Article

Convergence or Divergence in Text and Context? Reflections on Constitutional Preambles in the Constitution-making Exercises of Post-independence Cameroon and Post-apartheid South Africa

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Abstract

In this article, I attempt to establish the need for the convergence of the spirit of the law—the Preamble—and the letter of the law—the provisions of the Constitution of Cameroon contained in its articles. First, I adduce prototypes or archetypes of 'Jacobin constitutionalism' and Anglo-Saxon-style constitutionalism as benchmarks through which I evaluate the extent to which the spirit and letter of the law of the Constitution of Cameroon have been converged. Having established the incongruence of the Preamble with these prototypes, I have referred to the Constitution of post-apartheid South Africa as a fitting paradigm that entrenches modern constitutionalism against which the Preamble to the Cameroon Constitution can be compared, revisited and revised. South Africa has been selected based on the view that, as another African country, it would serve as a more appropriate benchmark for reviewing the Preamble to the Cameroon Constitution than those of the United States, France or other Western nations, which might result instead in a skewed logic. Also, both countries have similar legal systems and historical experiences. A juxtaposition of the two constitutional preambles vividly exposes the lapses in the Cameroon example. As a result, I have suggested that the Cameroon Constitution be amended for the purposes of reviewing its Preamble to bring it into line with the conventional requirements of democratic preambles and to transform the formal demands of the Preamble as tangible demands placed on a government through entrenched provisions. Reasons have been advanced in support of the necessity for including preambulatory clauses in a constitution without which the intent of the constitution per se would be deferred.

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Introduction

A country's constitution-making process is a significant procedure that delivers a constitution which either liberates the people or imposes authoritarianism and neo-colonialism on them. As a matter of fact, the *raison d'être* of a constitution-making exercise is generally encapsulated in a preamble, which lays out a new philosophy and ideology while breaking ranks with the erstwhile oppressive philosophy and defining the terms of the new dispensation. Present-day Cameroon and South Africa were previously ruled by colonial and apartheid regimes respectively. As a result, there is a sound historical and jurisprudential basis upon which to assert that insights from one of these constitutional systems may be helpful in addressing issues in the other.

Given the authoritarian and oppressive nature of these erstwhile regimes, their collapse in 1960 and 1994 respectively implied a shift towards a new dispensation defined by respect for human rights principles and democracy in their respective constitution-making exercises. The intent and conduct of the new law is known as the 'spirit of the law'. The spirit of the law implies that the declaration which establishes the new dispensation in terms of the preamble is imbued with and expanded by articled provisions which the constitution entrenches. These provisions of the constitution are known as the 'letter of the law'; they must empower the people of the new dispensation by whose constituent authority the new dispensation is established. The new law must then be able to inspire development and enhance the living standards of the present holders of the constituent power who were previously impoverished and dispossessed of their dignity and had their destiny hijacked by the authoritarian regimes. In other words, the spirit of the law must be developed as a logic of regulation that is intended to shape and bequeath tangible demands in the form of articled provisions; such provisions should shape inclusions in or exclusions from the final product of the constitutional process that will purposefully define what is experienced in the new dispensation.[1]

In this article, I have attempted to establish to what degree a departure from the oppressive dispensations as articulated by the constitutional preamble—the spirit of the law—is reflective of the articled provisions, or the letter of the constitution, in the most people-empowering provisions. In attempting to achieve this task, I try to problematise, first and foremost, the manner in which the Preamble to the Cameroon Constitution has been conceptualised. The Preamble is highly committed to hortative and celebratory

[1] Mark Goodale, *Anthropology and Law: A Critical Introduction* (New York University Press 2017) 118–119.

language and fails *in toto* to advance any preambulatory clauses. This sort of conception endangers the letter of the law and strips it of its derivative power, which is normally supposed to be founded on the spirit of the law—the preamble. This orientation is reaffirmed by the wording: 'For the letter kills, but the spirit gives life.'[2] As a matter of fact, not only has the Preamble to the Cameroon Constitution departed from conventional norms by not encapsulating the horrific history that inspired the struggle for independence; the articled provisions themselves are inconsistent with the priorities of the people of Cameroon. The spirit gives life, as Paul of Tarsus points out. But where the spirit itself, which in this case is the constitutional preamble, is dead, straying as it does from the norms of preambulatory clauses, then the letter of the constitution will, by implication, also be dead.

What is controversial about such a constitutional preamble is that the anticipated destiny of Cameroonians will be deferred. Highlighting the horrors experienced by Cameroonians at the hands of colonists provokes and instigates a resolute urge in the people to push for the establishment of a dispensation that distances itself from the previous legal order. This can be achieved through a genuine constitutional acknowledgment of the primacy of 'we the people', the supremacy of the constitution, a commitment to protect human rights and the protection of the citizenry from government abuse. Both the Preamble and the articled provisions of the Cameroon Constitution have failed to address these issues, and such a failure accounts for the reason why Cameroon needs to refer to the Preamble to the South African Constitution for the anticipated amendment, given that the South African version is a desirable paradigm in this respect.

I have identified four cardinal, salient and 'we-the-people' empowering principles of the constitution that democratic constitutions conventionally identify with and which by implication are supposed to be encapsulated in the letter of the constitution by way of its articled provisions. The second part of this article provides the background that contextualises the problem; the third analyses the cardinal factors of both dispensations, and the fourth part contains the conclusion and recommendations.

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[2] Holy Bible 2 Corinthians 3: 6. The Preamble to the Cameroon Constitution does not express the intent of 'we the people' of Cameroon but that of the coloniser. Cameroonians did not participate in the constitution-making process, which allowed the participation of only colonial regime-minded Cameroonian elites and the French colonial administration. John Mbaku, 'Decolonisation, reunification, and federation in Cameroon' in John Mbaku and Joseph Takougang, *The Leadership Challenge in Africa* (Africa World Press 2004) 46. Therefore, the Constitution cannot by any means be the intent of 'we the people' when they did not take part in the constitution-making process.

Contextualising the Background to the Content and Language of Constitutional Preambles

Constitutional preambles link the history and culture of a nation, provide a justification and rationalisation for the birth of the constitution, and establish a connection with its citizens. This they achieve while also influencing the interpretation and application of the law in a manner that turns their back on and vilifies the previous order.[3] Preambles constitute a defining moment in the history of a nation by bringing together the past, the present and the future to form an intelligible narrative. They map the trajectory of the subsequent constitutional text by conveying fundamental principles that are decisive in interpreting both the constitutional text and ordinary legislation. Preambles cannot practically diverge from constitutions, although exceptions to this rule do exist.[4] They must integrate themselves into the grander whole, but they must not appear to be mere 'window dressings' as they may well have practical implications through legal interpretation and application.[5] Nevertheless, preambles are not self-contained constitutions within constitutions; rather, they are subject to reasonable limitation through subsequently codified constitutional principles. In this regard, it is important to note that the Preamble to the Cameroon Constitution is closer to the French model of constitutional exceptionalism, even though it is in many ways inadequately so, and instead represents 'Jacobin constitutionalism'. The South African model is compatible with the Preamble to the United States Constitution, representing as it does 'Anglo-Saxon-style constitutionalism'.[6]

The United States case of *Jacobson v Commonwealth of Massachusetts*[7] defeated the argument that a preamble might be taken into consideration in a judicial review of constitutionality; it also reaffirmed the fact that a preamble cannot have any legal value.[8] Nonetheless, the provisions of the US Constitution include those on human rights,[9] and the second paragraph of the Preamble of the Constitution of France 1958 states that:

> By virtue of these principles and that of self-determination of the peoples, the Republic offers to the overseas territories that express the will to adhere to their new institutions

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3 Stefan Theil, 'Three insights from Peter Haberle's "Preambles in the text and context of constitutions"' (2015) UK Constitutional Law Association Blog <hpp://ukconstitutionallaw.org> accessed 8 April 2015.

4 As with every legal rule, the exception to this rule could be seen in the constitutions of Kenya 2010 and Nigeria 1999, among others. This article is, however, predicated on the rule and not on the exception.

5 ibid.

6 Justin Frosini, 'Constitutional Preambles: More than just a Narration of History' (2017) Univ of Illinois LR 604–605.

7 197 US 11 (1905).

8 ibid 609. See also Tom Ginsburg, Nick Foti and Daniel Rockmore, '"We the Peoples": The Global Origins of Constitutional Preambles' (2014) 46 George Washington Intl R 104.

9 Bill of Rights (1791). This was the first amendment to the US Constitution in 1791.

> founded on the common ideal of liberty, equality and fraternity and conceived with a view to their democratic development.[10]

While many overseas French territories, or the so-called former colonies, such as those in Francophone Africa, adhered to their new institutions—for instance, the *Conseil constitutionnel* of France—this institution's power as '*regulateur de l'activite des pouvoirs publics*'[11] is either neutralised or absent in the *Conseil constitutionnel* of Cameroon. The French Constitution's Preamble, which enshrines declarations such as the Declaration of the Rights of Man and Citizens of 1789 and other human-rights charters which have been made justiciable by virtue of the *Conseil Constitutionnel* judgments of DC 70–39 and DC 71–44,[12] is evidence of French constitutional exceptionalism. But in adopting this same French approach, the Cameroon Constitution does so in bad faith. The human rights set out in the Preamble to the French Constitution are justiciable by virtue of the fact that the terms of the Preamble could be used in a judicial review by the *Conseil Constitutionnel*, as is evident in the cases given above. This means that the human rights enshrined in the French Preamble are on *par* with those in the remaining provisions of the Constitution, and are therefore justiciable.[13]

However, this is not the case with the Cameroon Constitution, which takes its cue from the French Constitution of 1958. The Constitution of Cameroon states in article 65 that the Preamble is part and parcel of the Constitution and therefore attributes legal force to the Preamble so far as the human rights enshrined in it are concerned. However, despite entrenching this article, the government of Cameroon is cognisant of the fact that human rights will never be justiciable because the Constitution does not provide for any proper and effective mechanism to sanction any violation of human rights; and citizens do not have the *locus standi* to appear before the constitutional council that is mandated to protect human rights.

Based on Cameroon's departure from these two conventional designs, I have suggested that the Cameroon Constitution should be amended by a review of its Preamble, following the South African example. Instead of making the Preamble justiciable, the articles of Chapter 2 of the South African Constitution entrench fundamental rights as the letter of the law. This approach is a far cry from what the previous apartheid regime practised; instead, it is an embodiment of a constitutional design based on modern constitutionalism. The Preamble to the Constitution of the Republic of South Africa, 1996 states in part that:

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10 Preamble to the French Constitution, 1958.

11 Frosini (n 6) 614.

12 ibid. See also the *Conseil Constitutionnel* decision no 70–39DC, 19 June 1970.

13 Frosini (n 6) 615.

> We, the people of South Africa,
> Recognise the injustices of our past;
> …
>
> Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;

The Preamble suggests—even indicates—that there has been a shift from an unjust past to a present dispensation defined by respect for human-rights principles and human dignity.

On the contrary, Cameroon's Preamble is seen to be inconsistent with and lacking in reference to the country's historical experiences—indeed, passive about them. The Preamble to the South African Constitution, on the other hand, is well founded, marrying as it does the spirit with the letter of the Constitution, so that the Constitution remains as a single, integrated document. In other words, the nature or the basis of the letter of the Constitution can be traced back to the Preamble that expresses the spirit of the law. In this regard, it makes sense, then, when Theil posits that preambles offer themselves as antitheses to the specific horrors inflicted upon a people or a society during a given period.[14] It is this recognition of the perpetration of horrors on the people of Cameroon in the past that will make necessary a vanguard system that protects the populace against such authoritarian legacies in preference for the establishment of transformative institutions befitting the post-independence era. It must be noted that a formal commitment to respect for human rights is followed by a more detailed Bill of Rights entrenched in the Constitution of South Africa. This shows that there is a degree of communication and interaction between the Preamble and the subsequent articles of the Constitution.[15]

The language of the Preamble to the Cameroon Constitution, however, is synonymous with celebratory language since it contains expressions such as 'jealous of our hard-earned independence'; yet it fails to state anything about those who suffered in pursuit of the freedom of the country, as is the case with the South African example: '… honour those who suffered for justice and freedom in our land ...' The Cameroonian example resorts rather to aspirational language such as '… assert our firm determination to build the Cameroonian Fatherland on the basis of the ideals of fraternity, justice and progress.' This Preamble embeds human rights but it fails to affirm the government's commitment to protecting human rights by entrenching the same as either provisions in or the letter of the Constitution.

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14 Theil (n 3).

15 ibid.

As an attempt to redress the stalemate that exists in the clauses of the Preamble to the Cameroon Constitution, I argue for an amendment to the Constitution in order to redress the lacunae in the Preamble based upon lessons learned from that of South Africa. The underlying problem at the heart of this proposed amendment is informed by the impropriety with which the clauses in the Preamble have been phrased, completely ignoring the horrors and adverse experiences of Cameroonians under the colonial regime. The acknowledgement of genuine clauses makes it possible to inspire the need for the resultant constitution arising from the constitution-making exercise to emphasise the supremacy of the fundamental law, the primacy of 'we the people', the participation of the people in constitutional processes, and the protection of human rights and the citizenry from executive abuse. It could also result in the development of a mechanism through which these protections could be practically enforced.

These factors are what distinguish the Preamble to the South African Constitution from that of Cameroon, because these values are subsequently encapsulated in the provisions of the South African Constitution. Conversely, the absence of these measures from the Cameroon Constitution has led to the independence and protection of the Cameroonian citizenry being compromised. I analyse and discuss the following factors below; they constitute the core of the unaddressed clauses in the Preamble to the Cameroon Constitution, motivated by the central role the same clauses play in the South African Constitution.

Reflections on the Amendment of the Cameroon Constitution to Review its Preamble following the South African Paradigm

The use of South African example as a desirable prototype upon which an amendment to the Cameroon Constitution to review its Preamble is proposed is appropriate for a variety of reasons, including the fact that South Africa has a mixed legal system that is influenced by Roman-Dutch law, English common law and South African indigenous law.[16] Cameroon has a bi-jural legal system[17] that is made up of French civil law, English common law and Cameroonian indigenous law.[18] It is therefore clear that both countries have experienced English common law as well as civil-law and indigenous-law influences. This section examines those crucial factors that account for the conventional nature and characteristics of modern constitutionalism in the Preamble to the South African Constitution which directs the trajectory of constitutional texts. It is these factors that give it the edge over the Constitution of Cameroon and make it imperative to amend the Cameroon Constitution so as to review its Preamble. However, this exercise cannot avoid changing the constitutional design of the Cameroon Constitution extensively, thereby evoking broader discussions of some new

16 Francois du Bois, 'Introduction: History, System and Sources' in CG van der Merwe and Jacques du Plessis (eds), *Introduction to the Law of South Africa* (Kluwer Law 2004) 40–41.

17 Fombad (www.nyulanglobal.org).

18 ibid.

characteristics of it that will trigger a design shift resulting from the review of the preamble of the present, aged ideological Constitution of Cameroon. These new characteristics are: the separation of powers, an independent judiciary, the need for judicial review, the need for a mechanism to amend the constitution, the supremacy of the constitution, institutions supporting democracy and the respect for human rights. All of these constitute aspects of modern constitutionalism; they are broadly incorporated in the four salient factors discussed below in one way or another.

'We the People'

In a democracy, the constitution needs to distinguish between decisions made by 'we the people' and those made by their government.[19]

A supreme law can be deemed to have been done in the name of the people only when a movement's political partisans have of necessity convinced an extraordinary cross-section of citizens to take their proposed initiative with seriousness usually not accorded to ordinary politics. But the abovementioned extraordinary cronies are also challenged with the task of convincing a majority of the citizenry to support their initiative in a deliberative forum provided for 'higher law-making'.[20]

Ackerman, reaffirming Hamilton in the 78th Federalists denying that judicial review was not undemocratic, equally captures the act of masquerading and the consequences of forging a constitution not made by the people and not people-oriented yet misrepresenting such a constitution-making process and the resultant constitution as having been established in the name of 'we the people' in the following words:

> Revolutions that devour their children in the sea of blood with the masses cheering on until, after popular passions exhaust themselves in an orgy of destruction, a Napoleon or Stalin emerges to rule the inert mass of his countrymen. If this is revolution, then surely the American constitution is counter-revolutionary.[21]

The authoritarian nature of the current Cameroon Constitution which emerged from independence in 1960, the unification constitution in 1961, the unitary constitution in 1972 through to the current so-called 'decentralisation constitution'[22] of 1996 suggests that 'we the people' could not have given authority to the existence of such a controversial text. Rather, such a deviation suggests that the intention was to sustain the anachronistic colonial French ideology of *plein pouvoir* under the Fifth French Republic's Constitution of 1958. There the president held reasonable power

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19 Bruce Ackerman, *We the People: Foundations* (Harvard University Press 1991) 6.

20 ibid.

21 Bruce Ackerman, 'Storrs Lectures: Discovering the Constitution' (1984) 93 Yale LJ 1013.

22 Twenty-one years after the promulgation of this 1996 Constitution, decentralisation has still not become operational.

independently without parliament[23] in the post-independence constitution-making process of Cameroon which was controlled by the French colonial administration.[24] While appearing to serve the people, that administration in reality machinated against them with the intention of misleadingly preserving the colonial order. Cameroon could not have gone through the adverse treatment at the hands of colonialists[25] only to gain independence and then turn around and entrust power in the hands of a leader with unchecked powers,[26] as the above quotation suggests. As a matter of fact, the Preamble to the Cameroon Constitution, being the spirit of the law, is inconsistent with the letter of the law when controversial provisions such as articles 6, 9, 47, 53, 63, and many others, remove power from the same people the Constitution claims its authority is derived from. This is evidence that the text of the Constitution is far removed from its context: the articled provisions are inconsistent with the constitutional preamble. Unlike the Preamble to the Cameroon Constitution, the South African version provides a desirable constitutional preambulatory paradigm. The uniformness of its text and context; reference to historical experiences and the contextual language and the entrenched right to participation and general characteristics of modern constitutionalism that flow from the preamble to the text have thus made the South African approach a desirable paradigm for Cameroon to emulate. The articled provisions of the South African Constitution provide evidence that the people were consulted and participated in the process. This is evidenced by the introduction of people-centred provisions which limit the powers of the authorities: the Bill of Rights, Chapter 9 institutions, judicial review and the fact that the President of the Republic has no immunity from criminal acts committed while in office.[27] The presence of such people-empowering provisions

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23 Linda Keith and Ayo Ogundele, 'Legal Systems and Constitutionalism in Sub-Saharan Africa: An Empirical Examination of Colonial Influences on Human Rights' (2007) 29 Human Rights Quarterly 1071.

24 Mbaku and Takougang (n 2) 46.

25 Carlson Anyangwe, *The Cameroon Judicial System* (Edition CEPER 1987) 5, 61. See chapter 2 of Justin Wanki, 'When the Rule of Law and Constitutionalism become a Mirage: An Analysis of Constitutionalism and the Rule of Law in Post-independent Cameroon against Post-apartheid South Africa (LLD thesis, University of Pretoria, 2015).

26 Constitution of Cameroon, 1996. Article 6 invests the President of the Republic with an unlimited term of office. Article 9 attributes unchecked powers to the President in times of turmoil in the country. Article 53 grants unlimited immunity to the President to be protected from prosecution for acts committed while in office and even when he leaves the office of the president. What this means is that the people of Cameroon have accepted and endorsed an irresponsible President, a servant who is not answerable to his master. This cannot be true of any genuine democracy in the world, regardless of the literacy level of the people or even how much they are given to patronage or patrimonialism and neo-patrimonialistic politics. Therefore such powers are inconsistent with the objectives of a constitution and as a result thwarts the spirit of that law—the Constitution.

27 Unlike article 53(3) of the Cameroon Constitution, which expressly absolves the President of the Republic of any crimes committed while in office and also from prosecution when he leaves office, the South African Constitution does not provide for such absolution and therefore the President of South Africa is criminally liable. Section 1(C) of the founding provisions of the Constitution states

in the South African Constitution conveys the conviction that 'We the people' are the true foundation of the constitution-making process and 'the people' ensured that their interests were considered.

The participation of the people of South Africa in the constitution-making process occurred in two phases. The first was based on consultation with the people and the second involved the Constitutional Assembly's (CA) drafting a refined working draft after consultation with the people. The establishment of the constitutional committee led to a newsletter, known as *Constitutional Talk*, being published. That was entrusted with explaining the processes to the people and with distributing a draft text approved by the CA.[28] The constitutional committee was established by the elected representatives of the people as a CA; it reached out to educate the citizens and gather their views.[29] This degree of public participation was certainly a mark of approval for the Constitution by the people, confirming that the text was not exclusively drafted by political elites. Rather, the public participation initiative made possible 'ownership' of the Constitution by all South Africans.[30] Therefore, 'we the people' is an appropriate expression by which to describe the constitution-making exercise in South Africa, reflecting as it does both the text and context-articled provisions and Preamble to the Constitution. The South African version demonstrates elaborately the participation and consultation of the people in the constitution-making exercise that delivered the present constitution. The Cameroon version can therefore be amended along those same lines for the sole purpose of addressing historical experiences marked by dispossession and disenfranchisement through affirmative action,[31] among other means of redress. The amendment will not be complete without having confirmed the constitution as the supreme law of the land.

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that the Constitution is the supreme law, reiterating the Preamble. The state of South Africa is therefore founded on the rule of law. Given that the doctrine of state sovereign immunity which invests the head of state with immunity is only subordinate to the rule of law to which South Africa subscribes, the President cannot be considered to have sovereign immunity, then because South Africa adheres to the rule of law and not a doctrine upon which sovereign immunity is founded. See also South African International Criminal Court Act 27 of 2003, s 4(1).

28 Heinz Klug, 'South Africa's Experience in Constitution-building' <http://ssrn.com/abstract=1808168> accessed 25 July 2017.

29 Vivien Hart, 'Democratic Constitution-making' (2003) 107 Special Report 8.

30 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.

31 While the case of dispossession and disenfranchisement cannot be equated to the situations experienced in the United States and South Africa due to the absence of segregated classes as existed in these two countries, the act of exploitation practised by the so-called former colonial master, France, and which they still continue to do should stop. In this way the proceeds previously ripped from the people can now be invested in improving the peoples' lives as a means or kind of affirmative action.

Supremacy of the Constitution

While it is contended that the constitution of a country is the supreme law based on the will of the people and limiting the government authority derived from them,[32] the Cameroon Constitution does not expressly highlight that it is the supreme law of the land anywhere in the Preamble or the articled provisions. This omission must not be attributed to a constitutional innuendo regarding its supremacy. My assumption for the challenge that in Cameroon it may not have the force of a supreme law is also predicated on the fact that the 1961 Federal Constitution of Cameroon[33] provided in proviso 1 of article 47 that no revision that might impair the unity of the federation would be accepted. Moreover, proviso 3 of the same article provided that not even a referendum would be acceptable.[34] Yet President Ahidjo still managed to convert the federation into a unitary state by means of a charade of a referendum meant for the sole purpose of despotically putting an end to the federation.[35] This was done while this clause was still in existence and, worse still, without the consent of the people. This flagrant transgression of the constitution with impunity simply suggests that the constitution is not the overriding law of the land. More important was the view that, given the failure to contest the process when it took place then, today Cameroonians find themselves unable to challenge any law or act perpetuated by public authorities, even if the officials have acted arbitrarily or *ultra vires*.[36] Ever since the constitutional *coup* President Ahidjo orchestrated in 1972, there has been no substantive reform to the constitutional environment and perception of the subsequent constitution of 1972. Therefore, the legacy of undermining the supremacy of the constitution is perpetuated in the present 1996 constitutional environment and constitution, which amended the 1972 constitution. The only three provisions of the constitution which come close to making it appear to be the supreme law, but which were marred by the absence of mechanisms for their execution, are articles 46, 47 and 68. These three articles deal with the referral of matters to the constitutional council to ensure consistency with the constitution, yet

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32 Klaus Stern, 'The Genesis and Evolution of European–American Constitutionalism: Some Comments on the Fundamental Aspects' (1985) XVIII Comparative and Intl LJ SA 199.

33 The 1961 Federal Constitution ushered in a federal dispensation subject to the union between La Republic du Cameroun and Southern Cameroons.

34 Piet Konings, 'The Anglophone Struggle for Federalism in Cameroon' in L Bastia and J Ibrahim (eds), *Federalism and Decentralisation in Africa: The Multi-cultural Challenge* (Institut du Federalisme 1999) 303.

35 Enoh Meyomesse, 'Une Nouvelle Constitution pour le Cameroun et Par les Camerounais Eux-memes. <http://enoh-meyomesse.blogspot.com/2008/04/une-nouvelle-constitution-pour-le.html> accessed 10 October 2016.

36 Nyo' Wakai, *Under the Broken Scale of Justice: The Law and My Times* (Langaa Research & Publication 2009) 114.

only persons who have no interest in referring matters to the constitutional council have been vested with the powers to do so.[37]

This has been the *modus operandi* of constitution-making in Cameroon way back to the process of drafting the constitution of 1960 at independence.[38] Yet in a constitutional democracy the people are supposed to be credited with the writing of the constitution.[39] The absence of adherence to the core tenets of the rule of law as demonstrated above confirm the assertion that the constitution in Cameroon may not be the overriding law of the land, because neither the Preamble nor the articled provisions mention it. Meanwhile, paragraph 6 of the Preamble to the South African Constitution states that the constitution is the supreme law of the Republic. This statement of fact in the Preamble is confirmed by an articled provision of the constitution itself.[40]

Examining these two countries, it becomes evident that the transition from the oppressive colonial to trusteeship[41] regimes in Cameroon failed to highlight any positive change. Rather, the colonial legacy continued in the new democratic dispensation: the constitution-making exercise of the independence constitution having been assigned to the colonial administration. Subsequent constitutions took their cue from this independence constitution without any alteration to the colonial ideology. This explains why the constitutional preamble and the articled provisions had, as a matter of urgency, to contain a statement that the constitution is the supreme law of the land. Implicitly, the colonial administration which made the constitution is supreme in place of 'we the people' referred to in the constitution. Conversely, in both the Preamble to the South African Constitution and the articled provisions it states expressly that the Constitution is the supreme law of the land.[42] This provision is empowering as it puts the people first. By emphasising the supremacy of the Constitution, the constitutional engineer attempts to highlight the break from the apartheid regime, which was characterised by parliamentary supremacy, to a new dispensation marked by the supremacy of the people: constitutional supremacy. In such a dispensation, human rights are rendered indispensable.

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37 Cameroon Constitution, 1996. Article 47(2) only permits the President of the Republic and his cohort (group of parliamentarians and senators) to refer matters to the Constitutional Council.

38 Mbaku and Takougang (n 2) 46.

39 Dennis Mueller, *Constitutional Democracy* (Oxford University Press 1996) 59.

40 Constitution of the Republic of South Africa, 1996. Section 2 of Chapter 1 on founding provisions includes the fact that the Constitution is the supreme law of the Republic and any law or conduct inconsistent with it is invalid.

41 Despite Cameroon's being a UN Trust handed over to French and English administration, which *de jure* never entertained colonialism, what happened *de facto* made it a colony.

42 Preamble to the South African Constitution, 1996. Paragraph 6 states: 'We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic.'

Human Rights

Whereas article 65 disingenuously makes the Preamble part and parcel of the Constitution, the lack of provision for an enforcement mechanism for human rights betrays the bad faith of the constitutional architects. By implication, human rights are not justiciable in Cameroon. For the purposes of enunciating the problem in this article, I limit human rights to socio-economic rights. I do so because of the impact that socio-economic rights have on addressing the poverty quagmire in the post-colonial state.[43] The idea that this article attempts to place in the spotlight is establishing to what degree people-empowering provisions have characterised the Preamble to the post-independence Cameroon and post-apartheid South African Constitutions and made substantive demands through the medium of articled provisions. The primacy of socio-economic rights is defined by their acute postponement during the colonial and apartheid eras.

Making socio-economic rights justiciable in the post-colonial and post-apartheid eras is the correct way to restore the peoples' dignity and to deal with poverty. In other words, extraordinary takings in the form of forced deprivations by one class or group on another fuelled warfare, revolutions and regime change and these in turn have resulted in a restructuring of property rights in South Africa and Africa generally.[44] These extraordinary takings, which can be termed 'dignity takings', take the form of state expropriations of wealth or property from a given class of people that it considers inferior. This practice is exemplified by the colonial and apartheid governments' expropriation of property from blacks in South Africa and other African countries.[45]

Moreover, in Cameroon, socio-economic rights are merely guiding principles for the state without there being any indication of future commitment to their justiciability in post-independence Cameroon. This makes the inclusion of article 65 in the 1996 Constitution a possible excuse for the executive to avoid criticism, responsibility or, better still, government simply wanting to demonstrate its commitment in principle to the United Nations' human rights treaties to which it is a party, while in practice the situation remains consistent with the past. It must be noted that in Cameroon during the colonial administration era under Germany, France and Britain there was no regard for the economic, social and cultural rights of the indigenous people. Colonial policies encouraged social stratification, which undermined indigenous social frameworks and

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43 Whereas all human rights have transformative undertones, socio-economic rights have been shown to make more impact in addressing poverty in the post-colony than civil and political rights. This poverty is the legacy of colonialism. See also Mashele Rapatsa, 'South Africa's Transformative Constitution: From Civil and Political Rights Doctrine to Socio-economic Rights Promises' (2015) 5 Juridical Tribune 217.

44 Bernadette Atuahene, *We Want What's Ours: Learning from South Africa's Land Restitution Programme* (Oxford University Press 2014) 23.

45 ibid.

resulted in socio-economic inequalities.[46] Moreover, even where a negligible number of four economic, social and cultural rights are mentioned in the Preamble to the Constitution exclusively, this amounts to discrimination on the grounds that a gamut of civil and political rights are enumerated alongside it.[47]

This article is therefore an attempt to influence the government of Cameroon, through a constitutional review of the Preamble and the articled provisions of the Constitution, to better promote the socio-economic interests of its citizens who were completely undermined by colonialism and were therefore deprived of their right to dignity provided by the African Charter on Human and Peoples' Rights (ACHPR).[48] In essence, the restitution of socio-economic rights in Cameroon by elevating them to a justiciable right would be the first step towards the restoration of the peoples' dignity that was violated by colonialism and which has continued during the post-independence era.[49]

Meanwhile, in many respects the South African case is the exact opposite of the situation I have described in Cameroon. The Preamble to the South African Constitution directly highlights the need for the justiciability of socio-economic rights.[50] The Preamble proceeds expressly to highlight the protection of human rights, which include socio-economic rights.[51] These declarations are reaffirmed in articled provisions of the Constitution. Chapter 2 of the South African Constitution—the Bill of Rights—states in article 8(1):

> The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state. In addition to this provision, article 9(1) states that:

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46 Atangcho Akonumbo, 'Indirect Constitutional Protection of Economic, Social and Cultural Rights in Cameroon' in Danwood Chirwa and Lilian Chenwi (eds), *The Protection of Economic, Social and Cultural Rights in Africa*: *International, Regional and National Perspectives* (Cambridge University Press 2016) 531.

47 ibid 533.

48 Article 5. Among other things, this provision asserts that all forms of exploitation and degradation of man shall be prohibited. In addition, it was commonplace for the colonial administration to erode the local communities' rights over land and natural resources by applying the *terra nullium* theory which made the colonised's land a land without ownership, therefore giving the colonialist the right to own it. Land expropriation, too, was widely practised, leading to the depravation of the local communities of their land and natural resources and depriving them of the means of their livelihood: Akonumbo (n 46) 530.

49 The state of Cameroon embarks on retrogressive measures by not properly and adequately addressing the right to education, health and housing as envisaged by the Committee for Economic, Social and Cultural Rights' General Comments.

50 Paragraph 2 of the Preamble—Recognise the injustices of the past. Injustice such as the dispossession of Africa's peoples' land. Such injustice can be recognised by restitution of the land unconditionally.

51 Paragraph 7 of the Preamble. Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights.

> Everyone is equal before the law and has the right to equal protection and benefit of the law.

These two provisions of the Bill of Rights suggest a shift in ideology and jurisprudence from the former apartheid regime, which was characterised by the disenfranchisement and disempowerment of the majority in the South African polity, who were blacks, and the conduct of the apartheid law specifically suggested that the whites were superior to the blacks. The Bill of Rights entrenched in the 1996 Constitution provides for equality before the law and reiterates that the Bill of Rights binds the Legislature, the Executive and the Judiciary. In the ground-breaking case of *Makwanyane*,[52] Chief Justice Mahommed established a radical departure for the new constitutional environment in the South African Constitution from that of the apartheid past. He did so by evoking the notion, through the medium of the interim Constitution's text, that:

> The South African Constitution is different:
>
> It … represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos, expressly articulated in the Constitution.[53]

The following case depicts this evolution. In *Soobramoney v Minister of Health (KwaZulu-Natal),*[54] Chaskalson P said that 'a commitment … to transform society … lies at the heart of our new constitutional order.' This remark reinforces the express intention of the new constitutional system to serve the interests and aspirations of all in the new dispensation, and not only the privileged, as had been the case under the apartheid regime.

In this respect, the South African Constitution has embraced aspirations and intentions which serve to realise a democratic and egalitarian society in South Africa that is committed to social justice and self-empowerment.[55] In order not to allow observers or commentators to think that the new democratic dispensation of South Africa is perfect, it is often acknowledged that the new Constitution resulted from a specific historical context and that the democracy it practices and also celebrates is permanently a work-in-progress—still transformative and not as yet transformed.[56] This transformative project is constantly forward-looking and always susceptible to revision and

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52 *State v Makwanyane* 1995 (6) BCLR 665 (CC), found at para 262 of the judgment.

53 Karl Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14 SA J Human Rights 152.

54 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC) para 8.

55 Dennis Davis and Karl Klare, 'Transformative c=Constitutionalism and the Common and Customary Law' (2010) 26 SA J Human Rights 415.

56 ibid.

improvement.[57] The shift in focus to socio-economic rights was certainly a novelty, not only by virtue of being a departure from the jurisprudential order of the apartheid system.

Therefore, human rights serve as a vital tool in the transformative project of a state, since civil and political rights empower people to be liberated; but it must be stated that people become permanently liberated when socio-economic rights are justiciable. The postponement of socio-economic rights led to inequalities, a dispensation that could be resolved effectively only through the creation of an egalitarian society following social and legal reform. This idea is captured by Karl Klare as follows:

> Long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation of course, but in a historical context of conducive political developments) to transform a country's political and social institutions and power relationships in a democratic, Participatory, and egalitarian direction … it connotes an enterprise of inducing large-scale social change through non-violent political processes grounded in law.[58]

The respect for human rights is reinforced through the constitutional entrenchment of specialist organs such as the Public Protector.

The Public Protector

Established against a colonial backdrop, the Cameroon Constitution should have highlighted right from the Preamble that the people whom the constitution claims to be sovereign by virtue of the misrepresentative implication,[59] 'we the people', shall be protected against executive indiscretion. But no such idea can be derived from reading through the Preamble and no such provision exists in the articled provisions of the Constitution either. Such 'human rights-inclusive' models of constitution-making emerged only as a post-colonial constitutional design with a view to reconstructing former colonial states.[60] New waves of state reconstruction also attempt to yield innovative disparities in the devolution of power between centre and periphery. The latest wave since the Cold War has created a range of new independent institutions intended concurrently to protect democracy, on the one hand, and to circumscribe the

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57 ibid.

58 Karl Klare, quoted in Karin van Marle, 'The Spectacle of Post-apartheid Constitutionalism' (2007) 16 Griffith LR 417–418.

59 Misrepresentatives, because right from the Independence Constitution up to the present 1996 Constitution the participation of the people has been absent. It has always been a top-down exercise where only the former colonial government, France, and its Cameroonian acolytes were involved. See Mbaku and Takougang (n 2) 46.

60 Heinz Klug, 'Postcolonial Collages: Distributions of Power and Constitutional Models, with Special Reference to South Africa' (2003) 18 International Sociology 115.

powers of legislative majorities and democratically elected governments, on the other.[61] The Office of the Public Protector falls within the ambit of such institutions. An organ to dilute state power such as the ombudsperson known as the 'Public Protector' also has the power to investigate any conduct considered or suspected to be improper and resulting in prejudice in the public administration of any sphere of government. The Office of the Public Protector, which is responsible for shielding citizens from executive abuse, is not provided for in the Cameroon dispensation, with the result that the National Commission on Human Rights and Freedoms (NCHRF) will fulfil such a mandate. However, the Cameroonian NCHRF cannot properly discharge the duty of the Public Protector because the two are designed to serve distinct purposes. Even so, the NCHRF and the other specialised institutions in Cameroon are administrative, not constitutional bodies. Consequently, two observations emerge: not only is this institution absent in Cameroon, leaving respect for human rights at the mercy of the executive, but institutions fulfilling similar mandates are not constitutionally entrenched. When institutions discharging such an indispensable mandate are not constitutionally entrenched, their functions can be easily manipulated by the executive. Prior to the passage of a law establishing these institutions, they were established by presidential decree. By implication, the president could use a presidential decree to dissolve the mandate of the institutions at will, whenever his political vision was threatened by their existence.

Neither the Preamble nor the articled provisions of the Cameroon Constitution highlight the institution of Public Protector. Therefore the differences in the mandate of NCHRF and the Public Protector must be determined for the purposes of understanding why the two are necessary in an ostensible democracy such as Cameroon. The two institutions are distinguishable in that, whereas the NCHRF is mandated with discrimination and human rights issues perpetuated by individuals, groups and government, the Public Protector's (Ombudsman's) objective is to protect individuals or citizens from rights abuses orchestrated by public officials or institutions.[62] In post-independence Cameroon the Office of the Public Protector was supposed to exist to ensure that abuses that were easily perpetrated on the people by the colonial administration were stamped out from the onset of the current democratic dispensation. The historical processes through which the European invaders forced their ideological mechanisms of public mediation on the subordinated people of Cameroon was based on a framework of an all-encompassing legal–political superstructure that combined the use of violence and the control of ideas in order to achieve economic goals for the benefit of Western industries.[63] The legacy inherited from the colonial era has survived into the post-

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61 ibid 116.

62 Sergio Pinheiro and David Baluarte, 'National Strategies – Human Rights Commissions, Ombudsmen and National Action Plans' (2000) *Human Development Report Background Paper* 3.

63 Nfamewih Aseh, 'Ideologies, Governance, and the Public Sphere in Cameroon' (2008) CODESRIA 3.

colonial state and consequently respect for fundamental rights has been overlooked in favour of the survival of oppressive colonial structures in post-independence Cameroon.[64] For this same reason, the existence of the Public Protector will be instrumental in controlling executive abuse of the population in the present dispensation. This means that an institution must exist that demarcates the activities of the previous colonial state from those of the current democratic dispensation making such activities accountable.

The Office of the Public Protector in South Africa, in contrast, is a constitutionalised organ and the Preamble to the Constitution states that:

> We … adopt this Constitution as the supreme law of the Republic so as to …
>
> Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law.[65]

The Public Protector protects the people of South Africa, as provided by Chapter 9 of the Constitution, which makes it an independent organ. While other Chapter 9 organs include the Commission for Gender Equality and the South African Human Rights Commission, these are beyond the purview of this article. The role of the Public Protector in South Africa is set out in the Constitution:

> To investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice; to report on that conduct and to take appropriate remedial action.[66]

The Public Protector serves as a last defence against bureaucratic oppression, and against corruption and malfeasance in public office. Even though the Constitution requires the Public Protector to steer clear of the investigation of courts' decisions,[67] the empowering legislation, the Public Protector Act, in its wording, suggest that the Public Protector is within their constitutional bounds to investigate more broadly than they have hitherto done in South Africa.

According to the wording of this Act,[68] the Public Protector is vested with powers to investigate and provide appropriate remedial action against non-public servants or staff of such non-public services such as enterprises, provided their conduct is encapsulated

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64 Benard Muna, *Cameroon and the Challenges of the 21st Century* (Tama Books 1993) VI.

65 Paragraph 6 of the Preamble to the Constitution of South Africa, 1996.

66 Article 182 of the Constitution of the Republic of South Africa, 1996.

67 Section 182(3) of the Constitution of the Republic of South Africa, 1996.

68 Act 22 of 2003.

within the category of activities the legislation anticipates.[69] The Public Protector's remedial activities have been evident in the dismissal of a former Minister of Co-operative Governance and a former National Police Commissioner based on her damning reports. Certainly from the powers and authority of the Public Protector as highlighted above it is clear that it is a 'we the people' empowering institution which ensures that the executive does not have the latitude to act as it pleases against the people as it did during the apartheid era, but rather that it is accountable to the people in terms of how taxpayers' money is spent, among other things. Recently, the Public Protector's office forced former President Zuma to pay back an amount of money to the National Treasury as a remedial action in terms of the Public Protector's report on the taxpayer-funded upgrades effected on his Nkandla homestead.[70] This institution protects citizens from actions of the kind that were taken against them with impunity during the apartheid era.

For post-independence Cameroon therefore to show proof of its transformation from the previous oppressive setting and conduct, it needs institutions such as this to guard against the possible recurrences of such vagaries in the present post-independence dispensation. The constitutional entrenchment of such an institution with proper implementation organs provides at least a conducive environment within which citizens can exercise their democratic rights without fear of their being suppressed by an unaccountable executive.

Conclusion

In this article I analysed the transition from the colonial and apartheid regimes of Cameroon and South Africa into post-independence and post-apartheid constitutional states respectively by considering the evidence of such a transition in the spirit and letter of the law: the preambles and the reaffirmation of such preambulatory declarations in the articled provisions of both Constitutions.

The analyses have led me to the view that the Preamble to the South African Constitution, regardless of its existing challenges, has the most empowering 'we the people' propositions that converge the Preamble and the articled provisions of the Constitution and give it the required consistency in terms of text and context. The Preamble highlights who the real authors of the constitution are and its origin in popular sovereignty; it encapsulates the preambulatory clauses which speak to executive excesses committed on the people during the apartheid era, and indicates how the current dispensation can overturn those excesses. To this end, the challenges raised by

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69 Paul Hoffman, 'Mandate of Public Protector Wider than Critics Imagine' *Business Day* (Johannesburg, 10 May 2013) 13.

70 Tebogo Monama, 'Rein in ANC Hooligans: Thuli, Unfazed by Attacks, Vows to do Job without Fear or Favour' *Pretoria News* (29 August 2014) 1.

the Preamble are addressed by articled provisions of the Constitution: people's power; upholding the rule of law, which was absent during both authoritarian eras; the justiciability of socio-economic rights to bridge inequalities that are the effects of imperialism and authoritarianism.

Moreover, the fact that the Preamble to the Cameroon Constitution has utterly failed to highlight the historical experiences of Cameroonians rather disadvantages Cameroonians because the absence of the acknowledgment of these experiences is a failure to depict the urgency required to address colonial legacies in the current dispensation. One repercussion of such an omission is that the likelihood of a prosperous destiny for Cameroonians has been quashed. Consequently, addressing issues such as the justiciability of socio-economic rights, the upholding of the rule of law, the restoration of political power to the people and the creation of an institution to protect citizens from executive abuse have become urgently necessary in order to protect and promote the sovereignty of 'we the people'. Given the extent to which the people have been dispossessed of these features, which have still not been encapsulated in the spirit of the law—the constitutional Preamble—this has become a matter of the greatest urgency. Post-independence Cameroon must therefore emulate the Preamble of South Africa's Constitution to ameliorate its own so that the articled provisions automatically have to address the same issues declared in the Preamble and in that way enable the text and context of the Cameroon Constitution to be dealt with consistently.

In addressing the shortcomings of the Preamble to the Cameroon Constitution, the following recommendation must be considered: that the Cameroon Constitution must be abrogated and a new constitution built from scratch with the participation of the people and a new preamble must be structured that reflects and recognises the past historical experiences of the people along the same lines of the South African version. This will help to produce a constitution that ties the preamble to the entire constitution itself, leading to consistency within the text and context.

It is absolutely necessary that the historical events are reflected and recognised in the context of the Preamble to the Cameroon Constitution because, if the horrors of the past are not highlighted, the urgency needed to put in place a mechanism to counter their potential future recurrence will not receive due recognition. If such a mechanism is not anticipated and put in place to protect and promote the sovereignty of 'we the people', upholding the rule of law, respect for human rights and establishment of the Office of the Public Protector, then the excesses that characterised colonial Cameroon will simply survive post-independence.

The demeanour of a preamble determines how the constitutional text proper should be interpreted. Therefore, when a preamble is mute about the past undemocratic conduct of government, the interpretation of the present provisions will not take cognisance of

such conduct. Consequently, the letter of the law will not interpret the text in a progressive manner that evokes and invokes the absolute necessity of adhering to democratic conduct in post-independence Cameroon. Absent any connection between the spirit and the letter of the law, the oppressive activities of the colonial era would not be challenged, because the interpretation in a preamble would not have been influenced by reference having been made to the gravity of the atrocities of the colonial regime.

The amendment of the constitution to review the Preamble to the Cameroon Constitution will consequently change the constitutional design, which would require these key considerations:

- The outdated ideological constitution must be submitted to modern aspects of constitutionalism, such as the separation of powers, in order to prevent an imperial executive from emerging or being sustained who can trample on human rights without accountability.
- The judiciary's independence must be guaranteed so that it will be able to pass judgments based on the law and the conscience of the judges and will not have to submit to the whims of the executive.
- Judicial review must be implemented genuinely as a mechanism with which to challenge unconstitutional acts and acts of electoral fraud.
- A mechanism is needed to amend the Constitution, and institutions supporting democracy must be put in place alongside the supremacy of the constitution.
- Human rights must be respected and provision must be made for a human rights enforcement mechanism.

In other words, a preamble must highlight the need to protect citizens as a means of negating past oppressive and despotic experiences and the same should be entrenched as constitutional provisions. The mandate of these features of modern constitutionalism is then to limit government power so that a means is sought to address citizenry protection, even though the presence of these institutions may not be a firm guarantee that government power will be limited. Nevertheless, the entrenchment of these features perhaps points to greater future prospects of constitutionalism.[71]

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