From administrative to constitutional bodies – The fourth branch of government: Towards the constitutionalization of independent specialized national institutions in Cameroon

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Abstract: In this article, I discuss the need to constitutionalize independent national institutions in Cameroon. Even though a considerable number of these institutions exist in Cameroon, for more practical reasons this study specifically delves into the analysis of National Commission for Human Rights and Freedoms (NCHRF) and Elections Cameroon (ELECAM). The existence of these institutions as administrative institutions has opened the leeway for the executive to manipulate them for ulterior motives. As a result, these institutions have failed to fulfil their mandate in terms of post-Cold War constitutionalism requirements intended to restrain the excessive executive power, reminiscent of that exercised by the colonial state. In the aftermath of colonialism, post-colonial state reconstruction aims at bringing about transformative constitutionalism where these independent institutions support and promote constitutional democracy in Cameroon and enforce accountable governance. This article reveals that amending the constitution to entrench these institutions is not enough to guarantee the independence and the transformative mandate that these institutions are vested with. This shortcoming is informed by the flawed nature of the present constitution which is an aged-old ideological document. The existence of this blight calls for the engagement of a new constitution-making process that systematically eradicates the influence of elites. The current system is controlled by 'strongmen' due to lack of separation of powers, the resultant constitution should therefore clearly break with this present culture. Given that South Africa was one of the pioneer and unique jurisdictions in the world to entrench these group of institutions genuinely supporting constitutional democracy in chapter 9 of its constitution, I have referred to their constitutional experience to import what practical measures are available not just to enable the constitutionalization of these institutions in Cameroon, but equally their effective implementation. A proposal for the provision of additional post-Cold War constitutional features in the new constitutional design has been advanced in support of strengthening the constitutionalization ambition, without which this design would be nothing more than a dead letter or would fail to achieve its intended purpose.

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A. Introduction

Most fledgling democracies in Africa still struggle with the transition to a genuine democracy. In order to implement the respect for rights and also shield the citizens from executive abuse, the existence of constitutionalized specialized institutions responsible for these purposes are indispensable. This design of constitutionalism could be understood as a building block of transformative constitutionalism, given that it is a design that departs from the colonial and post-colonial constitutional paradigms that still brazenly entrust the chief executive with enormous unrestrained powers and maintain constitutional structures that enable further violation of rights. While these institutions are absolutely necessary for the proper transition and sustenance of constitutional democracy, it has been noticed that almost three decades into the post-1990 constitutional rights revolution,[1], the constitution of Cameroon still has not entrenched these institutions popularly referred to as institutions supporting constitutional democracy. In other formerly colonial contexts, the latest wave of state reconstruction has introduced a new postcolonial collage of institutions that may adequately address the needs of democratic or constitutional governance in the postcolonial era.[2] These institutions are necessary for the purpose of demarcating the activities of the erstwhile colonial state from those of the present dispensation in order to render these activities accountable.[3] This article examines the design and function of independent institutions in Cameroon and proceeds in three steps. In the first part, the article briefly discusses the evolution of independent institutions supporting democracy in Africa. In a second step, the article discusses two particular independent institutions in Cameroon, the National Human Rights Commission and the Electoral Monitoring Body of Cameroon and examines whether the two institutions have been able to limit abuse of power by the state. Finally, the article turns to the case of South Africa and examines whether there are lessons to learn from the South African constitution. The last part ends with a conclusion and recommendations on the way forward.

B. The evolution of Independent institutions supporting constitutional democracy in Africa

Many post-1990 African constitutions provide for one or more independent institutions. These institutions are mandated to concomitantly check government and to enable transformation and in many other ways to supplement the classical checks and balances methods of

1 *Charles Fombad*, Constitutional reforms and constitutionalism in Africa: Reflections on some current challenges and future prospects, Buffalo Law Revue 59 (2011), p. 1026.

2 *Heinz Klug*, Postcolonial collages: Distributions of power and constitutional models, International Sociology 18 (2003), p. 128.

3 *Justin Wanki*, 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, Southern Africa Public Law 33 (2018), p. 17.

ensuring accountable government.[4] Three features distinguish these institutions from other institutions: They operate outside the sphere of government and are not a 'branch of government', they are independent and impartial, and to a reasonable extent, they serve as 'intermediary institutions' which provide the link between citizens on the one side and executive and parliament on the other.[5] It is worth noting that the checks and balances that these independent institutions supporting democracy provide on government are not done through the exercise of power. On the contrary, they check government power by providing a legitimate and authoritative account of acts carried out by government, which can then be used by citizens and parliament in scrutinizing government's performance.[6] These institutions therefore have a persuasive role as they render government answerable to them by exerting 'cooperative' control.[7] In constitutions which have entrenched and given enforcement to the role of these institutions, the transformation mandate of the institutions can be achieved through the institutions' building of support around human rights norms and the setting up of networks of citizens committed to the basic values of the constitution.[8] In South Africa, these institutions appear in Chapter 9 of the 1996 constitution and regarded as South Africa's most venerated contribution to the evolution of constitutionalism.[9] These institutions have been constitutionally entrenched in the South African constitution in a manner that they can enable enforcement of the constitution and they can support and sustain constitutionalism.[10] The constitution of Zimbabwe, 2013 in its chapter 12 entrenches these independent institutions known as 'independent commissions supporting democracy', chapter 15 of the Kenyan constitution of 2010 entrenches the same independent constitutions as well known as 'commissions and independent offices', which institutions are subjected to the principle in chapter 15 despite being dispersed in the constitution,[11] and Title VI of the Democratic Republic of Congo's constitution, 2005 entrenches these independent institutions known as 'Democracy-supporting institutions'.[12] Many other African constitutions simply provide for one or more of such institutions; the Namibian constitution of 1990 in article 127 provides for an Auditor General and article 142 provides for an Ombudsperson. The 1992 constitution of Ghana provides in separate articles for a Commission on Human

4 *Christina Murray*, The human rights commission et al: What is the role of South Africa's chapter 9 institutions? Potchefstroom Electronic Revue 2 (2006), p. 9/26.

5 Ibid, p. 5/26.

6 Ibid, p. 10/26.

7 Ibid, p. 12/26.

8 Ibid, p. 14/26.

9 *Fombad*, note 1, p. 1019.

10 Ibid, p. 1020.

11 *Charles Fombad*, Designing institutions and mechanisms for the implementation and enforcement of the constitution: Changing perspective in Africa, Journal of International and Comparative Law 25 (2017), p. 74.

12 Arts 211 and 212.

Rights and Administrative Justice, an electoral commission, a National Media Commission and an Auditor General among others.

The fundamental objective of independent institutions supporting democracy has generally been to provide for the reinforcement of constitutionally protected checks and balances, to ensure support, strengthen and defend a country's constitutional democracy.[13]

Independent constitutional bodies became part of post-Cold War constitutionalism for the purpose of fragmenting and contending state power.[14] These models of constitutionalism and constitution-making emerged as a post-colonial collage with a view to reconstructing erstwhile colonial states.[15] Given that each new wave of state reconstruction attempts to yield new variations of devolution of power between center and periphery, the latest wave of post-cold war has created these new independent institutions designed for the dual purpose of protecting democracy on the one hand and circumscribing the powers of legislative majorities and democratically elected governments on the other hand.[16] These various mechanisms established to check the abuse of power, especially in the South African 1996 constitution which paved the way in Africa in that regard were the Independent Electoral Commission, the ombudsperson known as the public protector, the Human Rights Commission among others.[17]

C. Independent and specialised national institutions in Cameroon as administrative institutions

Article 14(2) of the Constitution of 1996 states that parliament shall legislate and control government action in Cameroon. Based on this article, parliament has passed laws creating apparent independent and specialised institutions that address specific issues. These institutions, amongst others, in terms of the scope of this article include the NHRC and the independent elections governing body, ELECAM. These institutions in Cameroon are administrative and not constitutional bodies.[18] Independent institutions in Cameroon may be nominal because there are no entrenched provisions in the Cameroon Constitution defining their mandate, appointment of members, execution of orders, financial autonomy, and general legal and institutional frameworks. These same institutions in many modern and progressive democracies are constitutionally entrenched and the constitution clearly defines their man-

13 Constitution of South Africa, 1996. Ss 181-194. See *Mashele Rapatsa*, Transformative constitutionalism in South Africa: 20 years of democracy, Mediterranean Journal of Social Science 5 (2014) p. 894.

14 *Klug*, note 2, p. 115.

15 Ibid.

16 Ibid, p. 116.

17 Ibid.

18 These institutions have no constitutional mandate. All the institutions are still under tight executive control.

date, appointment of officials, and term of office inter alia. In the case of South Africa for instance, these institutions are covered under Chapter 9 of the Constitution of 1996.[19]

I. National human rights institutions in Cameroon

National human rights institutions are non-judicial bodies of human rights architecture at the domestic level.[20] The aim of establishing these institutions was to shift the monitoring, respect, protection, and fulfilment of international and regional human rights from government agencies, such as specific ministries for human rights, to independent national institutions that have specific knowledge and expertise on international human rights standards, theories, and practice that can develop national action plans and strategies with established targets and benchmarks.[21] These institutions are most often administrative in nature but lack any judicial or law-making powers.[22] These bodies maybe attached, yet not subordinated to the executive or legislative arms of government.[23] Even though national human rights commissions are always required by law to submit reports to parliament, they still however function independently.[24] These principles were soon after recognised by the UN Commission on Human Rights in the next session and at the Vienna World Conference on Human Rights in June 1993.[25] These principles stipulate that the NHRI's (National Human Rights Institutions) composition and its sphere of competence must be aimed at promoting and protecting human rights, and this must be clearly established by a legislative or consti-

19 These same institutions in South Africa are constitutionally entrenched and the constitution clearly defines their mandate, appointment of officials, and term of office amongst others, in terms of Chapter 9 of the South African Constitution of 1996. In Cameroon, these institutions have to rely on presidential decrees for most of its other activities to go operational. Given that the ruling party, the CPDM has a crushing majority of parliamentarians in parliament and can adopt any law promoting the views and desires of the executive, makes the independence of these institutions questionable. Essentially, the fact that parliament votes the law does not make the law independent, because almost all laws in Cameroon are proposed by the president. By implication, the bill will never fail because parliament is controlled by the executive through its crushing majority. The executive can therefore propose any arbitrary law governing specialised institutions and the bill will go through.

20 *M. Nowak*, National human rights institutions in Europe: Comparative, European and international perspectives, in: J. Woters and K. Meuwissen (eds.), National Human Rights Institutions in Europe: Comparative, European and international perspective, Cambridge 2013, p. 13.

21 Ibid.

22 *Bonolo Dinokopila*, Bringing the Paris Principles home: Towards the establishment of a National Human Rights Commission in Botswana (2012), pp. 67-68.

23 *P. Pinheiro* and *D. Baluarte*, National strategies – human rights commissions, ombudsmen and national action plans, Human Development Report Background (2000), Paper 2.

24 Above. An international workshop was held on National Institutions for the Promotion and Protection of Human Rights in Paris from 7 to 9 October 1991. During this workshop principles relating to the status of national institutions were defined and these became known as the "Paris Principles" Nowak, note 20, p. 14.

25 Ibid.

tutional text. For the purpose of ensuring the proper independence of this body, it would be preferable to follow the trend elsewhere which has been to constitutionalize this body, followed by an enabling Act of parliament setting out the functions and power of the institution.[26]

These institutions must be independent from their governments, and must not be subjected to financial control that may lead to the compromise of their independence.[27] At regional level, the African Charter on Human and Peoples' Rights in Article 26 compels states parties to use the NHRI as a platform to ensure that charter rights are respected, and Article 62 provides that as part of a state party's reporting obligation, it should be highlighted whether or not these institutions have been established. In addition to the provisions of ACHPR, the African Commission has formulated criteria that the NHRI in Africa must comply with for the purpose of qualifying to apply for observer status with the African Commission.[28]

The common two types of NHRI that exist are national human rights commissions (NHRC) and ombudsmen. These two are distinguishable in that while the NHRC is mandated with discrimination and human rights issues perpetuated by individuals, groups, and government, the ombudsman's objective is to protect individuals or citizenry from rights abuses orchestrated by public officials or institutions.[29] Given the scope and premise of this article, this section will simply examine the independence of this body in its present state as an administrative and not a constitutional institution. More so, how well-suited has this institution been so far in carrying out its duty as human rights protectors and ensuring fairness and legality in public administration. It must be noted that no ombudsman or public protector exists in Cameroon. Cameroon only has a national human rights commission. In some jurisdictions the Ombudsman, Human Rights Commission and National Anti-corruption Commission are fused together[30]

1. The National Commission for Human Rights and freedoms of Cameroon

By setting up this new institution by virtue of Law No. 2004/016 of 22 July 2004, the state of Cameroon acknowledged its duty to guarantee the independence of national institutions

26 *Bonolo Dinokopila*, Beyond paper-based affiliate status: National human rights institutions and the African Commission on Human and Peoples' Rights, African Human Rights Law Journal 10 (2010), p. 67.

27 *Nowak*, note 20 , p. 15.

28 See African Commission document DOC/OS (XXVI)/115, distributed at the 26 Ordinary Session of the Commission in Kigali, Rwanda, November 1999.

29 *Pinheiro* and *Baluarte*, note 23 , p. 3.

30 *Dinokopila*, note 26, p. 29.

charged with the mandate of promoting and protecting human rights.[31] Its predecessor, the National Committee on Human Rights and Freedoms set up by Presidential Decree No. 90/1459 of 8 November 1990 was seen to be over-dependent on the executive, and the UN Human Rights Committee persuaded Cameroon to honour its engagement as a state party to the ICCPR by setting up a more independent institution.[32] This institution was not only set up by a presidential decree, its members were equally appointed by the president a year later by Presidential Decree No 90/1459 of 8 November 1990 but its findings are said to have never been published.[33] The presidential appointment of members compromises the mandate of any institution because those members will be answerable to the president who appointed them. The status of the new institution will be examined to determine whether it has experienced any meaningful transformation so as to reinforce the independence of the institution in terms of the requirement of the post-Cold War constitutional design. I have selected the most salient components essential for the determination of the independence and transformation indicator mandate of the institutions to carry out the present examination:

a) General autonomy of the Commission

National human rights commissions can be instrumental in fostering the rule of law and transformation if they are established under the right legal framework, granted broad powers and functions, and are independent from the legislature and the executive.[34] It is not sufficient to guarantee the independence of these institutions by merely entrenching a provision for their existence in the constitution or legislation. It needs to go beyond these two mechanisms and be independent from the control of any public officials, and the authority of these institutions must be promptly respected by everyone.[35]

31 Human Rights Committee (Covenant on Civil and Political Rights) "Consideration of reports submitted by states parties under Article 40 of the covenant – Fourth periodic reports of states parties – Cameroon" (CCPR/C/CMR/4 March 2009), p. 74.

32 Art 30 of the Law No 2004/016 of 22nd July 2004 to set up the organisation and functioning of the National Commission on Human Rights and Freedoms states that the commission replaces the committee that was set up by a presidential decree.

33 *S. Dicklitch*, Failed democratic transition in Cameroon: A human rights explanation, Human Rights Quarterly (2002), p. 174.

34 *S. Gwei*, The Cameroon experience in creating and running a National Commission for the Promotion and Protection of Human Rights, in: K. Hossain, L. Besselink, H. Selassie, G. Selasie, E. Volke (eds.), Human Rights Commissions and Ombudsman Office: National experiences throughout the world, The Hague; Boston 2000, p. 199.

35 Above. The commission does not have any institutional, financial, or individual autonomy. This completely defeats the independence of the institution by virtue of being established through legislation. This commission does not really differ from the moribund committee that was established through a presidential decree. Section 1(3) of the law establishing the commission states that the commission is financially autonomous since its budget is voted by parliament, and not at the request of the president's whims and caprices. However, this parliament is rubber-stamped by the

Section 19(2) and (3) provide for the commission's annual report to be submitted to first to the president of the republic, and then to the presidents of the national assembly and the senate. The commission's mid-year report is to be submitted to the prime minister, the minister of justice, and the minister of territorial administration. All these authorities are members of the executive and under the direct patronage of the president of the republic, including the presidents of the national assembly and the senate. There can only be ostensible independence for the commission when its reports are submitted to the very members of the executive who have a high propensity for violating human rights. This fact has completely neutralised the independence of the commission, and anything relating to its independence is an expensive indulgence.

b) Financial autonomy of the Commission

Section 20 of Law No 2004/016 of 22 July 2004 setting up the Organisation and functioning of National Commission on Human Rights and Freedoms states that the commission's resources will come from annual state budget allocations and support from national and international partners. Section 23 further clarifies that the commission's budget and investment plan shall be submitted to the Prime Minister for approval as part of the finance law of the year. This simply means that the commission is not free from executive control and has neither independence nor the capacity to bring transformation. Therefore, very little can be expected in terms of human rights promotion and protection.

Finally, Article 31 states that this present law on the organisation and function of the new commission shall be implemented by a presidential decree. Everything regarding the commission relies on the president. Therefore, it cannot be said that the commission has independence of any kind and less so, that this institution conforms to the post-Cold War constitutional design intended to fragment state powers and transform constitutional democracy.

c) Access to the commission

The commission went operational in 1992 and published its maiden report only nine years later. This was known as the Five-Year Activity Report.[36] Within the time covered by the report, the commission received an average of 500 petitions per year. From 2003-2006 it received 2 213 complaints: 434 in 2003; 569 in 2004; 481 in 2005; and 729 in 2006.[37] The above calculation reveals that petitions to the commission decreased progressively as the years went by. One of the facts accounting for this reluctance in petitions is inter alia, the

president, and will certainly adopt his proposal. The outcome is that the president still controls the commission.

36 1992-1997 of March 1999.

37 *Ndode Nkumbe*, The effectiveness of domestic complaint mechanisms in the protection of human rights in Cameroon Cameroon, Journal of Democracy and Human Rights (2011), p. 42.

fact that the commission's office was centralised in Yaounde, the capital province of Cameroon. Not everyone could have access to the commission. It was not until 2003 and 2006 that branches of the commission were opened in the north western and south western regions of Cameroon. Even so, it is doubtful whether or not their activities can reach the divisions and even the sub-divisions of these provinces, where distances are significant and roads might be inaccessible.[38] Put differently, the state still largely controls the functioning of this institution and its independence is therefore questionable.

d) Jurisprudence of the commission

Jurisprudence in this case will include findings, their treatment, and the remedy administered. Given that section 19 of Law No. 2004/016 of 22 July 2004 requires that the findings of the commission should be reported to the president of the republic and other executive cohorts, means effective remedies will be dispensed as a favour by the said authorities and not as a right. It is conclusively doubtless that the commission's propensity to provide effective remedy is low.[39] This can clearly be illustrated in the case of Mrs. S reported in the 2007 Annual Report. Mrs S's son was detained in the Eseka prison where he fell and later died in hospital. The commission later dismissed Mrs. S's allegation that her son died as a result of the negligence of the prison officials and she claimed damages for this. However, after its own investigation, the commission found that the death of the victim resulted from a liver problem that the victim had been suffering from and the commission asked the victim's mother to drop the case.[40] Comparative jurisprudence of other national commissions has proven that states are encouraged to pay damages for violations orchestrated by its officials such as happens in India, but is a rare occurrence in Cameroon.[41] The commission prefers to treat cases against the state agents as discrete matters to be settled in a way that satisfies the individual petitioner, instead of treating the matter as a systemic human rights offence committed by the state through its agents.[42]

Another important issue that hampers the commission's ability to provide sound remedies is that it is not vested with the competence to convey investigated cases to court directly, as is the case with commissions in other jurisdictions such as the Commission on Human Rights and Administrative Justice of Ghana.[43] Administrative rather than legal channels carrying out investigations is what has continuously kept the commission's complaint mechanism weak. However, in the case of *Mukong v. Cameroon,*[44] the commission laid

38 Ibid.

39 Ibid, p. 46.

40 Ibid, p. 47.

41 Ibid.

42 Ibid.

43 Ibid, p. 48.

44 *David Harris*, Cases and materials on international law, London 1988, p. 285. The commission confirmed that Mukong's right to freedom of expression was infringed upon and recommended

down a precedent to which reference is made whenever it deals with the right to freedom of expression that the constitution of Cameroon guarantees.

To conclude, given the scope of the Cameroonian NCHRF, it has been illustrated that insofar as the mechanism is a viable tool to uphold constitutional democracy and transformative constitutionalism in Cameroon, executive hijack and control of the mechanism has rendered it a tool used to absolve the executive from incrimination. Therefore, it cannot be said that this institution is independent and can fulfil its mandate in its present state. It will therefore require vital adjustment as provided for in this article for the institution to properly serve the purpose for which it is intended. The next mechanism under discussion will be ELECAM.

II. Elections Cameroon – ELECAM

ELECAM was created in 2006 and law No. 2006/011 of 29 December 2006 was designed to set up and lay down the conditions for the organisation and the functioning of ELECAM. Nevertheless, this 2006 Law has been repealed and re-legislated into the 2012 Law on the Electoral Code. Prior to the birth of ELECAM, there was the ministry of territorial administration and decentralization (MINATD) that was later also replaced by National Elections Observatory (NEO). The Herald Newspaper described NEO as follows:

> *No one suspected that NEO would simply endorse the abusive elections of MINATD and become its willing accomplice. That is what it since became and does so with great delight. It has never disqualified an election in spite of the many short comings of organisation.*[45]

The problem with elections as a means to achieving democracy in Cameroon has so far been that the NEO facilitated the manipulation and distortion of the electoral process[46] The Cameroonian government ignored the essence of democracy when the predecessor of NEO, the MINATD created NEO as an Elections Monitoring Body (EMB) in order to give the impression that election management would no longer be exercised by the government. It had to exercise institutional independence, impartiality, and professionalism towards all political parties.[47] However, controversy becomes apparent in Section 3 (1) of the NEO code

that government respects that right. This case enabled the commission to lay down guidelines on how government can respect the right to freedom of expression by pointing to Article 19(3) of the International Covenant on Civil and Political Rights that addresses the issue exhaustively.

45 *Boniface Forbin*, The height of institutional dysfunction, quoted in: C. Fombad and A. Ewang, Election management bodies and peace-building in Africa: Cameroon's move from National Election Observatory (NEO) to Elections Cameroon (ELECAM), Revue Africaine de Sciences Juridiques 8 (2008), p.18.

46 *Charles Fombad*, Cameroon's National Elections Observatory and the prospects of constitutional change of government in: Frank Columbus (ed.), Politics & Economics of Africa 3 (2002), p. 85.

47 Ibid, p. 87.

that designated the president of the republic as the exclusive person to appoint its members.[48] The appointee will certainly be answerable to the president, given that maximum incentives were reserved for the appointees who cooperated with the president.[49] This apparent reconversion of the old habits into the new institution simply means that the jettisoning of MINATD, in preference to the NEO, has simply paled into insignificance.[50] This institutional defectiveness, which was caused inter alia by the over-reliance on presidential decrees for almost every act that related to NEO, influenced the call for an independent electoral organ. Thus, ELECAM was established as a means of righting the wrongs of the NEO. However, whether it has lived up to expectations is yet another question to be answered in the subsequent lines of this article.

1. Mandate and powers of ELECAM

ELECAM's existence is not buttressed by a constitutional provision that entrenches its existence and elicits stringent rules regulating its amendment. By implication, given that ELECAM is based on a law legislated by parliament as an ordinary law, it could be amended even by subterfuge during an ordinary parliamentary session – since the president has a fleeting majority in parliament. The presidential decree appointing the members of ELECAM is one of the enabling decrees required to complement Law No. 2006/011 of 29 December 2006 as amended by the 2012 Law on the Electoral Code to set up and lay down the organisation and functioning of elections in Cameroon. This law complements the presidential decrees that effectively implemented ELECAM.[51] Another presidential decree appoints the director general and his deputy [52] and another appoints the chairperson and his vice.[53]

48 Ibid, p. 86.

49 Ibid.

50 Ibid, p. 85.

51 *Yerima Nsom*, Biya bows to SDF pressure, Decrees on ELECAM, http://www.cameroonpostline.com/biya-bows-to-sdf-pressure-decrees-on-elecam/ (last accessed 20 March 2015), also see section 42(4).

52 Presidential Decree No 2008/470 of 31 December 2008 on the Appointment of Officials of Elections Cameroon.

53 Presidential Decree No 2008/464 of 30 December 2008 on the Appointment of the President and Vice-president of the Electoral Board of Elections Cameroon. See also Section 8(3) of the ELECAM Law. Section 1(2) of the ELECAM law empowers this organ to be responsible for the organisation, management, and supervision of the electoral operations and referendums. Section 4(1) states that Elections Cameroon shall organise, manage, and supervise elections and referendums and 4(2) states that Elections Cameroon shall be vested with the requisite powers to perform its duties. In this regard ELECAM has been attributed a wider mandate than that which was given to the defunct NEO, and thus NEO and even the MINATD no longer have any significant business with electoral management in Cameroon.

Section 5 of ELECAM law also defines the functioning of the organ. It is specified that this organ shall use the following channels to perform its duties through the following organs – The EB and

However, it is quite ambiguous that even though the duty to manage an election is vested in ELECAM, the last presidential elections of 2011 were called by a presidential decree and not by ELECAM, as the law requires.[54] These state of events makes the independence of the institution questionable.

2. Financial autonomy of ELECAM

Section 27 of the ELECAM law states that ELECAM's resources shall be public funds managed in compliance with public accounting rules. Section 30 clarifies that after the EB has submitted their draft budgets to government, it shall consider it and table it before parliament for adoption as part of finance law. This law illustrates that even though ELECAM's budget may be said to be independent by virtue of being voted by parliament, the draft bill for the budget is only tabled before parliament by government after 'consideration'. The government still has the upper hand to determine the autonomy of the institution. It might simply take its time in considering the tabling of the bill, and if the Government perhaps find that it might not fulfil a certain agenda they intend to push forward, it might simply be sluggish or might not act promptly in tabling the bill before parliament. This leaves ELECAM in the same predicament in which NEO usually found itself in terms of lack of finances since government had to cater for their financial needs. Put differently, ELECAM's financial autonomy to properly manage electoral issues in Cameroon may be at the mercy of the executive representing government. Another gap that exists in this same law regarding the financial autonomy of ELECAM is that Section 31 suggests that after the financial bill for ELECAM finances has been passed by parliament, the minister of finance is requested to disburse the funds as a priority state expenditure as set out in the appropriation of the finance law. So far, the implication of these laws is that both before and after the passage of the ELECAM budget in parliament, ELECAM's financial autonomy is still compromised since government needs to consider the draft budget before passage in parliament, and after passage another government agent in the person of the minister of finance still has

the general directorate of elections (GDE). Section 6(1) specifically defines the mandate of the EB, which is to ensure compliance with the electoral law of all stakeholders for the purpose of guaranteeing regular, impartial, free, fair transparent, and credible polls. Section 6(1) explains how the EB shall carry out this task: carry out proper scrutinisation during the elections and non-election years; scrutinise candidacies and publish the final list of candidates contesting official public elections; publish presidential, legislative, and senatorial electoral trends; and forward election reports to constitutional council or bodies provided for by the law amongst others. Section 7 states that EB shall adopt the by-laws of Elections Cameroon and hold consultations with administration, political parties, and civil society for the purpose of managing the electoral process.

Section 18 of the law states that the DGE shall be responsible for the organisation and management of the poll under the supervision of the electoral board, and the section empowers a director general as his deputy as appropriate authority to run the general directorate of elections.

54 *Walter Nkwi*, The counting of votes that have never counted: Reading into the 2011 presidential election in Cameroon, Cameroon Journal on Democracy and Human Rights 5 (2011), p. 14.

to disburse the funds after the bill has passed. The minister of finance as an agent of government could still apply dilatory measures in disbursing the amount voted by parliament if they want to delay the functioning of the institution. Thus, this means that even with the apparent independence of ELECAM, many factors, including the provision of its functioning budget, could be disrupted by the government if they believe a certain agenda intended to be carried out with the funds will not be in their interest.

3. Appointment of ELECAM members

The law provides that the members of the Electoral Board shall be twelve members.[55] Section 20(1) states that the director general and his deputy shall be appointed by a presidential decree to serve for a period of five years, renewable as appropriate upon consultation with the electoral board. It is commonplace for appointees who seek reappointment to always act in the interests of those who appoint them, so that at the end of their mandate reappointment is sure to happen. In such a situation, it would be quite difficult for a commissioner to act independently because they need a favour from the person who appoints them. Essentially, appointees will naturally need to act in favour of that person who may appoint them since 'one good turn deserves another'. Section 8(3) states that the chairperson and vice-chairperson of the electoral board shall be appointed by presidential decree upon the consultation with political parties represented in the national assembly and civil society. However, no provision is annexed to compel the president to properly consult with this body before appointment. The outcome would certainly be an appointment reflective of personal interest, and an outcome that is restrictive and lacking in any degree of transparency, and biased appointments. More so, an appointment by presidential decree in Cameroon is an act of state.[56] This means that once the president has proclaimed his appointment, regardless of the unsuitability of the appointee, the appointment is insulated from judicial review. This is an indication that it would be difficult to preserve the independence of the institution and that of its members.

The mandate of ELECAM, its appointment of members, and the financial autonomy of the institution do not illustrate any degree of independence and impartiality of the institution. To make matters regarding its independence worse, Section 41 of the law states that where ELECAM has been properly established as incompetent by the constitutional council, the president of the republic shall, under Article 5 of the constitution, take the requisite corrective measures. This is a dangerous open-ended provision since the president can use whatever method he deems fit to resolve the matter, including unorthodox methods that might only satisfy his ulterior motives at the expense of the electorates. These setbacks render the independence and autonomy of ELECAM, which has replaced MINATD and NEO,

55 Section 8(1) of ELECAM Law.

56 See Kouang Guillaume Charles contre Etat du Cameroon. Jugement no66 ADD/CS/CA du 31 MAI 1979, sections 8(10) and 53 of the Constitution of Cameroon, 1996.

questionable. That said, the above examination has revealed that these so called independent national institutions in Cameroon are not independent and have thus failed to strengthen or transform constitutional democracy in Cameroon. With this constitutional stalemate, it would be necessary to examine how independent, and to what degree the institutions supporting constitutional democracy in South Africa have been able to achieve progress in terms of transformation of its constitutional democracy, for the sake of importing and adopting the same to Cameroon to advance its own constitutional democracy.

D. Lessons learnt from the South African chapter 9 institutions on how to properly implement the potential constitutionalised independent national institutions in Cameroon

Given that institutions supporting constitutional democracy have become South Africa's most important contribution to the development of constitutionalism in post-apartheid South Africa and post-colonial Africa as earlier indicated, it would be vital to learn from South Africa how the constitutionalization of these institutions can enable further implementation and enhancement of constitutionalism. More so, South Africa is the unique country in the world where the constitution establishes such numerous and properly functioning diverse institutions genuinely supporting constitutional democracy.[57] Nevertheless, South Africa has not been selected because it is the best functioning jurisdiction in terms of constitutional institutions. South Africa faces numerous challenges in this regard as the recent controversies concerning the current Public Protector have demonstrated.[58] Instead, South Africa has been selected as another African jurisdiction with numerous implementation scenarios that provide a practical understanding of the institutions.

Ginsburg has argued that administrative institutions enjoy a greater deal of endurance than constitutional institutions. He adduces the case of the French *Conseil d'Etat*'s survival of episodic swings from monarchy to presidentialism and parliamentarism and from dictatorship to democracy. He also points to the Swedish ombudsman which has survived numerous transformations of the political structure.[59] While this is historically correct, I hold a contrary view in the case of Cameroon, given that during the colonial era, constitutional law and administrative law were reasonably underdeveloped, resulting in colonial law consequently serving as a self-sufficient body of rules attributing unrestrained powers to the

57 *Pierre de Vos,* Balancing independence and accountability: The role of chapter 9 institutions in South Africa's constitutional democracy, in: Danwood Chirwa and Lia Nijzink, Accountable governments in Africa, Cape Town 2012, p. 174.

58 *A. Mbatha, M. Cohen, P. Vecchiatto,* Ax hovers over South Africa's controversial graft ombudsman,(2019) July Biz News, https://www.biznews.com/undictated/2019/07/23/time-public-protector (last accessed 30 September 2019).

59 *Tom Ginsburg*, Written constitutions and the administrative state: On the constitutional character of administrative law, University of Chicago Public Law & Legal Theory Working Paper No 331 (2010), p. 122.

administrators to reign over the people.[60] Administrative institutions facilitated the abuse of human rights during the colonial era. As earlier mentioned, in the post-colonial era, these institutions have not been transformed. Instead, the post-independence elites have used these structures as a windfall to maintain sustainable abuse and exploitation of the people.[61] This is corroborated by the fact that all administrative institutions in Cameroon are directly subordinated to the executive and function through presidential decrees. This is the reason why I argue for the constitutionalization of those institutions for them to work more independently, if they adhere to the recommendations put forward at the end of this article. These Chapter 9 institutions in the South African constitution are considered 'watchdogs' which keep government in check and transform society. These institutions are required to exercise their power without favour, fear and prejudice. To achieve this goal, the institutions submit annual reports to the National Assembly, highlighting their progress or challenges encountered.[62] While these institutions are answerable to the National Assembly which is a political body, it could be argued that their independence might be tampered with. Nevertheless, parliament in South Africa is made up of numerous vibrant political parties which ensure the check and balance process against the political party in power. This is quite different from the situation of parliament in Cameroon where the opposition is very weak, has no influence and in many instances, merely an extension of the party in power. These institutions in South Africa cannot be easily manipulated because as constitutional institutions and not administrative institutions, the Constitutional Court and not the executive has the appropriate powers to decide as the final arbiter how a stalemate should be resolved. However, it is also important to highlight here that recent rulings by the Constitutional Court to make the recommendations of the Public Protector binding, including other lower courts were not anchored on express provisions from the constitution. The South African constitutional system is a value-oriented one. The values include human dignity, freedom and equality before the law and justice.[63] Interpretation of constitutional provisions must therefore take into account the values which the state is duty-bound to uphold.[64] The Public Protector in South Africa was established against the backdrop of an erstwhile apartheid regime that oppressed the black majority. Therefore, the Public Protector's role in the post-apartheid era is to stymie state abuse of the public. Against this backdrop, the recommendations of this institution should certainly not come without legal implications. The cases I now examine confirm that the recommendations of the Public Protector are binding. It must also be added here that, experience from engaging with the work and

60 *Issa Shivji,* Contradictory perspectives on rights and justice in the context of land tenure reform in Tanzania, in: M. Mamdani (ed.), Comparative essays on the politics of rights and culture, Cape Town, 2000, p. 39.

61 *Bernard Muna*, Cameroon and the challenges of the 21st century, Bamenda, 1993, pp. vi and 4.

62 *Veleska Langeveldt*, Briefing paper 287 on the Chapter 9 institutions in South Africa (2012), p. 2. Art 181 of the Constitution of South Africa, 1996.

63 *Benard Bekink,* Principles of South African Constitutional Law, Durban, 2012, p. 198.

64 Ibid.

influence of the three Public Protectors South Africa has had so far suggests that if the Public Protector is not principled, objective and competent as exemplified by Thuli Madonsela's tenure, then he/she could be perceived to be politically driven as exemplified by the tenures of Lawrence Mushwana[65] and the current Busisiwe Nkwebane.[66]

From the appointment of members serving in the various institutions to its finances and its institutional structure, it is ensured that neither the executive nor parliament can influence its work. For the sake of ensuring their independence, the funding of the institution is not provided for by the executive arm of government. It is done by parliament. The independent institutions are required to be granted an opportunity to defend its budget requirement before the relevant committees of parliament or parliament itself.[67] In terms of political/administrative independence, the Chapter 9 institutions are guided exclusively by the constitution as defined in the *New National Party case*.[68] The Constitutional Court stated that the Chapter 9 institutions should be capable of fulfilling their mandate without fear, favour or prejudice. That any engagement by the executive or parliament with these institutions must be carried out in a manner that avoids interference with these institutions' fulfilment of their constitutional obligations.[69]

I. Defining factors in designing independent constitutional implementation institutions

Fombad has highlighted three factors critical in the effective implementation of these institutions in South Africa.[70]

1. Constitutional entrenchment

The constitution reflects the sovereign will of the people as the supreme law, as a result any act carried out in violation of the constitution will be declared invalid. A transient majority would not be able to casually amend the constitution to achieve its ulterior plans. This explains the reason why institutions created by the constitution may endure in comparison to those created by legislation which could be changed by parliament at the convenient time of the government in power.[71] This also means that even the various commissioners cannot be

65 *K O'Grady,* Mushwana Letting 'ANC Petticoat Show', The Weekender 11-12 November (2006), p. 3.

66 *A. Mbatha, M. Cohen, P. Vecchiatto*, note 59.

67 *Andrew Konstant*, Assessing the performance of South Africa's constitution: The performance of chapter 9 institutions International Institute for Democracy and Electoral Assistance, Stockholm, 2016, p. 8.

68 *New National Party* v *Government of the Republic of South Africa and Others* (1999) ZACC 5; 1999 (3) SA 191; 1999 (5) BCLR.

69 *Konstant*, note 68 , p. 8.

70 *Fombad*, note 11, pp. 84-90.

71 Ibid, p. 85.

removed irrationally by the president as the constitution tightens the threshold for the removal of the commissioners or public protector before the elapse of their mandate, maybe for political expediency.[72] Even though the President is able to remove a member of the commissions from office, this function is rather ceremonial. He may only pronounce the removal after the National Assembly has respected due processes and proper consultations.[73] For the removal of the Public Protector, two-thirds majority of a vote of parliament is required. Even though the commissioner is appointed by the president, this appointment is also entirely ceremonious. The recommendations for the candidate amongst whom the president will appoint the commissioner are made by a committee proportionally composed of members of all political parties represented in the National Assembly.[74]

2. Protection from partisan manipulation and institutional independence

Four governing principles provided for under section 191 ensure that these institutions are not exposed to political interference. These are: the institutions are subject exclusively to the constitution, other state organs through legislative and other means must ensure the independence, impartiality and effectiveness of these institutions,[75] no interference by any person or organ with the functioning of these institutions and the institutions are accountable to parliament and must report on their work to parliament at least once a year.[76] Though the recommendations of these institutions had not been binding until the era of the Nkandla debacle, existing cases have proven that these recommendations were persuasive and selectively implemented in some cases prior to Nkandla: Some damning report of investigations and their recommendations submitted to the president resulted in the president suspending the then Police Commissioner Bheki Cele and his subsequent dismissal. Prior to this event, the Public Protector (PP) had also made recommendations to the president which resulting in him recalling Gwen Mahlangu and Sicelo Shiceka as cabinet ministers.[77] Pansy Tlakula was investigated by the Public Protector and it was found out that she was involved in 'grossly irregular' procurement process of securing office space for the Independent Electoral Commission. In June 2014, the court recommended the removal of Tlakula by

72 Sec 194 of Chapter 9, constitution of South Africa, 1996.

73 Ibid.

74 *Konstant*, note 68 , p. 16.

75 The Constitutional Court established this in *In re: Certification of the Constitution of the Republic of South Africa, 1996 (10) BCLR 1253 (CC)* Paras 161 and 163. The Court held that chapter 9 institutions are to ensure that members of government fulfill their tasks effectively without corruption and also to assure that government is accountable and responsible.

76 *Fombad*, note 11 , pp. 86-87.

77 *Nickolas Baeur,* Zuma wields axe 'for the good of SA, http://mg.co.za/article/2011-10-24-zuma-wields-the-axe-for-good-of-sa (last accessed 10 February 2019).

virtue of her misconduct described in PP's report. Unable to clear her name, Tlakula resigned in September 2014.[78]

Nevertheless, the Nkandla case brought a new dawn in the development of the powers of Chapter 9 institutions. The recommendations of these institutions are now binding after the constitutional Court aligning with the Supreme Court of Appeal,[79] and departing from the decision of the Western Cape High Court which held that 'a finding by the Public Protector (PP) is not binding on persons and organs of state'.[80] In the Nkandla case, tax payers' money was abused to the tune of well over R246 million (approximately $ 24.600 million at the time) for the upgrade of the presidential homestead-Nkandla. The PP launched an investigation into this alleged malpractice and concluded that the president and his family had unduly benefitted from certain non-security features.[81] Given that this amounted to the president breaking his oath of office and therefore acting in breach of his constitutional obligation in terms of sections 96(1), (2)(b) of the constitution, the PP took remedial action against the president to return part of the amount spent on the upgrades. The president failed to comply with these recommendations and the matter was brought before the constitutional court which confirmed that the recommendations of the PP are binding.[82]

3. The constitutional entrenchment of deadlines

Deadlines of the implementation of any newly created constitutional mechanism must be entrenched and serious consequences must follow non-compliance or failure to execution. This means reasonable timeframes must be adopted to avoid procrastination and manipulation of the implementation process.[83] Lastly, monitoring of the implementation of the deadlines is necessary. To facilitate this, special apolitical constitutional implementation institutions should be given the task to ensure progressive implementation to the latter.[84] For instance, Cameroon's constitution of 1996 created some of the institutions recommended by the post-Cold War constitutional design. Nonetheless, twenty-three years later, the pace of implementation of this constitution is still considerably slow. The Constitutional Council only went operational in 2018, twenty-two years after it was created. This slow pace of im-

78 *Konstant*, note 68 p. 19.

79 In this case, the Acting Chief Operations Officer of SABC ignored the recommendations of the Public Protector, and worse still the Board of the organization instead of instituting the recommendations against the acting CEO, appointed him as the permanent COO and the minister of communication endorsed the appointment. The SPA held the powers of the Public Protector went beyond mere non-binding recommendations. Konstant, note 68, p. 11.

80 *Democratic Alliance* v *The South African Broadcasting Corporation Limited and Others* case no 12497/2014.

81 Ibid, Para 11.

82 Ibid, Paras 49-50 and 105: *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* (2016) ZACC 11.

83 *Fombad*, note 11, p. 90.

84 Ibid.

plementation is informed by the lack of entrenchment of constitutional deadlines for implementation of the constitution and the inexistence of special constitutional implementation institutions.

E. Conclusion

I have argued that even though the constitution of Cameroon was apparently amended in 1996 as a demonstration of its interest to comply with the post-Cold War constitutionalism that concomitantly circumscribes the use of state power and the promotion and transformation of constitutional democracy, it still by no means entrenches and implements some of the indispensable features of this design. Notably, independent institutions supporting or promoting constitutional democracy. I have further argued that the absence of these institutions in the 1996 constitution only exposes symptoms of a wider problem which has been diagnosed to be an elite-driven constitutional design and continuity of the colonial order in a democracy. As a result, I have proposed that a new constitution-making process should be engaged that will deliver a modern constitutional design for Cameroon that is rooted in popular participation and consultation.[85] This would neutralise the influence of the 'strong men' – elites and the constitutionalization of these special institutions in the new constitution will make a positive impact.

The two most influential of these institutions; the NCHRF and ELECAM have been examined to show that the existence of these institutions as administrative and not constitutional institutions has disempowered these institutions of the independence and power to transform constitutional democracy that these institutions are supposedly vested with. More so, the executive still exercises a great deal of control over these institutions as it does over all other state institutions. This compromises the functioning of these institutions, given that they are usually designed to address the legacy of colonialism and unrestrained executive power in the reconstruction process of the post-colonial state. This article has omitted CONAC in the analysis because there has been no evolution in the status of this Agency in terms of its independence and transformation mandate. At best, CONAC is worse off than the other two commissions because from its institutional independence, personal independence and financial autonomy, there is nothing to write home about. Everything concerning CONAC still depends on a presidential decree and such a manner of operation can never deliver the results such commissions were intended to produce. No doubt the Central maximum security prison at Kondengui in the capital city, Yaounde is full of cabinet ministers apprehended for embezzlement and locked up at the behest of the president and not CONAC.

The Chapter 9 institutions of the South African constitution have been examined as a means of exporting lessons (best practices) learnt from their operation to Cameroon to en-

85 The current constitution is an aged-old ideological constitution. The spirit of the law has not been transformed.

able the constitutional entrenchment and implementation of these independent institutions in the constitutional system of Cameroon. A number of lessons have been learnt, that can be recommended to Cameroon as steps to follow in constitutionalizing its independent and national institutions and their subsequent implementation. These steps are: a new constitution should entrench these institutions and this time, specifically creating a Public Protector separate from the NCHRF. Its entrenchment will be followed by the entrenchment of deadlines of the implementation of the institutions and the entrenchment of apolitical institutions that will monitor the implementation process.[86] Thereafter, a specific legislation can be passed for the implementation of these institutions.

The work of the institutions should be reported to parliament and not to the executive as it is currently done and the recommendations of the institutions must be binding on individuals and public organs as developed in the Nkandla jurisprudence in South Africa. The anachronistic method of using presidential decrees to directly appoint members into the institutions without any meaningful vetting of candidates should be done away with. A standing apolitical representative committee must be constituted to select potential candidates and the role of the president in appointing should be merely symbolic. The same goes for the removal of a member from any of the commissions. Additionally, two-thirds majority of members of parliament will be required to advise for the removal of a member. An amendment to remove any of the entrenched institutions will require four-fifth majority of the Members of Parliament for such a bill to pass.

The budget of the institutions should not be provided by the executive following the national finance law. This is going to jeopardise the independence of the institutions. Instead, the budget for the institutions should be voted by parliament so that there is more assurance that the required budget will be approved depending on how well the institution defends it before parliament, in terms of its reason and purpose for demanding the specific amount of budget. If the budget were to come from the executive, then the institutions would have to walk according to the dictates of the executive or forfeit the approval of its budget.

Notwithstanding the points advanced above, the resultant constitutional design must completely shift from the age-old ideological foundation to one that fully recognises other vital features of post-Cold War constitutionalism missing from Cameroon's present constitutional design. They would help strengthen the independent national institutions supporting constitutional democracy in Cameroon. These key considerations will be:

- The new constitutional design should also entrench a bill of rights into the new constitution and the various classes of rights will be properly defined. The entrenchment of other institutions such as the commission for gender equality and the Auditor-General and others may be done progressively where the need arises.

86 *Charles Fombad*, Problematising the issue of constitutional implementation in Africa, in: Charles Fombad (ed.) The implementation of modern African constitutions: Challenges and Prospects, Pretoria 2016, pp. 15-16.

- While the constitution entrenches a Constitutional Council (CC) as a particular feature of post-Cold War constitutionalism, it however has no power of judicial review. For the independent institutions to thrive, the CC must be empowered with judicial review so that it can rule, for example on the binding nature of its recommendations where the executive ignores them. The confirmation of the binding nature of the Public Protector's recommendations in South Africa by the Constitutional Court has brought about the promotion and transformation of constitutional democracy in that country. This has been possible due to the shift in constitutional design in post-apartheid South Africa. The new constitution has a transformative undertone as the participation and consultation of the people resulted in a perception of the people's ownership of the constitution.
- The implementation of the separation of powers is absolutely necessary to avoid interference by any of the existing powers. For these institutions to appropriately serve as the fourth branch of government, they should have the degree of independence that will empower them to function without 'fear or favour'. The National Assembly should also be reformed and some of its standing rules or orders be transformed so that the ruling party does not use the majority trump card to decide who is appointed into the institutions or removed. This is because with the present indecent politics conducted in the National Assembly where the ruling party constantly commands a fleeting majority, it could influence the rules, even if fourth-fifth majority were to be required in given instances.
- A mechanism to amend the constitution is required alongside the supremacy of the constitution. The 2008 amendment has shown that without such a proper mechanism, government can go at length to remove the institutions through an amendment, if that is what it would take to maintain power.