The Constitutional Processes in Kenya and Zimbabwe: A Comparative Perspective

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Abstract

In recent years, Kenya and Zimbabwe have been described in comparative terms. The similarities between the two countries include a shared colonial legacy, common experiences in the areas of power sharing, equitable distribution of resources, economic asymmetries, regional disparities, corruption and electoral reforms. The Independence Constitutions of the two countries were negotiated at Lancaster House in London, Britain, and are both referred to as Lancaster House Constitutions. Both countries have grappled with the challenge of creating widely accepted constitutions. Using a comparative case study approach, the article discusses the processes of constitution-making in the two countries. Although the article recognises the importance of content, it largely focuses on the processes leading to the creation of the 2010 and 2013 Constitutions of Kenya and Zimbabwe, respectively.

1. Introduction

Kenya and Zimbabwe have been described in comparable terms before. The two countries were once run by private companies before they became British colonies. The Imperial British East Africa Company was responsible for administering the territorial affairs of Kenya and its equivalent, the British South Africa Company was responsible for the territorial administration of Zimbabwe (Palley 1966: 10). Britain created the founding constitutions of the two countries (Olsson 2011: 14). In the post-colonial period, both countries grappled with the question of creating widely accepted constitutions. In recent times, both countries have encountered challenges reforming their security sectors (Noyes 2013: 43). Kenya and Zimbabwe have experimented with power sharing governments following elections whose results were disputed (Cheeseman and Tendi 2010: 203). Hsieh (2010: 1) has noted that Kenya and Zimbabwe's system of politics became semi-presidential when the contending parties facilitated power sharing governments after the disputed presidential elections of 2007 and 2008, respectively.

From the foregoing, a lot has already been written about the two countries.

However, there is a scarcity of studies that have compared the processes of the constitution-making in the two countries. It is precisely for this reason that the article, using the comparative case study approach, discusses the procedural issues involved in the creation of the 2010 and 2013 Kenya and Zimbabwe Constitutions, respectively. The article begins by discussing the features of a process of constitution-making. Thereafter, it discusses the drivers for the constitutional reform in Kenya. This is followed by a brief discussion of the process leading to the creation of the 2010 Kenya Constitution. After this, the article discusses the drivers for the constitutional reform in Zimbabwe. This is followed by a discussion of the processes leading to the creation of the 2013 Zimbabwe Constitution. The article then engages in a comparative discussion of the processes of constitution-making in the case studies. Emphasis is placed on the institutional and procedural issues involved in the creation of the two Constitutions and not on the content. Thereafter the article briefly tests the commitment of the two countries to constitutionalism. This is followed by a discussion of the lessons drawn and concluding remarks.

2. Constitution-making processes: conceptual framework and key features

According to Hart (2003: 1) the process of constitution-making is as important as the content. The process serves many functions. It clarifies the key players in the constitutional negotiations, provides the timelines within which each stage of the process is going to be achieved and indicates the quantity of resources needed to create a constitution (Brandt *et al* 2011: 20). In addition, the process determines the parameters within which a new constitution is going to be created (Ebrahim, Fayemi and Loomis 1999: 25). Further, the process establishes a set of rules, codes and procedures that guide the selection of the members of the constitution-making bodies. Ghai and Galli (2006: 9) assert that the process determines which "interests are articulated, and which are excluded". A process of constitution-making has distinct features and characteristics.

According to Ghai (2005: 1133) the first feature is agreeing on the institutions and processes for making a constitution. It is the responsibility of the major stakeholders to agree on the institutions and processes for constitution-making. The duty to create a new constitution is often assigned a constitutional assembly, a national conference, a constitutional commission, or a parliament, among other considerations (Brandt *et al* 2011: 232). In some countries, it is the responsibility of the chosen body to design the constitution-making procedures. In other countries the procedures are designed by either the government, political parties, the international community or occupying forces.

The next stage is civic education (Ghai 2005: 1133). Generally, the purpose of

civic education is to equip the people with the information that they require to participate in the constitution-making process. Following this is the consultation stage (Ghai 2005: 1133). Through consultation, the constitution-making body solicits the views of the people on the issues they wish to see in the constitution (Ghai and Galli 2006: 9). The objective is to ensure that the people's views are sought, heard and considered before a draft constitution is produced (Ghai and Galli 2006: 10). Usually the draft constitution goes through various stages before it is adopted as supreme law. The first stage is deciding which body adopts the constitution and the role assigned the chosen body (Gathii 2008: 1133). In some cases, the constitution-making body is assigned the dual function of creating and adopting the draft constitution. In other cases, however, adoption is the responsibility of bodies such as parliaments and constituent assemblies. In other countries, the draft constitution is also ratified through a referendum. In this case, people vote to either accept or reject the draft constitution (Brandt *et al* 2011: 217). The referendum serves two functions. Firstly, it is an expression of the principle of self-determination. Secondly, the referendum is seen as a "necessary condition for the validity of constitutional change" (Brandt *et al* 2011: 296).

3. The drivers for constitutional reform in Kenya

The quest to democratise political processes was a leading cause of constitutional reform in Kenya. For a long time, people had expressed dismay over the state of democracy in Kenya. The disenchantment is traced back to the Constitution of Kenya (Amendment) Act of 1982 which achieved three things; transforming Kenya into a one-party state, concentrating all power into the hands of the Kenya African National Union (KANU) ruling party, and limiting political contestation to members of the ruling party (Kamunde-Aquino 2014: 4). There was also the concern that the state institutions had become appendages of the ruling party. In addition, there was disenchantment that the ruling party had developed a penchant for intolerance to dissenting views and often responded heavy-handedly to any activities that challenged the one-party state rule provided for in the constitution. Further, there was bitterness that those responsible for past human rights abuses were not being held accountable. There was dismay over the concentration of too much power in the hands of the president and government ministers. In addition, there was unhappiness over the politicisation of state institutions.

Ethnicity was also a driver for the constitutional reform. It was hoped that a new constitution would address the problem of the ethnicisation of the country's political system. Ethnicity was a source of discord for those who felt marginalised (Holmquit and Wa Githinji 2009: 101). The source of the dismay was that the ethnic group with the most representation in national government, the Kikuyu,

benefited most when compared to ethnic groups that were not represented. To make matters worse, the successive presidents of Kenya were not doing enough to promote a model of nation building that was genuinely inclusive (Omulo and Williams 2018: 101). There was little consideration of the interests of the ethnicities not represented in government who were marginalised politically and rarely participated in the national decision-making processes. Poor governance also fostered the politics of patronage and cronyism (Murunga and Nasong'o 2006: 10). The situation was made worse by the fact that there was no political will to tackle rampant corruption involving senior government officials (Mutula *et al* 2013: 1).

In addition, the country's electoral system was not characterised by integrity and therefore its credibility became questionable. There was resentment that the administration of elections was associated with allegations of bribery, rigging, illegalities, irregularities and bias (Carl Le Van 2011: 2). Further, the country's democracy was characterised by polarised politics, deep-seated grievances, resentment, manipulations, rhetoric, stereotypes and ethnic prejudices.

There was also bitterness over the persistent amendment of the Independence Constitution of Kenya (Ndegwa 2012: 12). At the centre of the antipathy, among other issues, was the allegation that the amendments were always carried out with little or no public consultation. This, for example, was the case with the First Amendment which gave the President unbridled powers to appoint and dismiss members of the Public Service Commission, the Attorney General, and the Permanent Secretaries and the Controller Auditor General (Kamunde-Aquino 2014: 4; Constitution of Kenya (Amendment) Act No 4 of 1988). Such amendments were detested as they placed more power in the hands of the president.

The economy also featured in the call for constitutional reform. At the time of the call, the economy of Kenya was not in a healthy state with low growth levels, rising inflation, high levels of unemployment and low inward Foreign Direct Investment. It was in distress and the reasons for this included mismanagement, lack of accountability and poor policies. This situation was exacerbated by the existence of wide-spread disparities in development across the country's regions. Other determinants were poverty, inequality, hand to mouth existence and deprivation (Carvalho 2013: 115; Khisa and Oesterdiekhoff 2012: 1).

4. A synopsis of the processes leading to the creation of the 2010 Kenya Constitution

Additionally, the constitution-making process in Kenya is traced back to the presidential elections that were held on 27 December 2007. The election produced a disputed outcome. The election was contested by the then sitting president, Mwai Kibaki, and Raila Odinga of the Orange Democratic Movement (Van Vliet, Wa-

hiuand Magolowondo 2011: 29). The results of the presidential elections were delayed and then announced amidst allegations of vote rigging and manipulation. The delay in announcing the results was interpreted by the opposition as a sign that Kibaki's party had rigged the elections. The electoral authorities declared Kibaki the winner, a declaration that was rejected by the opposition. In the mayhem that followed, 1 300 people died, about 350 000 people were internally displaced and millions worth of property destroyed. The African Union (AU) mediated in the conflict. In this regard, the Panel of Eminent Persons led by the former United Nations (UN) Secretary General, Kofi Annan, was given the responsibility to mediate and end this circle of governance crisis. As a result of this intervention, on 28 February 2008 Kibaki and Odinga signed a delicate agreement that saw the formation of a Coalition Government and calmed the volatile situation in the country (Kagwanja 2009: 1). Odinga became prime minister while Kibaki retained the position of president. The power sharing government was pitched as a solution to the political malaise the country was experiencing. Importantly, the power sharing government was assigned the responsibility to fledge out a new constitution.

Following the formation of a power sharing government, the Parliament of Kenya passed the Constitution of Kenya Review Act, No 9 of 2008 (thereafter to be referred to as the Review Act) (Van Vliet, Wahiu and Magolowondo 2011: 29). The Review Act provided for the creation of a new constitution in Kenya. It bestowed the responsibility to create a new constitution on the Committee of Experts (CoEs). This was a body comprised of nine members. Of the nine members six were Kenyan nationals nominated by the National Assembly on the recommendations of the Parliamentary Select Committee on Constitution-making (thereafter referred to as the PSC) and appointed by the President (section 8 (5) of the Review Act). Three were foreign nationals chosen by the PSC from a list of five drawn by the Panel of Eminent African Persons in consultation with the National Dialogue and Reconciliation Committee and appointed by the President (section 8 (4) (a) of the Review Act). In addition, the Director of the CoEs and the Attorney-General were ex-officio members without voting rights. The members of the CoEs were sworn in by Kibaki on 2 March 2009. Section 5 of the Review Act identified the PSC, the National Assembly and a Referendum as the other bodies that would work with the CoEs in creating a new constitution. Section 6 of the Review Act outlined the principles that guided the four bodies in creating a new constitution. Among other things, the principles provided for the people of Kenya to participate "actively, freely and meaningfully" in the creation of the new constitution (Section 6 (d) (1)). For example, Section 23 (i) provides for civic education before drafting. The purpose of civic education is to raise awareness in people

around the matters involved in drafting a widely accepted constitution. The Act also provided for the CoEs to hold civic education before it published the Proposed Constitution (section 35 of the Act).

The Act placed the responsibility to resolve 'contentious issues' in the hands of the CoEs. Further, the CoEs were assigned the mandate to identify 'agreed issues'. The agreed issues were incorporated into the draft while a solution was needed before contentious issues were incorporated into the draft (section 30 of the Review Act). Thereafter, the draft Constitution would be published and the public given thirty days within which to react to the draft (section 32 (a) and (b) of the Review Act). Section 32 (c) of the Review Act gave the CoEs 21 days within which to incorporate the views of the public. After that, the draft Constitution was submitted to the PSC for further deliberation and consensus on the contentious issues (section 33 (1) (c). The PSC was tasked to the report on the process of constitution and the draft before the National Assembly (section 33 (3) of the Review Act). The National Assembly either approves the draft or recommends amendments within 30 days of the PSC tabling the draft (section 33 (4) of the Review Act). If the draft is approved, it is sent to the Attorney-General for publication. However, if the National Assembly disapproves the draft constitution, the PSC, the Reference Group and the CoEs are expected to hold a joint meeting to deliberate on the issues raised as well as make suggestive changes to the National Assembly. Thereafter the National Assembly submits the draft to the Attorney-General for publication. The draft and the referendum question are then published. The duty to frame the referendum was placed in the hands of the Interim Independent Electoral Commission. A referendum would then be held. Once the draft constitution secured the requisite approval, the President proclaims the new Constitution to be law (in terms of section 43A of the Review Act).

5. The drivers for constitutional reform in Zimbabwe

Any assessment of the factors that prompted constitutional reform in Zimbabwe needs to start by discussing the role of political factors. At the centre of the discussion is the country's political system which was ostensibly skewed in favour of the ruling party. Frequently a case was made that constitutional and institutional reforms were necessary to create an environment that was conducive to hold free and fair elections. (Human Rights Watch 2013: 2). The ruling party was regularly accused of systematically manipulating electoral results. As a result, electoral contests were always disputed. Another complaint was that the bodies that were administering the elections were biased towards the ruling party. Specifically, the Zimbabwe Electoral Commission (ZEC) and the Registrar-General of Voters' were accused of influencing outcomes of elections because of their proximity to

the ruling party by virtue of the manner in which they were appointed (Kabemba 2006: 15). Added to this was the fact that issues of the violation of human rights, political impunity and unlawful detentions had become a frequent occurrence (Zimbabwe Human Rights NGO Forum 2012: 4). In addition, the demand for reform emanated from the never-ending amendment of the Independence Constitution which was politically motivated most of the time and was not based on democratic consultation. As in Kenya, most of the amendments sought to protect the ruling party from the opposition. Generally, most of the amendments were needlessly misplaced, ill-timed and ill-advised as they either reversed certain judicial determinations the ruling party was not happy with or assaulted certain liberties in the constitutions, among other things (Kagoro 2004: 240; Ndlovu-Gatsheni and Bruerton 2010: 1; Ndulo 2010: 177).

The perilous state of the economy was also cited as a reason for demanding constitutional reform. The economy has not been performing to satisfaction since the ruling party assumed power close to four decades ago. It was argued that the ruinous policies of the ruling party were responsible for the socio-economic hardships the people endured. These included shortages of basic goods, a stuttering economy, the rampant closure of companies, unbridled recession, and a weak investment climate (Bratton and Masunungure 2011: 29). The social inequality, rampant corruption, endemic poverty, a high rate of inflation, declining Gross Domestic Product (GDP) and high unemployment, regional disparities and economic asymmetries in the provinces were also cited as arguments for demanding constitutional reform (Rupiya 2002: 94; Rudzuna 2016: 1). The situation was made worse by the fact that the country was not doing enough to be a good member of the international community of countries. Its confrontation with countries from the West was exacerbating its isolation from the international community, hampering foreign direct investment and limiting the opportunities for the growth and development.

6. A synopsis of the processes leading to the creation of the 2013 Zimbabwe Constitution

As in Kenya, Zimbabwe's constitutional reform is also traced back to disputed harmonised elections held on 27 March 2008 (Cheeseman and Tendi 2010: 203). The announcement of the result of the election was delayed by one month. When the results were finally announced, Morgan Tsvangirai of the Movement for Democratic Change (MDC) had defeated Robert Mugabe of the Zimbabwe African National Union-Patriotic Front (ZANU-PF) who was then president (Mehler 2009: 1). The Zimbabwe Electoral Commission (ZEC) ordered a runoff election that was boycotted by Tsvangirai. Nevertheless, on 27 June 2008, Robert Mugabe ran unchallenged and was declared the winner by the ZEC (Mokhawa 2015: 28). The

result of the election was rejected by the international community resulting in the contending parties signing the Global Political Agreement (GPA) and entering a power sharing government in which Mugabe retained his position as president and Tsvangirai was appointed prime minister (Nhede 2012: 181). In appending their names to the GPA, the leaders were "concerned about the recent challenges that we have faced as a country and the multiple threats to the well-being of our people and, therefore, determined to resolve these permanently (Preamble to the GPA)". Article V1 of the GPA assigned a committee of the Parliament of Zimbabwe, the Select Committee of Parliament for Constitution-Making (COPAC) the responsibility to create the country's new Constitution (Magaya 2015: 1). The Parliament of Zimbabwe then composed a 25-member COPAC (Nhede 2012: 180). Thereafter, the COPAC convened the First-All Stakeholders' Meeting which was a consultative forum that solicited ideas from delegates on the general structure of the impending constitution. The meeting was not preceded by civic education as was the public consultation that followed it and whose responsibility was to get ordinary people to influence the drafting. The views elicited from the consultation were then categorised and classified. This was an exercise that was assigned thematic committees which comprised legislators and civil society representatives (COPAC's Final Narrative Report to Parliament 2013: 46). The purpose of the thematic committees was to classify the views generated from the public consultation for purposes of drafting. Following this was the drafting and the Second-All Stakeholders' Conference. The Conference afforded the people an opportunity to react to the draft constitution and influence its finalisation. After this, the draft constitution, accompanied by the report on the process of constitution-making, was presented to parliament on 7 February 2013 (COPAC's Final Narrative Report to Parliament 2013: 1). It was approved without alteration by both houses of the parliament, that is, the National Assembly and Senate. The draft constitution was then presented to a ratification referendum where people voted overwhelmingly to accept it. The results of the referendum were presented to parliament for endorsement (IOL 2013: 1). The constitution was then given presidential assent thereby entering into force. In the following paragraphs, the Article compares the constitutional processes of the two countries.

7. Comparing the processes of constitution-making in Kenya and Zimbabwe

One of the issues that is comparable is the framework for the processes of constitution-making. Kenya's process of constitution-making was anchored by an Act of Parliament, the Review Act, giving legal protection to the constitutional process and negotiations. Comparatively, Zimbabwe's constitution-making process

was based on a political agreement that was not incorporated into either legislation or the constitution (Human Rights Watch 2013: 1). One of the weaknesses of the agreement was that it was an accord between three political parties represented in parliament. It was only binding to the political parties that had signed the agreement and not any other body or entity (Matyszak and Reeler 2011: 8). This opened space for possible spoilers to act without constraints as long as they did not break any law. The other weakness was that the agreement was not brought before parliament for endorsement (Matyszak and Reeler 2011: 8).

Another issue is the choice of the institutions of constitution-making. Kenya opted for a CoEs as the body that would create the new constitution (Maingi 2012: 63). A committee such as the one used in Kenya is technically classified as a Constitutional Commission. In other words, it is a body comprised of experts assigned the mandate to write a constitution after which it is disbanded. The CoEs comprised local and foreign experts with proven knowledge and experience in many academic disciplines including, comparative constitutional law; systems and structures of democratic governments; human rights; women and gender issues; public finance and administration (see section 10 (1) of the Review Act). Assigning experts, the responsibility to write a constitution ensures that the writing of the constitution is influenced more by professional considerations rather than pure and open political contemplations (Brandt *et al* 2010: 210). Another advantage is that experts bring to the "attention of decision makers the experience of other countries" (Ghai 2005: 30.) In addition, the writing is conducted professionally as the experts are engaged specifically to create a constitution after which they revert to their original jobs. However, recently, questions have begun to be asked about the placing of constitution-making in the hands of experts. The appeal of this approach has been dwindling in the face of increasing calls for the democratisation of constitution-making (Ghai 2005: 30.) In addition, the approach is called into question given that ordinary people play a limited role in influencing the provisions of the constitution. Furthermore, a weakness of this approach is that there is a limited role for politicians in constitution-making. Usually, politicians resent upholding constitutions they did not participate in writing. Another criticism often levelled against experts is that they tend to rely too much "on what they feel has worked successfully in other countries" (Brandt *et al* 2010: 284.) According to Ghai (2005: 30) there is now "a tendency to ignore or even denigrate the contribution of legal, political, administrative and economic experts". The role of lawyers is now largely confined to technical matters, mostly those relating to legal drafting.

The reasons for the change include the fact that a constitution now includes many issues that were previously excluded or left to lawyers to decide. Added to this is the fact that experts of other persuasions are now increasingly being asked to

advise constitution-makers on issues that lawyers are not familiar with and matters that were once left to political processes (Brandt *et al* 2011: 281).

In Zimbabwe the responsibility to create a new constitution was placed in the hands of the COPAC. As mentioned earlier, the COPAC was the name given to a sub-committee of the Parliament of Zimbabwe (Gwaravanda 2012: 128). It has been argued that a parliament is a credible institution to create a constitution. This relates to the fact that its members are selected based on democratic elections in which the people decide who is elected as their representatives to the legislature. However, Brandt *et al* (2011: 231) among others, have expressed doubts over the appropriateness of parliaments as constitution-making bodies. It is argued that parliaments are not inclusive enough. Another argument is that legislators cannot be constitution-makers as they "represent the people through political parties" (Brandt *et al* 2011: 231.) Further, it is contended that a parliament's accountability to the people is weak as it depends on intermittent elections. An additional argument is that a parliament cannot create a constitution as it is a creation of a constitution. Added to this is the argument that a parliament is subordinate to a constitution as it "functions by virtue of the constitution and according to the constitution" (Brandt *et al* 2011: 231.)

Another comparable issue is the type of civic education used to prepare ordinary people to participate in the process of constitution-making. In Kenya the process provided for civic education before and after drafting. Before drafting, the purpose of civic education was to afford the people an opportunity to influence drafting. After drafting, the purpose of civic education was to afford people an opportunity to be heard before a draft constitution is finalised (see section 27 of the Review Act). In Zimbabwe, the manner in which the framework of constitution-making was used provided limited room for civic education (Marumahoko 2017: 186). By limiting civic education, the Zimbabwe model undermined participatory constitution-making (Matyszak and Reeler 2011: 16). It made possible that people would be denied information they needed to contribute to the constitution-making process (Brandt *et al* 2011: 105.)

Yet another issue is the model of consultation used in the constitution-making processes. In Kenya, the CoEs arranged face-to-face consultations with ordinary people across the country. In addition, the constitution-makers also consulted the draft constitutions made in the past (Brandt *et al* 2011: 207.) The analysis and incorporation of the views gathered through public consultation was the responsibility of an independent CoEs and the Reference Group, a body made up of 30 people chosen by interest groups (see Article 30 of the Review Act). It was also the duty of the two bodies to agree on the issues that would be incorporated in the constitution. Further, the two bodies together with the PSC were also responsible

for resolving contentious issues before incorporation. Two contentious issues almost led to the breakdown of the constitutional negotiation. One of the contentious issues was whether to include Kadhi Courts in the constitution (CoEs Final Report 2010: 10). Kadhi Courts are a court system in Kenya that with a jurisdiction that is limited to the determination of questions of Muslim law relating to marriage, divorce, inheritance, succession and personal status, among other issues. The Kadhi Courts were only included in the constitution after exhaustive discussions and negotiations (CoEs Final Report 2010: 10). The other issue was whether abortion should be allowed in the constitution. Progress was only realised after there was a clause that abolished abortion. The Reference Group and the PSC facilitated and led the negotiations (CoEs Final Report 2010: 10).

In Zimbabwe the COPAC arranged face-to-face consultation meetings (COPAC Final Narrative Report to Parliament 2013: 36.) However, the provision to consult past draft constitutions, especially the Kariba draft Constitution was not honoured although there was reference to it in the preamble of the framework for the constitution-making process (see Preamble to Article VI of the GPA). The reason for this is that the political parties distrusted each other, and the process was characterised by squabbling, coercion, intimidation and contention, among other negatives (Marumahoko 2013: 187.) Further, because of the *ad hoc* nature of the political agreement and the fact that the process was not legally protected, progress depended on the goodwill and cooperation of the feuding political parties in the shaky power sharing government. In Zimbabwe, the GPA was silent on the resolution of contentious issues and the basis upon which issues were incorporated in the draft constitution. Issues which members in the COPAC could not agree on included the preamble, devolution, the appointment of provincial governors, devolvement of powers to provincial councils, method of appointment of provincial governors, the provision that all Members of Parliament and Senators from a province will sit on its provincial council, the establishment of a special court to deal with constitutional matters, the approval of parliament in the presidential deployment of defence forces outside the country, the abolition of the Office of the Public Protector and the creation of a National Peace and Reconciliation Commission, among others (COPAC Final Narrative Report to Parliament 2013: 48).

Seemingly three issues explain the failure of the COPAC to address the contentious issues. Firstly, Article IV of the GPA did not have provisions for resolving contentious issues. Secondly, the COPAC did not adopt procedures for addressing such issues. Thirdly, the members of the COPAC lacked the mandate of the people who had appointed them to the constitution-making body. It was for these reasons that the appointing authorities created the so-called Management Committee and Committee of Seven when the process of constitution-making was in its

final stages (COPAC Final Narrative Report to Parliament 2013: 49). The two committees comprised members who were confidantes of the appointing authorities (COPAC Final Narrative Report to Parliament 2013: 50). As if that was not enough mockery of the norms of participatory constitution-making, in the dying moments of the process of constitution-making, the leaders of the three political parties that signed the GPA assigned themselves the responsibility to resolve contentious issues. Hart (2003: 11) characterises the model used to resolve contentious issues in Zimbabwe as "elite negotiation". Its weakness is that it is incompatible with the democratic argument that people must write a constitution for themselves. One can also argue that the involvement of the elite in the resolution of the contentious issues resulted in the privatisation of the process of constitution-making. In addition, it also created a situation in which the authorities wrote a constitution for themselves (Marumahoko 2017: 168).

Another point of comparison is the body used to adopt the draft constitutions. In both countries, there was parliamentary adoption of the draft Constitutions. In the case of Kenya, the CoEs submitted its draft Constitution accompanied by a report on the process of constitution-making to the PSC which tabled the two documents before the National Assembly for approval (see Article 33 (3) of the Review Act). In Zimbabwe, COPAC submitted its draft Constitution and the Report on the process of constitution-making to Parliament for adoption (see Article 6.1 (v) of the GPA). The role of the legislature in both countries was limited to receiving and adopting the draft constitution and the accompanying report on the processes of the constitution-making. The parliaments could not change the drafts submitted to them for adoption. Given that a different body had created the draft constitution, submission to parliament was important as it created opportunities for checks and balances. However, in the case of Zimbabwe, submission to parliament had symbolic significance as the draft constitution was created by a sub-committee of parliament (Marumahoko 2013: 234). In both cases, the legislatures comprised parliamentarians from the same political parties that had agreed to undertake constitutional reform. The approval of the documents was a foregone conclusion as the two processes were supported by the influential leaders of the political parties represented in parliament. In addition to parliamentary approval, the draft constitutions of the two countries were published before they were submitted to referendums (Wanga 2011: 2). There were, however, differences on the setting of the referendum questions. In Kenya, the Attorney-General consulted the Parliamentary Select Committee on constitution-making before setting the referendum question. When it comes to Zimbabwe, the framing of the referendum question was the responsibility of the Zimbabwe Electoral Commission. In both countries, the draft constitutions were ratified in constitutional referendums that were supported by the

leaders of the political parties represented in parliament.

8. Have the new Constitutions impacted the situation in Kenya and Zimbabwe?

The question to ask is whether the issues that prompted the constitutional reform were addressed in the new constitutions. Indeed, the new constitutions addressed many issues. These include providing for strong checks and balances on the exercise of governmental power, clearly separating the branches of the government, the elevation of local government, the protection of the rights of the people, and the creation of bodies that support democracy. However, a close assessment points to a failure to abide by the provisions in the constitutions. Implementation and enforcement has been weak and erratic. There have also been cases of instant reversal. The euphoria associated with the adoption of new constitutions did not last for too long. It quickly ran out of steam. Consider this! In both countries, the main driver for constitutional reform was the demand for the creation of a conducive environment for the holding of free and fair elections (Raftapolous 2013: 971.) However, many years down the road, that wish has not yet been realised. The electoral processes in both countries continue to be characterised by allegations of vote rigging, bias, and manipulation of the will of the people. The 2013 Zimbabwe elections were held before electoral, media, and security sector reforms mentioned in the GPA which formed the basis for a new constitution were achieved. Accordingly, the opposition rejected the outcome of the elections. In both countries, citizens as well as the opposition still have reservations over the independence of the electoral commissions. Those fears were confirmed when the Supreme Court of Kenya nullified the results of the first presidential election held in 2017 in which Uhuru Kenyatta was said to have defeated Raila Odinga (Dixon and Kyama 2017: 1.) The Court ruled that the election was not transparent and that the outcome did not reflect the popular will of the people. In the past, the electoral authorities in both countries were accused of manipulating elections in favour of the ruling party. Seemingly, both countries have not yet deviated from the electoral practices that prompted the call for new constitutions. In the case of Kenya, despite the adoption of a new constitution, ethnicity is still a strong defining feature of the convoluted political system (Kagwanja 2009: 1). In Zimbabwe the implementation of essential reforms continues to be shaped more by political considerations and not the provisions in the new constitution. The implementation of the provisions of the new constitutions has not always been accompanied by robust enforcement mechanisms. As if that is not enough, both countries are still grappling with issues of human rights abuses, corruption, poverty, deprivation, inequality, poor macroeconomic fundamentals and regional disparities (Owiti 2014: 547). This is the reality

even though it is now close to a decade since the two countries adopted their constitutions.

9. Lessons learnt from the case studies

Several lessons can be drawn from the experiences of Kenya and Zimbabwe in constitution-making. One of the lessons is that there is no opportune time for creating new constitutions. Another lesson is that it is possible to unveil new constitutions even when the conditions under which they are created do not necessarily represent a fundamental break with the past. In the case studies, the processes of constitution-making were under the spell of the same people whose power constitutional reform sought to constrain. An additional lesson is that the support of political adversaries and major stakeholders is necessary. Yet another lesson is that the process is as important as the content in the sense that both the legitimacy of the process and credibility of the content of processes proved crucial, as it is shown above. Another lesson is that the idea of one size fits all is unrealistic. This relates to the fact that there is no universally accepted model of constitution-making. The model that a country settles for is usually shaped by its socio-political and economic realities, among other considerations. This ties in with the observation by Miller (2010: 602) that "attempts to synthesise case studies into model constitution making processes would be unrealistic". Another lesson is that the design of the framework of constitution-making tends to be influenced more by political considerations rather than legal necessities. In both countries, the prominent politicians played an important role in the success of the constitution-making processes. This is in line with the observation by Brandt *et al* (2011: 18) that "constitution making is intensely political".

10. Conclusion

The objective of this article was to explain the similarities and differences between the constitutional processes of Kenya and Zimbabwe. The study found that the constitutional processes in both countries are traced back to presidential elections whose outcome was disputed. In both countries a power sharing agreement was externally facilitated. The power sharing governments were bestowed the responsibility to facilitate constitutional reform. The two countries pursued different approaches in making new constitutions. In Kenya, the Review Act was the legal basis for the process of constitution-making while the GPA was the basis for Zimbabwe's constitutional process. Kenya opted for a CoEs as the ideal constitution-making body whilst Zimbabwe settled for COPAC. The constitutional process in Kenya provided for civic education. In the case of Zimbabwe civic education was not an

institutionalised component of the process. In Kenya, legal drafting was the responsibility of a mixture of local and foreign experts while Zimbabwe opted for local legal drafters. Whereas Kenya's constitution-making process provided for the resolution of contentious issues, Zimbabwe's did not. In both countries, the draft constitutions were submitted for parliamentary adoption. The role of parliament was limited to approving the draft constitutions and the reports on the processes of constitution-making. In both countries, the draft constitutions were presented to the people and endorsed through referendums. From the foregoing, there are notable differences and similarities between the two constitutional processes.

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