powers means that there should be a clear distinction of functions between the three arms of the state. There should not be any overlaps in functions, personnel and powers. In the liberal sense, separation of powers means there could be overlaps in functions and personnel between the three branches of the government but there should be checks and balances. The system of checks requires a partial distribution of functions among the separate powers, such that every arm of the state can execute partial control over the remaining ones via certain legal instruments. The doctrine is based on the principles of specialization and independence. This means that no individual should have powers that span these offices. The chief institutions are usually taken to be the executive, the legislative assembly and the judiciary [9]. The separation of powers means three things. Firstly, persons should not form part of more than one of the three arms of the government, meaning the ministers should not sit in parliament. Secondly, one arm of the government should not control or interfere with the exercise of its functions by another. For instance, the judiciary should be independent of the executive or that ministers should not be responsible to parliament. Thirdly, one branch of the government should not exercise the function another. Ministers for instance should not possess legislative powers. The pure theory of the separation of powers in its true sense is very rigid and one of the reasons why it is not strictly accepted by the large number of countries in the world. Dealing with mutual relationships between, the legislature, executive and judiciary [10] the personnel in the legislative branch of government must not be the same as those in the executive or judicial arm of government. Each of these powers must be restricted to the performance of its own function and may not be authorized to interfere with the tasks of any other. Also, the members of the legislative domain must not have the same functions and powers as those in both the executive and the judiciary. The concept has as main advantage in that it ensures that too much power is not concentrated in one organ of the state, which prevents the temptation of abuse of power. It also promotes specialization and political freedom.

### **CRITICISM OF THE SEPARATION OF POWERS**

Many aspects of the classic separation of powers doctrine of a tripartite division between the legislative, executive and judiciary which is commonly attributed to Baron Montesquieu, have been subject to sustained academic criticism in recent decades [11]. James Madison, the father of the Constitution once wrote that the accumulation of all powers, legislative, executive and judiciary, in the same hands whether of one, a few, or many and whether hereditary, self-appointed or elective, may justly be pronounced the very definition of tyranny. An absolute separation of the organs of the state would hinder in working of the arms of government with co-operation and harmony. Administratively, efficiency cannot be attained if there is a complete separation of the arms of the government because each arm would try to preserve its powers, neglecting the other branches. It was only with this in mind that the founding fathers of various constitutions have accepted this principle with modifications to make it relevant to the changing times [12]. A pure doctrine demands the complete separation of personnel of the three arms of government, but this can be modified to introduce a partial separation of persons. That is to say that some people may be allowed to be

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members of more than one organ of the government, although a complete identity of personnel in the various branches will be forbidden [13]. It results to inequality of organs as the legislative body is essentially superior because it makes the framework in which the whole government machinery operates. The supremacy of the legislative branch is further confirmed by the fact that it exercises control over finances of the state. By this power the legislature exercises control over other organs, in view of theory of popular sovereignty and democracy, the executive and the judiciary must be subordinated to legislative control. Lastly, there is impossibility of totally separating and delineating the powers.

It is possible that a political system maybe established on the basis of separation of powers and pretend that the three organs of government are totally independent and not influenced by the others, but in practice one power, for a certain reason, may interfere in the domain of other powers and attempt to dominate or control them. In a presidential system, in which people directly elect the president, the executive power is totally in hands of the president. The executive also interferes and influences the legislature and the judiciary. The members of the legislative assembly who have the legislative right sit together and ratify a bill via a majority vote after holding discussions and deliberations, but since the constitution itself grants the president this veto power, a ratified bill of congress can be rendered null and void [14].

### **APPLICABILITY OF THE PRINCIPLE IN THE CAMEROONIAN CONSTITUTION**

The tripartite separation of the organs of the government is adumbrated in the Constitution of Cameroon [15]. It composes of the executive, [16] the legislative [17] and the judicial power [18]. The same Constitution makes further provisions for the relations between the executive and the legislative powers [19].

#### **The Executive Power**

The president of the republic of Cameroon is the first member of the executive power and the Head of State. The Cameroonian Constitution empowers the Head of State to take the oath of service in the presence of members of parliament and the Supreme Court meeting session. He shall be sworn in by the president of the National assembly. He is to represent the state in all acts of life and enact laws as provided in article 31 of the Constitution. He is to exercise the right of clemency after consultation with the higher judicial council and exercise statutory authority. That is if it is necessary and after consulting the government, the bureau of the National Assembly and the senate, he can dissolve the national assembly.

The government is the second member of the executive power [20]. This arm is empowered to implement the policy of the nation by the president of the republic and is responsible to the national assembly under conditions stipulated in article 34. The prime minister who is the head of government, direct its actions and is responsible for enforcing the laws. He is empowered to exercise statutory authority and appoint to civil posts, subject to the prerogatives of the President of the Republic in such areas.

#### **The Legislative Assembly**

This arm of the state is exercised by the parliament composed of two houses: the national assembly and the senate [21]. The Constitution of the Republic of Cameroon officially authorizes the parliament to legislate and control government action. Laws are passed by a simple majority of the members of the National assembly [22]. The President of the Republic of Cameroon may, before making any law, ask for a second reading. In such a case, bills shall be passed by an absolute majority of the senators.

#### **Relationship between the Executive and the Legislative Arm of the State**

According to the Constitution of the Republic of Cameroon, Bills may be tabled either by the President of the Republic or by members of the legislative arm of the state who are empowered to

pass bills [23]. Matters not reserved to the legislative body shall come under the jurisdiction of the authority officially authorized to issue rules and regulations [24]. The legislature may empower the President of the republic to legislate by way of ordinance for a limited period and for given purposes [25]. Government bills and private members' bills are to be tabled before the bureau of the National Assembly and the Senate [26]. The President is expected to enact laws passed by parliament within 15 (fifteen) days of their being forwarded to him unless he officially asks for a second reading or refers the matter to the Constitutional Council [27].

The Prime minister and the other members of Government are to have access to the legislative assembly and may participate in its deliberations [28]. At the session during which the finance bill is considered, the Prime Minister is to table to the National Assembly the Government's economic, financial, social and cultural programme. The Prime Minister may, after the deliberations of the council of ministers commit the responsibility of the Government before the National Assembly on a programme or, as the case may be, on general policy statement. The Prime Minister may, after deliberations of the council of ministers commit the responsibility of the government before the national assembly on the adoption of a bill. In such a case, the bill may be considered adopted except where a motion of censure tabled within the next 24 (twenty-four) hours is passed under the conditions provided for in the preceding paragraph [29]. The legislature is anticipated to control Government action through oral or written questions and by setting up committees of inquiry with specific terms of reference. The government on the other hand, subject to the imperatives of national defence, the security of the State or the secrecy of criminal investigation, is expected to provide any explanations and information to legislature [30].

### **Powers of the Judiciary**

Judicial power is to be exercised by the Supreme Court, Courts of Appeal and Tribunals. The judiciary of Cameroon is independent [31] of the executive and legislative arms of the state and magistrates of the bench shall, in discharging their duties are governed only by the law and their consciences [32]. The President of the Republic of Cameroon is empowered to guarantee the independence of judiciary and appoint members of the bench and the legal department. He is to be assisted in this task by the higher judicial council which is to give him its opinion on all nominations for the bench and on disciplinary action against judicial and legal officers.

### ***An Appraisal of the Application of the Principle Governing the Tripartite Separation of the Arms of Government in the Cameroonian Constitution***

In making an appraisal of the applicability, we are going to proceed from a reflection of a liberal or mixed separation of powers, relations or interaction between the three organs and lastly establish a conclusive standpoint on the applicability of the theory in the Republic of Cameroon.

#### ***A Reflection of a Liberal or Mixed Separation of Powers***

Cameroon like many other African countries has incorporated the principle of separation of powers in its amended constitution, [33] which went into effect on 1 January 1960 [34]. The principle of separation of powers is incorporated and well-structured into the executive, legislative and judicial powers. But the question that demands an answer is if the separation of powers is applicable in its strict, pure or rigid sense as opined by Montesquieu. Though the Cameroonian Constitution adopts the tripartite separation of powers structurally; the executive, legislative and judicial powers, the organs of the government are not utterly independent on paper. There is an overlap of personnel and functions between the three organs. The President of the Republic is a member of the executive, but he is named the Head of State, enact laws, appoint Civil and military personnel, dissolve the national assembly [35]. The prime minister is named head of government, with duties to be defined by the president. The Constitution of Cameroon also reserves further rights to the legislature and details how the President and legislature may interact. This includes the ability to grant legislative power to the

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President under limited circumstances [36]. According to the Constitution of the Republic of Cameroon as earlier mentioned the parliament of Cameroon may empower the president of the republic to legislate by way of ordinances for a limited period and a given purpose. The Cameroonian Constitution, in outlining the powers and responsibilities of the judicial branch of government, also officially authorizes the president of the Republic of Cameroon to appoint the members of the judicial branch of government.

#### *Relations and Interactions between the Three Organs of Government*

The Constitution clearly brings out situations that permits the relations between the executive and the legislative powers. In such cases the prime minister and the other members of Government are to access parliament and participate in its deliberations. At the session during which the finance bill is considered, the prime minister presents to the national assembly the governments' economic, financial, social and cultural programme. The parliament controls the action of the government through oral or written questions and by setting up committees of inquiry with specific terms of reference.

It should be noted that making the president of the Republic head of the judicial council and guarantor of independence of the judiciary inevitably undermines the independence of the judicial branch of the government. Over the years, Cameroonians have heard and read so much about the president of the national assembly representing the president of Cameroon at some annual summits or he is receiving some new ambassador or foreign envoy. There are times he serves as the personal representative of the President of the Republic at some funeral or another. Some of these statements may have sounded normal to the ordinary Cameroonian but someone with a legal understanding should be courageous enough to state that such practices are typically outside the law. Appointing the head of one arm of the state as a personal representative of the head of another branch reduces the appointee to the position of an errand boy. This makes the autonomy of such errand boy to be rubbed away gradually, and the theory of separation of powers becomes fictional. This makes our system look presidential [37].

The authorities in the country fail to bestow upon the judiciary substantial levels of independence which establishes the nexus between the domineering executive and the prevailing Hobbesian conception of separation of powers according to which powers mutually divided to totally destroy each other [38].

#### *A Conclusive Standpoint on the Applicability of the Pure Tripartite Separation of the Arms of Government in Cameroon*

From the above assessment, it is clear that the principle of separation of powers in the strict and pure sense is not applicable in Cameroon. The principle is more manifested in the liberal sense. It must be reiterated that the problem here is not Cameroon adhering to the strict separation of powers but a principle which is more fictional than factual, illusory than a reality. The principle of separation of powers in the pure or strict sense as advanced by Montesquieu implies an independence of the three organs of the state. Independence means self-governance, autonomy and non-interference of powers associated to the three organs of the state. Practically, it is impossible for these three organs to function effectively without cooperation, as it will only lead to suspicion, abuse of power and administrative inefficiency and inflexibility. The legislature who makes the laws itself is made of humans who are not impeccable in nature and that explains why in most legislation, there appear lapses and even errors. Yet, those are laws that are to be enforced by the executive and interpreted by the judiciary. The executive arm are governors who control people, and they can't do so efficiently, practically without delegated legislation. They need to make laws at their own levels to govern their subjects. More so, the executives do have budgets of which financial laws are reserved to the legislative domain. It is practically impossible for such finance laws to be made without the executive

participating in the deliberations. So, it is practically impossible for the strict separation of power to be applicable. We can therefore merely talk of a mixed separation of power or the separation of powers in the liberal sense. In practice, when we observe what happens in our normal little offices, we will realize that, though there is always definition of functions on paper for subordinates and superiors, most subordinates end up executing the functions of their superiors. And in most cases, the hierarchical superiors and subordinates cooperate in execution of both functions. Such administrations turn out to be more flexible and efficient. We do esteem that administration of a state turns to be stagnant in most cases in absence of cooperation and may collapse as no one man is all knowing and perfect.

The only disadvantage of cooperation is that one organ may want to override the other organ. In Cameroon, the domineering role of the President of the Republic and the executive is highly obvious [39].

## CONCLUSION

An attempt has been made to examine the applicability of the rigid, pure tripartite separation of powers in the Cameroonian Constitution and the Republic of Cameroon. The Tripartite Separation of the Organs of the government governed by the theory of separation of power is not a toddler principle. As opined by Montesquieu and his predecessors, it simply means the arms of the government should be divided into the executive, legislative and judicial power. In other words, each branch should be independent of each other, no overlap of membership nor functions which depicts the strict separation of powers. Many democratic countries have adopted and enshrined this tripartite separation of powers in their constitutions, the Republic of Cameroon inclusive. Astonishingly, though clearly adumbrated structurally in the Constitution in these democratic states, the independence of each organ, that self-governing or autonomous power allotted to each organ has for decades remain a paper principle. In other words, the pure theory of the tripartite separation of the organs of the government is practically impossible to be applicable. It is more of fiction than a reality, more of thought, illusory than fact.

When we observe how these three organs practically carry out their activities in the contemporary society, there is an overlap of functions, the three organs cooperate, relate and delegate some of their functions to each other. The executive arm of government also partakes in law-making, known as, delegated or subordinate legislation. In Cameroon for instance, though the Cameroonian Constitution has incorporated the tripartite separation in its constitution, there are provisions in the Cameroonian Constitution which empowers the executive and legislative power to relate.

Despite the fact that the tripartite division of the function of the state is practically applicable in the liberal or partial sense in Cameroon, it does not mean that problems won't still arise. It may still result to an abuse of power and the legislature may appear supreme than the other organs. However, that can be mitigated by creating a separate organ to reconcile the three organs where differences arise or skirmishes surface among them. This awesome political apparatus will prevent the parliament from appearing too supreme. Mindful of the fact that no human being is infallible and so is the parliament, a separate provision could be inserted in the Cameroonian constitution which permits the relationships between the executive, the judiciary and the legislative powers. Reason being that they are responsible for interpreting and enforcing the laws made by the legislature and will easily identify the gaps within the laws. They are closer to the people and are in best position to table recommendations to the legislature during a joint session for better laws that will unravel challenges of the modern society and in the domain of law-making. The constitution of Cameroon is silent about the non-political executives [40]. A provision should be included for the heads of the non-political executives. In democratic states, they are closer to the people than the political executives. Their recommendations during joined meetings will strengthen the position of the legislature in the enactment of better laws that will meet uprising challenges in the society.

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