The value of participation and legitimacy in the constitution-making processes of post-independence Cameroon and post-apartheid South Africa

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Abstract

In this article I contend that the Constitution-making process in post-apartheid South Africa provides a suitable paradigm that could enable post-independence Cameroon to break away from the past neo-colonialist and authoritarian ideologies in its future Constitution-making processes. Cameroon's Constitution-making deficit can be traced back to the independence Constitution-making process which implicitly facilitated neo-colonialism. Conversely, the Constitution-making process in post-apartheid South Africa espoused a break from apartheid, oppression, and authoritarianism. The nature and structures of the resultant Constitutions of the two countries attest to this view. Using the Constitution-making process in post-apartheid South Africa as an appropriate paradigm, I argue for a new trajectory as a response to post-independence Cameroonian Constitutions' subjection to neo-colonialism and authoritarianism. Inspiration from the South African paradigm of introducing the judiciary into the Constitution-making process is a novelty worthy of emulation by post-independence Cameroon. This paradigm promises greater legitimacy in the Constitution-making process and renders the final Constitution more 'self-binding' (binding on Cameroonians). The suitability of the South African paradigm is informed by the imperative to realign post-independence Cameroonian Constitutions with conventional and democratic principles of Constitution-making as exemplified by the post-apartheid South African model. In this way the Constitution-making process in post-independence Cameroon would systematically eradicate the 'chicanery-approach' of neo-colonialists and their neo-colonial acolytes, so that the resulting constitution is a manifestation of the will of the people.

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INTRODUCTION

First, I establish the significance of participation by citizens in a Constitution-making process (hereafter CMP). Secondly, I outline the importance of involving the judiciary in the CMP in order to ensure the legitimacy of the resulting Constitution. The article therefore contends that post-independence Cameroon should emulate the giant steps taken by post-apartheid South Africa by introducing a dimension novel to the traditional Constitution-making paradigm in Africa.[1] The novel Constitution-making paradigm adopted by post-apartheid South Africa promoted the participation of citizens in the CMP and the involvement of the judiciary in the process by certifying the Constitution's compliance with pre-agreed constitutional principles.[2] By virtue of this innovation, the South African Constitution achieved legitimacy through the participation of the citizens and the central role played by the judiciary in the process.

This article is not a comparative analysis per se. Rather, I adopt the South African post-apartheid Constitution-making approach as a paradigm worthy of emulation by post-independence Cameroon. However, by selecting this approach I am not suggesting that the post-apartheid South African paradigm is perfect. Despite its innovations, the resulting Constitution has numerous challenges of its own. I chose the post-apartheid South African paradigm as it provided for openness, transparency and participation in the CMP. These are indispensable tenets of a genuine CMP. However, these principles were wanting in the post-independence process in Cameroon. The CMP in post-independence Cameroon can be described as a misplaced initiative in that it failed truly to transfer the constituent authority

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1 Coel Kirkby and Christina Murray, 'Constitution-making in Anglophone Africa: We the people?' (ACADEMIA) <www.academia.edu/60226889/constitutionmaking_in_Anglophone_Africa_we_the_people_from_imposition to participation_in_constitution-making> accessed 7 July 2015 at 3. 'The citizens of these newly independent states had little if any involvement. They were negotiated one way or another with political leaders of the new states but usually this was done away from home, at a considerable distance from the people that they were to govern, in a process controlled by British officials, and in a way that conveyed a strong sense that the authority of the outgoing power was to be transferred not to the people of the newly independent state but to the handful of approved nationalist leaders.'

2 Post-apartheid South Africa had pre-agreed constitutional principles entrenched in the Interim Constitution of 1993 which the Constitutional Court then relied upon during the 1996 Constitution-making process to certify the final Constitution. In the case of post-independence Cameroon there were no pre-agreed constitutional principles. There existed no interim Constitution. However, in any future Constitution-making process, a steering or portfolio committee of equal representatives of the parties in Parliament (consisting of both National Assembly and Senate) must be set up to determine unique parliamentary principles which will facilitate the transition to democracy and human rights in post-independence Cameroon. These parliamentary principles will then be used in the Constitution-making process as pre-defined principles. As a result, post-independence Cameroon will break with colonial practices and embrace democratic principles. The judiciary will be charged with the duty to certify the text of the Constitution-making committee against the pre-agreed parliamentary principles.

previously held by the outgoing colonial power into the hands of the people of Cameroon who should be the authors of the constitution and the source of popular sovereignty. Consequently, a (the 1996) constitution'(s) claim that sovereignty vests in 'the people' of Cameroon is more symbolic than substantive.[3] The French colonial government and the Cameroonian elite had exclusive input into the independence Constitution and excluded the people of Cameroon from this process.[4] Constitution-making was thus monopolised at a conceptual level, by French colonial acolytes in collaboration with the French colonial administration, while the anti-colonialists and opposition politicians were excluded and marginalised.[5] The *Union des Populations du Cameroun* (UPC) which represented the majority political opinion among Cameroonians was side-lined. While succumbing to UPC's pressure for an independent and self-ruled Cameroon, the French ensured that the Constitution was conceptualised and drafted exclusively by French technical experts.[6] In addition, the French ensured that at independence the beneficiaries were their Cameroonian colonial acolytes and not the UPC.[7] These events facilitated the disenfranchisement of Cameroonians[8] as they did not – and still do not – identify with the laws originating from that CMP. By implication citizens strongly believe that the Constitution is not binding on them. The CMP in post-independence Cameroon was designed for the specific purpose of promoting neo-colonialism. Conversely, the CMP in post-apartheid South Africa was designed to break with apartheid and by implication segregation, oppression, and imperialism. This article espouses the post-apartheid South African paradigm as a suitable framework within which post-independence Cameroon can liberate itself from the shackles of neo-colonialism and cosmetic democracy. It also attempts to realign the present dispensation with the tenets of genuine constitutionalism and respect for human rights. For all practical purposes, the constitutional investiture of the constituent authority in the people of Cameroon must be viewed as a facade.[9] It has been contended that the state was constituted as a power-sharing democracy, and the Constitution as a law-making act of superior authority originating directly from the people. The Constitution is established as an

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3 Kirkby and Murray (n 1) at 3: 'The idea of public participation had little purchase on either British authorities or national elites'.

4 Nicodemus Awasom, 'Politics and Constitution-making in Francophone Cameroon, 1959-1960' (2002) 49 Africa Today 5. (Ever since the making of this Constitution, no subsequent Constitution has ever departed from the main colonial philosophy it epitomised in 1960. The present 1996 Constitution maintains the same philosophy.)

5 Ibid.

6 Ibid at 24

7 Ibid at 24.

8 Cameroun is the French spelling of Cameroon. In this article it refers to the territory under French trusteeship up to independence.

9 The Preamble of the current Constitution of Cameroon 1996 states the 'we the people', suggesting that the people are the creators of the state and therefore the source of popular sovereignty. However, the reality is very far from that claim.

act of popular sovereignty, and represents a constitutionalised limitation of power by basic rights.[10] Notwithstanding this apparent confirmation, the relegation of fundamental constitutional issues such as human rights to the preamble to the Cameroonian Constitution affirms the degree to which the people of Cameroon were excluded from the CMP. Without an independent arbiter, the body charged with producing a constitutional text is the proverbial 'unruly horse' without a check to ensure its compliance with pre-agreed constitutional principles – parliamentary principles in the case of post-independence Cameroon. Furthermore, such a body becomes a 'toothless bulldog' if its final text is submitted to the executive rather than to an independent judicial authority for approval. In this regard, as in post-apartheid South Africa, a Constitutional Court (CC) already existed which could verify compliance of the final text with pre-agreed constitutional principles to ensure that the Constitutional Assembly (CA) worked within specific boundaries.[11] The CC, or the Supreme Court, depending on the case in question, gives legitimacy to a constitution when it approves that the texts of the CA or Consultative Constitutional Committee (CCC) comply with pre-agreed parliamentary principles (transition from colonialism to democracy), among other factors. An examination of constitution-making in post-independence Cameroon and post-apartheid South Africa provides a suitable juxtaposition of two unparalleled processes with decidedly Janus features.

I contend that the Constitution of a nation is the supreme law based on the will of the people and limits all government authority derived therefrom.[12] If citizens genuinely participate in the CMP, the constitution which emerges will empower them in the resulting dispensation through human rights protection. The CC is the new authoritative bastion of justice. The post-apartheid South African principle of constitutionalism appears to have inherited a legal, constitutional, philosophical and political form rooted in the concept that public power can be limited through bodies to which citizens can turn when fundamental rights are violated.[13] While the CC ensures the realisation of a legitimate Constitution which is a product of popular consultation and certification, the absence of an equivalent in Cameroon during all its CMPs has brought the country to a critical crossroad in terms of the legitimacy of its Constitution and the executive's lack of respect for the rights of citizens. By emphasising and agreeing on the application of specific principles, the South African CC legitimated the South African

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10 Klaus Stern, 'The Genesis and Evolution of European-American Constitutionalism: Some Comments on the Fundamental Aspects' (1985) XVIII CILSA 190.

11 Andrea Lollini, 'Post-apartheid Constitutionalism' (2008) 3 STALS Research Paper 11.

12 Stern (n 10) at 199.

13 Lollini (n 11) at 6.

Constitution.[14] For the process to be legitimate it must represent the interest of a large segment of the country's population. The constitution should also be the product of an integration of ideas from major stakeholders in a country.[15] However, in Cameroon – as in many other African countries – these ideals have been ignored and the legacy of colonialism has endured after independence.

In the second part of this article I discuss constitution-making patterns in Africa and the role of participation and legitimacy in a CMP. The third section focuses on the CMPs in post-independence Cameroon and post-apartheid South Africa. In the conclusion, I evaluate the CMPs in both countries, and offer some recommendations.

GENERAL CONSTITUTION-MAKING PATTERNS IN AFRICA

Colonial rule bequeathed non-participation of the citizens in the affairs of the state and most especially the CMP, over-centralisation of power, and authoritarianism to independent African states.[16] This has resulted in African presidents becoming sole embodiments of the social will and purposes of the countries they are ruling.[17] In this regard, a Constitution which is inconsistent with the history of its nation is not a democratic Constitution. A democratic Constitution should rather be seen as a liberating document limiting the powers of the state and its institutions. There must be a general recognition of the existence of inherent values in the law which make it binding on the people. It must be proven that the people have accepted to be governed by such law and rules.[18] As Quashigah puts it, this conduct of reciprocal subsistence originates in pre-colonial Africa where reciprocity between the people and the rulers was indispensable given that mutual respect and honour for the rulers and the ruled constituted the foundation that gave rise to political authority within these societies.[19] In this regard the leadership made decisions through popular consultation which evidenced a bottom-up approach rather than a top-down authoritarian approach which is not African.[20] The bottom-up approach meant that the people participated in the formation of the rules that would govern them and which reflected their values, norms, and customs. As the people identified themselves with the

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14 Mashele Rapatsa, 'Transformative Constitutionalism in South Africa: 20 Years of Democracy' (2014) 5 Mediterranean Journal of Social Sciences 894.

15 Muna Ndulo, 'Constitution-making in Africa: Assessing Both the Process and Content' (2001) 21 Public Administration and Development 113.

16 Ibid at 104.

17 Ibid.

18 Funmilola Abioye, 'Constitution-making, Legitimacy and Rule of Law: A Comparative Analysis' (2011) XLIV CILSA 61.

19 Ibid.

20 Ibid at 63.

rules that governed them, and governance was void of coercion. This meant that obedience and compliance were conscious and so effective.[21]

A CMP and the resulting Constitution must be comprehensible to all not only to the elite. The people must be able to claim ownership of the Constitution and it must be capable of being used to defend the democratic state.[22] The CMPs in post-independence Cameroon and post-apartheid South Africa have been hailed as two unparalleled processes and paradigms whose resultant Constitutions differ significantly in both form and content. While it may be true that the South African human rights standards and principles may not be used by the Economic and Monetary Community of Central Africa (CEMAC) countries – of which Cameroon is a member – it must be conceded that the South African CMP serves as the most suitable paradigm to illustrate a fundamental break with a pre-existing constitutional order in Africa. It is on this basis that I have identified South Africa's CMP as one which should be emulated by post-independence Cameroon in its future CMPs.

THE ROLE OF PARTICIPATION AND LEGITIMACY

Ihonvbere argues that a CMP must be participatory, popular, democratic, and inclusive. By virtue of these qualities, the resulting Constitution can be used as an instrument for the defence of the democratic state.[23] Participation is important to the legitimacy of the Constitution and the degree to which the people understand and give effect to its provisions.[24] Ghai observes as follows:[25]

> Even a participatory Constitution-making process may leave the people bereft of mechanisms and opportunities to continue involvement in public affairs. To some extent this engagement can continue through civic education—but, this, however necessary, is not sufficient. The Constitution should itself create space for constant public participation, in the legislative process, in monitoring of government, in easy access to the courts and other complaints authorities for the protection of constitutional values, and so on … The courts also need to play their part in the renewal of law, in 'constitutionalizing' other areas of the law, suffusing it with values of human rights and, where applicable, of democracy.

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21 Ibid.

22 Ibid at 66.

23 Julius Ihonvbere, 'How to Make an Undemocratic Constitution: The Nigerian Example' (2000) Third World Quarterly 344.

24 Yash Ghai and Guido Galli, 'Constitution-building Processes and Democratization: Lessons Learned' (2006) International IDEA 236.

25 Ibid at 238.

On the basis of this assertion, the government of post-independence Cameroon needs to amend the Constitution and entrench a provision that will mandate and empower the judiciary to become part of the CMP for the purpose of certifying whether the proposals of the Constitutional Consultative Committee (CCC) comply with pre-agreed parliamentary principles. Given that the CCC in Cameroon is merely a debating forum whose proposals maybe set aside by the President, it is necessary to include an independent judiciary in the process to certify the CCC's proposals before the President signs the Constitution into law. This initiative will serve as an antidote against unilateral presidential decisions on the 'shape' of the Constitution. The judiciary will empower and assist 'the people' to decide how the Constitution should look.

THE CONSTITUTION-MAKING PROCESS IN POST-INDEPENDENCE CAMEROON AND POST-APARTHEID SOUTH AFRICA

The use of the post-apartheid South African paradigm to evaluate the conventional standard and progressiveness of post-independence Cameroonian CMPs is appropriate as both countries were formerly under colonialism. Additionally, both have adopted customary law as part of their legal systems.[26] South Africa has a mixed legal system which is influenced by the Roman-Dutch law – civil law, English common law, and the South African customary law.[27] Cameroon has a bi-jural legal system[28] which is made up of French civil law and English common law.[29] It is thus clear that both systems have experienced English common law as well as civil law influences. There is, therefore, a sound paradigmatic basis upon which to assert that insights from one of these CMPs may be helpful in addressing issues in the other's processes. I have used post-apartheid South Africa's process as a broad framework against which the CMPs in post-independence Cameroon may be measured. The purpose is to inspire the citizens to engineer change by themselves in the CMPs so that the Constitutions indeed emerge as the true embodiment of popular sovereignty in Cameroon.

Post-independence Cameroon

The Constitution-making process of the 1960 Constitution

The United Nations (UN) Trust Territory known as *La Republic du Cameroun* under French administration was granted independence in 1960. The CMP of this country failed properly to engage Cameroonians in choosing an

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26 For Cameroon, see Charles Fombad, 'Researching Cameroon Law' <www.nyulanglobal.org> accessed 20 May 2016. For SA, see Francois du Bois 'Introduction: History, System and Sources' in Cornelius Van der Merwe and Jacques du Plessis (eds), *Introduction to the Law of South Africa* (Kluwer Law International 200) 40-41.

27 Van der Merwe & Du Plessis (eds) Ibid.

28 Fombad (n 26)

29 Ibid.

appropriate institutional arrangement for Cameroon. A committee was established by Law No 59-56 of 31 October 1959 with the mandate to draft a Constitution for the new nation.[30] Decree No 60-1*bis* of 14 January 1960 was later issued to order the establishment of the CCC. On the same day, Decree No 60-2 of 14 January 1960 was passed authorising government to nominate members of the CCC. While it is accepted that committees draft constitutional rules in numerous countries, for the purpose of ensuring institutional reform, the citizenry usually prefer membership in such a committee to be determined by national elections and not by government.[31] Unfortunately, in the run up to the CMP of the independence Constitution, membership of the CCC was determined by the colonial government, the French entrepreneurial and commercial classes, and a small number of local elite.[32] Most importantly, in addition to disregarding the preference of assigning the determination of membership in the committee to the electorate, the CCC went as far as entrusting the designing of Cameroon's first Constitution to France.[33] To exacerbate matters, this colonial government, and not the people of the colony, decided on and selected the new rules. This was because there was no elected representative of the people to represent their views on the committee.[34] Conventional norms demand that for a country's Constitution to be developed, it should consist of representatives of the nation's major political parties as determined by national elections.[35] Unfortunately, the CMP in the French-administered territory of Cameroon did not allow the UPC, the most significant indigenous political party which also represented a substantial portion of local political opinion, to participate in drafting the Constitution.[36] As a result, the entire process of Constitution-making became a top-down exercise that was undemocratic, elite-driven, and non-participatory.

The UPC strongly opposed continued French rule in the colony and this prompted the French to deny them participation in the Constitution-making and decolonisation processes. The outcome was that the citizens were denied the right to choose their own institutional arrangements.[37] The UPC was seen as representing the interests and aspirations of the colonised people in the territory who had suffered enormously under the yoke of colonialism. Given that the French wished to maintain their influence in the territory

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30 John Mbaku, 'Economic Dependence in Cameroon: SAPs and the Bretton Woods Institutions' in John Mbaku and Joseph Takougang (eds), *The Leadership Challenge in Africa: Cameroon under Paul Biya* (Africa World Press 2004) 417.

31 Ibid.

32 Ibid.

33 Ibid.

34 John Mbaku, 'Decolonisation, Reunification, and Federation in Cameroon' in John Mbaku and Joseph Takougang, *The Leadership Challenge in Africa* (Africa World Press 2004) 43.

35 Ibid.

36 Ibid.

37 Ibid.

even after independence – on 13 July 1955 – the colonial government banned the UPC party and forced it underground. This was in the main to allow the colonial government subsequently to manipulate the conditions for independence and Constitution-making in the territory.[38] Outlawing the UPC, which represented the views of the majority of the colonised, is incongruent with Constitution-making as it expresses the peoples' will by referring to the legitimacy, in terms of the involvement of the people as a prerequisite for the legislated law to acquire its true meaning. This true meaning will, therefore, be the will of the people, attributed to a people that must, as a matter of fact, pre-exist the granting of that will.[39] Non-adherence to this norm compels the conclusion that the CMP in Cameroon was a sham. The UPC was banned and the final law could consequently be attributed only to aliens – the French colonial government. Thus, the rules adopted by *La République du Cameroun* at independence were incongruent with proper Constitution-making norms and such rules lacked legitimacy. It is therefore clear that the final Constitution was not a contract freely entered into by the indigenous peoples' representatives as 'the people' were denied effective participation in the CMP.[40] The citizens of Cameroon were completely alienated in the process. However, Cameroonians intentionally permitted this alienation in order to ease decolonisation. They strongly believed that after achieving independence which they desperately needed, the indigenous people will capture the governance structures and undertake a democratic Constitution-making process. As a result all Cameroonians will be enfranchised, empowered and afforded facilities such as language experts and translators to fully enhance their effective participation in designing rules favourable to their values.[41]

In a referendum organised after President Ahidjo and his cabinet had examined the CCC's final Draft Constitution, popular will could be disputed given that the majority of the population did not participate as they were still in a state of rebellion. It can be argued that the referendum took place in an atmosphere in which the majority of democratic guarantees were disregarded.[42] Therefore, despite this referendum the constitutional instrument lacked legitimacy.[43]

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38 Ibid at 44.

39 Emilios Christodoulidis, 'Constitutional Irresolution: Law and the Framing of Civil Society' (2003) 9 (4) European Law Journal 424.

40 Mbaku (n 34) at 46.

41 Ibid. Despite protestations of several opposition groups as evidence that the new Constitution militated against their opinion and aspirations, what could be qualified as a 'copy' of the Constitution of the Fifth French Republic was adopted as the fundamental rules to establish the institutions of the new *La République du Cameroun*.

42 Ibid at 21.

43 Ibid at 20.

The amendment process for the 1961 Constitution

In 1961 the existing Constitution had to be slightly amended in order to absorb Southern Cameroon to form what became known as the Federal Republic of Cameroon. This union of the two Cameroons provided a viable opportunity to reform existing laws and institutions to align them with the exigencies of the new dispensation or union; and also to reflect the views and aspirations of Cameroonians.[44] In fact, no attempt was made to give the citizens of both territories, and most especially of the Southern Cameroons, an opportunity to engage in deliberations in the federation. This resulted in extraordinary powers being granted to the federal government by the 1961 Constitution.[45]

The amendment process for the 1971 Constitution

In 1972 President Ahidjo announced in the National Assembly that he intended to transform the Federal Republic of Cameroon into a unitary state.[46] He then summarily arrogated to himself absolute powers – *les plein pouvoir*. The Southern Cameroonians were shocked by how Ahidjo used his referendum 'gimmick' despotically to end the federation. The referendum was a farce that left citizens with only a 'yes'[47] option.[48] So, in the final analysis, the Cameroonian CMPs analysed so far have been characterised by non-participation of the people, a process monopolised by the indigenous urban elite– an elite-driven, undemocratic and non-consultative process.

The making process of the 1996 Constitution

President Paul Biya organised what was known as the 'tripartite conference' to replace the 'sovereign national conference'.[49] The outcome of this process became what is commonly referred to as the 1996 amendment to the 1972 Constitution.

The amendment was carried out in three stages. The deliberations of the Technical Committee on Constitutional Matters (TCCM) met irregularly between November 1991 and February 1992 and reached consensus that the Constitution's cardinal goals would be the decentralisation of political

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44 Mbaku (n 30) at 406.

45 Ibid at 418.

46 Ibid at 303.

47 Meaning 'Yes'.

48 Piet Konings, 'The Anglophone Struggle for Federalism in Cameroon' in LRB Fleiner and J Ibrahim (eds), *Federalism and Decentralization in Africa: The Multicultural Challenge* (Institut du fédéralisme 1999) 303.

49 Charles Fombad, 'Cameroon's Troubled Democratic Transition and the Deconstruction of the Federalist Problematic' in Frank Columbus (ed), 3 *Politics & Economics of Africa* (Nova Science 2002) 52. The conference took place between October-November 1991 and was essentially comprised of the President's appointees and operated within a restricted agenda. Heeding to pressure from the delegates, the conference decided to establish a TCCM. Composed of seven Francophones and four Anglophones, the committee was charged with the duty of formulating the outlines of a 'new' Constitution.

and administrative powers and the entrenchment of fundamental rights.[50] Due to a number of disagreements regarding the content of the Constitution and other related issues, the proceedings of the TCCM were suspended in February 1992. The process only resumed and moved to stage two when a new technical committee was established by presidential decree in 1993, and surprisingly, still with a mandate to draft a new Constitution.[51] However, this talk of a 'new' Constitution soon changed when in November 1994 the President appointed an altogether different committee to study a document published in December, known as 'Proposals of the President for the Revision of the Constitution'. So, at the third stage of the conference, drafting a 'new' Constitution was no longer the *raison d'être* of the conference. The aim was now merely a revision of the 1972 Constitution, and worse still, this was based on a proposal from the President.[52] This sudden awkward turn of events elicited spectacular resignations from the committee, including prominent Anglophone members. The committee forged ahead and submitted a draft to the President who then tabled it before parliament at the eleventh hour in the course of an extraordinary session during November 1995. The entire negotiation process of this revised Constitution took place only within the ruling party – the CPDM.[53] This Bill was later promulgated into law by the President on 18 January 1996 as 'Law No 06 of 18 January 1996 to amend the Constitution of 2 June 1972'.[54] The 1996 Constitution was amended by a handful of political elite who took direct instructions from the President instead of the people of Cameroon. This has been a sustained pattern of the CMPs in Cameroon. The legitimacy of the Constitution remains contentious as the CMP was not open to popular consultation, participation, evaluation and judicial oversight.

Post-apartheid South Africa

The CMP in South Africa is widely acclaimed as a positive example of broad public participation.[55] The transition stage that led South Africa out of the apartheid era into a constitutional democracy was dominated by political parties in matters concerning interim government and constitutional reform.

However, during this period interest groups and civil society were allowed to participate in the process.[56] It is clear that the requirements for a sound CMP that follows the trends in international law and the international

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50 Ibid at 53.

51 Ibid.

52 Ibid.

53 Victor Ngoh, 'Biya and the Transition to Democracy' in John Mbaku and Joseph Takougang (eds), *The Leadership Challenge in Africa: Cameroon under Paul Biya* (Africa World Press 2004) 442.

54 Fombad (n 49) at 53.

55 Briefing paper no. 20 of Reporting Democracy International 'Lessons learned from Constitution-making: Processes with Broad-based Participation' (2011) 6.

56 Ibid.

obligations of states, were observed by South Africa. Factors such as broad consultation of the people, constitutional awareness, the civil education of people, legitimacy, inclusivity, and most especially, transparency and accountability, were encapsulated in the process.[57]

It is important to note that even though political parties supported of the first part of the transition that allowed them to agree on the interim Constitution, a Constitutional Assembly (CA) was thereafter elected in April 1994.[58] The CA then took over the second stage of the process which was to draft the Constitution, ensuring that it adhered to the three internationally acknowledged principles of inclusivity, accessibility, and transparency.[59] Even though the interim Constitution lacked legitimacy because it was drafted by political parties and no mass participation was involved, it still paved the way for a new constitutional order and provided a structure of constitutional principles to which all parties agreed. Given that South Africa was developing a new culture of participatory constitution-making, Hart posits that a new culture of constitution-making includes practices such as prior agreement on broad principles as a first phase, and the role of an interim constitution which is to create space for longer-term democratic deliberation.[60] The participation of the people of South Africa in the CMP took place in two phases. The first phase was based on consultation with the people; the second phase involved the CA drafting a refined working draft after consultation with the people. The technical committee recommended that the CA be constituted by a joint-sitting of the two houses of Parliament – The National Assembly and the Senate – and be given two years from the first sitting of the National Assembly to draw up a new constitution as required by section 73(1).[61] At the second meeting of the CA in August 1994, a 44-member constitutional committee was established to serve as a steering committee, and an administrative structure was established to manage the CMP. The constitutional committee handled both support for the CA and its administrative team, and also facilitated other important aspects of the process such as public participation programmes, constitutional education programmes, constitutional public meeting programmes, and a newsletter known as *Constitutional Talk* which was intended to explain the processes. The entire CMP can be explained under the following headings:

Consultation with the people (public participation)

Experiments with public participation in the process of constitution-making are an outstanding feature of 'new constitutionalism'.[62] Insofar as public

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57 Ibid at 2, 3, 4.
58 Ibid at 6.
59 Ibid.
60 Ibid at 8.
61 South African Interim Constitution, 1993.
62 Vivien Hart, 'Democratic Constitution-making' (2003) Special Report (2003) 4.

participation in constitution-making is desirable, it remains a matter of opinion, making participation difficult to enforce as a right.[63] However, through the Universal Declaration of Human Rights and the general comments by the United Nations Human Rights Committee, international law has shown that citizens have certain civic duties and rights that cannot be restricted by governments.[64]

In Africa, experiments with new structures and forms of participation are currently developing an open process which embraces citizens in constitutional conversation.[65] In South Africa a constitutional committee established by the elected representatives of the people as a CA reached out to educate the citizens and capture their views.[66]

Citizens were called on to present submissions. Public meetings also provided a forum for the members of the CA and opportunities to present their work and gauge the reaction of participants. Some 13 443 substantive submissions were presented, and ninety per cent of the submissions came from individuals. Furthermore, over 2 000 000 people signed petitions on different issues.[67] This success story of public participation was certainly a stamp of approval for the Constitution by the people, confirming that the text was not exclusively drafted by a political elite. On the contrary, the public participation initiative facilitated 'ownership' of the Constitution by all South Africans.[68]

The Constitutional Assembly and the Constitution-making process

The CA was tasked with the expeditious writing of a new constitutional text. Moreover, apart from the technical committee recommending the establishment of the constitution-making body – the CA – it also proposed the establishment of a Constitutional Court (CC), which amongst others, had to certify the conformity of the Draft Constitution to agreed constitutional principles.[69] The CC was also important because the CA was a sovereign body charged with the duty of drafting and adopting a new constitution, subject only to the agreed constitutional principles.[70] The CC's role in the process was pivotally informed by its mandate to determine whether or not the draft text conformed to the requirements of the pre-agreed constitutional

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63 Ibid at 5.
64 Ibid.
65 Ibid at 7.
66 Ibid at 8.
67 Ibid.
68 Christina Murray, 'Negotiating Beyond Deadlock: From the Constitutional Assembly to the Court' in Penelope Andrews and Stephen Ellmann, *Post-apartheid Constitutions: Perspectives on South Africa's Basic Law* (Witwatersrand University Press 2001) 112.
69 Hassen Ebrahim, *Soul of the Nation: Constitution-making in South Africa* (Oxford University Press 1998) 159.
70 Ibid at 160.

principles. The CC's certification therefore enhanced the legitimacy of the Constitution.

However, the constitutional vacuum in which the CA functioned made it possible for the majority to ignore minority aspirations. The new constitution would have thus functioned as an authoritarian regime disregarding minority interests. This would have implied that the CA could consolidate its power in an authoritarian fashion.[71] In order to avoid such an ordeal, the CC had to be established to, amongst others, resolve any contention.

After the publication of the draft text, the public was again invited to provide submissions regarding any amendments to the draft text they viewed as necessary.[72] A majority of the people were satisfied with the level of consultation and the CA passed the final draft constitutional text with a majority of eighty percent, making up the required two-thirds majority.[73]

Certification of the Constitution (imperative of the judiciary)

There were thirty-four constitutional principles which the CC had to use in deciding whether or not to certify that the constitutional text could be adopted.[74] In its judgment delivered on 6 September 1996, the judges found that the text adopted on 8 May 1996 failed to comply with the constitutional principles in eight categories. As a result, the CC declined to certify the Constitution pending the necessary amendments. Among others, the CC observed with concern that text required only special' procedures' for amending the Constitution but required no special 'majorities'.[75] It further decided that in order to improve the procedure, both Houses of Parliament should be involved in the amendment process, and that clear notice periods were required which would allow ample time for reflecting on the proposed amendments. Nevertheless, the CC pointed out that inasmuch as inconsistencies existed, the CA had drafted a document that adhered to the overwhelming majority of the constitutional principles.[76]

As a result of the CC's judgment, a few amendments were made to the text before it was finally certified. A couple of inconsistencies were highlighted by the CC, most significantly, the Bill of Rights; two of the Chapter 9 institutions – the offices of the Public Protector and the Auditor General – clarification on the state of emergency clause; and the powers of a province relating to policing. The CC ruled that for the Public Protector and the Auditor General to be effectively independent a two-thirds majority rather than an ordinary majority was required for their removal from office.[77] The

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71 Ibid at 123.
72 Briefing paper no. 20 (n 55) at 6.
73 Ibid.
74 Ebrahim (n 69) at 224.
75 Ibid at 228.
76 Ibid.
77 Ibid at 228.

CC did not object to the state of emergency clause but advised that section 37(5) be improved and amended to distinguish derogable rights from non-derogable rights in a considered and rational way.[78] The CC also emphasised the importance of the entrenchment of the Bill of Rights. In this regard the CC insisted that any amendment to the Bill of Rights should require a greater majority than that for the amendment of an ordinary provision, and that the amendment should involve both Houses of Parliament.[79] On 8 May 1996 the amended text was adopted with the same overwhelming majority.

Immediately after the revised text had been passed it was tabled before the CC for certification. The task of the CC was to check that the text now complied with constitutional principles relating to section 73 A(1), (2), and (3) read with section 71(2), as required by the interim Constitution. The judges approached the certification exercise with due consideration of its previous judgment which the CA had used in drafting the amended text.

Even though the two certification exercises were similar, there is one important difference. While an objector to the certification could raise any issue, irrespective of whether or not it had been considered previously, the person who corroborated the objection raised incurred a heavier burden of proof as to why the objection should be considered.[80] Given that the first certification exercise was conducted in consultation with a broad spectrum of South African society through oral and written submissions, the CC found that no important issue could have been neglected.[81]

Finally, the Constitution – which had been amended on the 'orders' of the CC to bring it into line with the pre-determined constitutional principles – was certified by that same CC on 4 December 1996.[82] A date was subsequently set for the President to assent to and sign the Constitution into law.

Historically, the Supreme Court of India and the Federal Constitutional Court of Germany have espoused doctrines under which constitutional amendments contrary to constitutional principles could be evaluated. Nevertheless, it was an innovation for the South African CC to have certified a Constitution democratically created by a constituent body, which is normally seen as an embodiment of popular sovereignty, and yet ultimately act within its bounds.[83]

The fact that this same survey confirmed a strong sense of ownership among all South Africans bears testimony to the significant role of public

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78 Ibid.
79 Ibid at 229.
80 Ibid at 233.
81 Ibid.
82 Murray (n 68) above at 122.
83 Heinz Klug, 'Postcolonial Collages: Distributions of Power and Constitutional Models, with Special Reference to South Africa' (2003) 18 1 International Sociology 124.

participation.[84] It is clear that through this authentic participatory process in constitution-making, South Africa's Constitution of 1996 gained popular legitimacy. This legitimacy was further enhanced by the CC's certification of the Constitution.

OBSERVATIONS ON THE DIVERGENCE OF THE CONSTITUTION-MAKING PROCESSES IN POST-INDEPENDENCE CAMEROON AND POST-APARTHEID SOUTH AFRICA

There are two remarkable characteristics of Cameroon's constitution-making style. Firstly, the specialist body for constitution-making that is intended to constitute the element of popular representation of constituencies is not an independent body. This specialist body – irrespective of its guise as the CCC or the TCCM – does not have the final say as to what is included in the constitution. The body merely acts as a debating forum and its decisions serve as mere recommendations which may or may not be accepted by the President and his government.[85] Secondly, the judiciary, regrettably, has no mandate to certify constitutional compliance with pre-determined principles. Nevertheless, to expunge colonial ideological continuity from post-independence Cameroonian Constitutions – which have to date been conceived through the subterfuge of an independent Constitution-making paradigm – it is necessary that the judiciary be included in future CMPs. Such inclusion will ensure that pre-agreed principles facilitate the break with neo-colonialism and authoritarianism and promote the ideals of democracy and constitutionalism. It is only after the court's certification process that the constitution can be adopted by Parliament or through a referendum if the need arises. Promulgation will follow.

Why is this unique process necessary? Firstly, the absence of a certification process results in the constitution lacking legitimacy.[86] Secondly, as shown earlier, because the Cameroonian citizens have never truly participated in any CMP, there is need for oversight by and assurance from the judiciary that this will be addressed in subsequent processes. Thirdly, the boycotting of the adoption process of the 1996 Constitution by the opposition in Parliament rendered the legitimacy of the approved Constitution open to question. This makes the need for a future certification process indispensable. Moreover, there have to date been no clearly articulated constitutional principles in terms of which to define any proposed new dispensation. By implication,

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84 Ibid.

85 Awasom (n 4) above at 17.

86 The Constitution may lack legitimacy for two reasons: firstly, because the CCC's proposal is handed over to the Chief Executive who then takes the final decision. His decision might be bias since he is a political leader. The CCC is merely a debating body and its proposal could be thrown out by the executive if they are unfavourable to him. Secondly, the voice of 'the people' is absent given that membership of the CCC is not by means of election but through presidential appointment. By virtue of this stalemate certifying the proposed text against pre-agreed parliamentary principles is indispensable.

there has been no stop-gap (also sunrise and sunset clauses. The sun of the interim Constitution will set while the sun of the new constitutional order rises) between the colonial constitutional/legal order and the implementation of democratic and universal human rights principles in the new dispensation. It is beyond doubt that human rights, which lie buried in the preamble to the Cameroonian Constitution, are little more than an illusion designed to confound the reality that the Constitution's conformity with international standards is at best questionable.

The 2008 amendment introduced by the current Biya government had a hidden agenda. It was aimed at eliminating the limit on the presidential term of office so allowing President Biya an opportunity to contest a further presidential election. The fact that the entire Cameroonian populace went on the rampage after this proposal was made public speaks clearly of popular disapproval. The resulting amended provision lacks legitimacy. If popular sovereignty assumes that all law-making authority ultimately vests in the people of the nation[87] and defines the *raison d'être* of the rule of law and constitutionalism, then all previous, and the current, Cameroonian Constitutions are by implication illegitimate given that the people have never truly participated in any of the processes. Popular sovereignty which espouses participation has a dual role in that the people lend legitimacy to a constitution through consultation and participation in its making, subject to process and concepts geared towards the protection and preservation of the people themselves.

CONCLUSION

In my analysis, I have examined the CMPs in post-independence Cameroon and post-apartheid South Africa in light of the significance of popular participation and the need for the judiciary to play a role by certifying the process. This examination has shown, first, that while the processes in post-independence Cameroon have been exclusive, non-consultative, and lacked the involvement of the judiciary, the process in post-apartheid South Africa has been inclusive and consultative. Second, the involvement of a Constitutional Court in South Africa at the time of the CMP to check the conformity of the constitutional text against the backdrop of pre-agreed constitutional principles, thereby ensuring the legitimacy of the resultant constitution, is a welcome innovation. Conversely, none of the CMPs in Cameroon has provided for an independent arbiter to perform an equivalent function. The practice has always been to have the constitutional text adopted by a parliament subservient to the executive, and/or the subsequent approval of the constitution in a bogus referendum. The CMP of the 1996 Constitution of post-independence Cameroon provided a good opportunity

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[87] John Vile, *The Constitutional Amending Process in American Political Thought* (Praeger 1992) 14.

for the government of Cameroon to correct this state of affairs by engaging an independent judiciary to rule on the validity of the constitutional text proposed by the TCCM. The need for this approach is informed by the fact that if the process does not involve judicial certification, the executive may simply table the text before a subservient parliament which rubber stamps its authority (approves the constitution regardless of its illegitimacy) or organises a bogus referendum in which the constitution is ratified. Such dynamics underpin how imperative it is to involve an independent judiciary in the process. Unfortunately, this approach was not adopted. Rather, the Constitution resulting from the 1996 process provided for a weak Constitutional Council which is oriented to politics rather than law. As a result, in 2008 this institution exposed its lack of efficacy when it was unable to act independently amid a controversial constitutional amendment proposed by the President of the Republic. The participation of the citizens in a CMP is indispensable as it determines whether 'the people' actually govern as democracy professes. The reason why an enigmatic constitution that is incongruent with the people's aspirations emerged in post-independence Cameroon – completely disempowering the people while irrationally empowering the executive[88] – is informed by the citizens' exclusion from and non-participation in the CMP. According to Wheatley and Mendez, the participation of the people in a CMP results in a constitution most likely to be accepted as a manifestation of the will of the people.[89] If this is correct, then the current Constitution is not a manifestation of the will of the Cameroonian people given that the elite, rather than the people, participated fully in all the CMPs in post-independence Cameroon.

My aim with this article has been to show how post-apartheid South Africa has addressed the core constitutive elements of legitimacy and popular participation in the CMP. A rational observation of the two processes in post-independence Cameroon and post-apartheid South Africa reveals unparalleled prototypes of CMPs in Africa. While post-apartheid South Africa is progressively empowering its citizens through participation, consultation, and certification of the Constitution, the CMP in post-independence Cameroon has ignored participation by and consultation of Cameroonian citizens. This impasse implies that the Cameroonian citizens have never been empowered, not even after independence in 1960. The indispensability of this core element lies in the fact that during the apartheid era the black majority was prevented from participating in the CMP and as a result, the then Constitutions were expressly racist in form and permitted inequality in every sphere between black, coloured and Indian people on

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88 Cameroon Constitution of 1996; pt ii ch 1 from arts 5–10.

89 Jonathan Wheatley and Fernando Mendez, *Patterns of Constitutional Design: The Role of Citizens and Elites in Constitution-making* (Routledge 2013) Ch 4.

the one hand, and white people on the other.[90] Findings from the post-apartheid CMP demonstrate a radical departure from the apartheid model, confirming that this core element has been addressed to an acceptable degree in post-apartheid South Africa. Of prime interest is the necessity to compare this progress with the situation in post-independence Cameroon. A review of the above argument reveals that the Cameroonian citizens are truly insignificant and passive in the CMP and, therefore, have no control over their destiny. Consequently, their wishes and aspirations have been ignored and this irrationality has crept all the way into the current 1996 Constitution of Cameroon. In fact, CMPs in Africa are generally marred by non-participation as happened in post-independence Cameroon. Post-apartheid South Africa is the exception.

In conclusion, I offer a few recommendations to redefine the trajectory of future CMPs in post-independence Cameroon. 'The people themselves' must push for these recommendations in future processes.

First, a restructured, empowered and independent Constitutional Council or court should be involved in any future CMP. The current state in which the Constitutional Council exists does not give it the power to act as an independent arbiter in any matter of national interest. The role of a new Council will be to supervise the process and rule on the compliance of the final text with pre-adopted parliamentary principles to ensure that the CCC or TCCM works within specific boundaries.

Second, the elite should play a role subordinate to the central position of the people in any future CMP. The participation, and most especially consultation, of the people will determine which structures, powers, rights, privileges, prerogatives and exceptions are included in any future constitution. In this way 'the people' themselves shall rule.

Third, 'the people' must reserve the right to decide and direct any amendment process and ratification of the Constitution. The approval of such sensitive matters in a Constitution resulting from a CMP must be by the citizens themselves. This approval must result from a correctly conducted referendum, supervised by an independent judiciary so that the legitimacy of the Constitution is enhanced, and the trust arising from the exercise enforces the binding power of the constitution on the people. As a result, the citizens will accept such a Constitution as a manifestation of their will. Anything short of this duty from government would be unacceptable to the citizens of post-independence Cameroon.

Finally, where the constituencies have confidence in their political representatives, as was the case with post-apartheid South Africa in 1996 (and Namibia in 1991), they may entrust their constituent assemblies with the power to approve the constitution. While shunning a referendum as a

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[90] John Dugard, *Human Rights and the South African Legal Order* (Princetown University Press 1978) 20.

majoritarian tool, a certification process of the final constitution by the judiciary against pre-negotiated parliamentary principles is imperative.[91] In other words, the referendum process could be replaced by independent judicial certification of the constitution in the CMP of post-independence Cameroon.

[91] Kirkby and Murray (n 1) at 17.