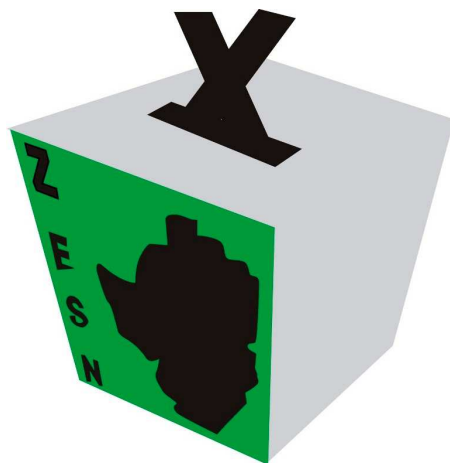


ANALYSIS OF ELECTION-RELATED PROVISIONS OF THE COPAC DRAFT CONSTITUTION



PAPER PREPARED FOR ZESN

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Executive Summary

A constitution is the bedrock to democracy. However Constitution Building is a process and not an event. The Lancaster House Constitution was the first supreme law of the land. This Constitution was drafted in Lancaster as a cease fire and transitional document. This Constitution to date has been amended 19 times in 32 years. Ownership of the constitution is a problem, as this constitution is not home grown and people driven. Zimbabweans have always had a quest to have what is termed a people driven constitution with the aspirations and needs of the citizens, including how they desire to be governed. The lack of a constitutional blue print resulted in the formation of the National Constitutional Assembly (NCA) a pressure group whose goal is to ensure that the country has a constitution crafted by the people for the people.

In response to pressure from civil society and the growing need for democratic processes and democracy, the President appointed a 400 member Constitutional Commission led by Justice Chidyausiku in 1999 to come up with a Constitution. However the proposed constitution was rejected in a Constitutional Referendum in the year 2000. The No vote however did not stop the clamor for a new constitution. The NCA soldiered on with this quest and produced the NCA draft Constitution. In 2007 the three political parties (ZANU PF, MDC-T, MDC) met in Kariba and came up with what is termed the Kariba Draft Constitution. The Kariba Draft Constitution was never adopted as the Supreme Law of the Land. The Global Political Agreement (GPA), which resulted in the formation of an Inclusive Government in February 2009, in Article VI outlined stages to draft a new constitution. This critical process has a number of stages which are outlined and these should be adhered to. The stages include, selection of a Constitutional Parliamentary Select Committee, first stakeholders conference, public outreach to collect views from the citizens, data analysis, drafting, second stakeholders conference, Referendum and adoption of the Constitution. To date this process has reached the drafting stage, though there are hiccups and disagreements on certain issues by the political parties. Two working draft constitutions have already been published in the Herald, the first one in February and the second one in May 2012.

The Zimbabwe Election Support Network (ZESN) is guided by the main goal of promoting democratic elections in Zimbabwe. The organisation was part of ZZZCOMP an initiative which brought together Zimbabwe Lawyers for Human Rights (ZLHR), Zimbabwe Peace Project (ZPP) and ZESN to monitor the outreach process. From the outset ZESN has had an interest in the Constitution Reform Process to ensure that the supreme law will promote free, fair and democratic elections. During the outreach phase, ZESN conducted public outreach activities to inform citizens about the various options available

on Electoral Systems, Election Management Bodies and Systems of Governance. The organisation also wrote various position papers on the above matters. ZESN was coming from a position where problems of representation of minority groups, wastage of results and violence had been witnessed because of the electoral system utilized in Zimbabwe which is First Past the Post (FPTP). ZESN was also lobbying for an independent Election Management Body which would report to Parliament and not the current case where ZEC reports to the Minister, an executive branch.

A whole plethora of reforms is needed to conduct free and fair elections. The organisation has been lobbying for an environment that is conducive, where fundamental freedoms of association, assembly, speech and movement are upheld and protected. The Analysis of the Constitution will look at the following aspects:

- The Bill of Rights
- The Executive- Election of the president, challenge to presidential election, assumption of office by President-elect, term of office of the President
- Executive Functions (Separation of Powers)
- Electoral Systems
- Delimitation of Constituencies
- Timing of Elections
- The Electoral Commission
- Commencement of the Constitution and Transitional Mechanisms

This analysis is meant to inform citizens about the provisions relating to elections in the working draft Constitution and to what extent they promote credible elections.

INTRODUCTION

This paper seeks to analyse the provisions of COPAC's Draft Constitution which have a bearing on elections and electoral processes. COPAC has not yet produced its "final draft" and what is being referred to herein is the Draft published as a supplement to the Herald of 2 May 2012.

The approach adopted in this paper is that each provision which has a bearing on elections and electoral processes is identified, explained and analysed. The analysis focuses on the legal meaning of the provision and its practical implications. Special attention is paid to how any provision relates to the current law with a view to illustrating the extent, if any, to which the Draft Constitution addresses defects on electoral matters in the current constitution.

The paper identifies the following provisions of the Draft Constitution as having a direct bearing on elections and electoral process.¹

- The Bill of Rights – provisions on a basket of rights which are central to elections, such as the right to vote.
- The Electoral System
 - Parliamentary election
 - Presidential election
- Independent Institutions supporting democracy
 - Electoral Commission
- Separation of Powers with special focus on the powers and functions of the President in relation to elections.
- Commencement of the Constitution, including transitional provisions.

Each aspect is now examined in detail.

¹ All these aspects are identified in the terms of reference for this paper

2. The Bill of Rights

2.1 Right to Vote

A major weakness of the current constitution was that it did not provide, in the Bill of Rights, certain fundamental political rights considered essential to free and fair elections. One such missing political right was the right to vote. This defect was rectified by Amendment No. 19 which introduced a new section 23A providing for the right to vote. Before Amendment No. 19, the absence of a right to vote in the Constitution was dramatized by the case of Madzingo & Others v Minister of Justice and Others². Madzingo and his colleagues were all registered voters but were resident and employed in the United Kingdom. They were unable to travel to Zimbabwe to cast their votes in their respective constituencies for the 2005 parliamentary election. They were concerned that no mechanism had been established in the UK to enable them to vote. They approached the Supreme Court seeking an order compelling the authorities to put in place mechanisms for them to vote while in the United Kingdom. The Supreme Court dismissed their application primarily on the basis that the right to vote was not constitutionally protected in the Bill of Rights.

The COPAC Draft has adopted the provisions of section 23A of the current constitution which provide for a right to vote. The specific provision in the COPAC Draft is in 4.10(3) in the following words:

“Subject to this Constitution, every citizen of Zimbabwe who is of or over eighteen years of age has the right –

- (a) to vote in all elections and referendums to which this Constitution applies, and to do so in secret, and
- (b) to stand for election for public office and, if elected, to hold such office.”

This COPAC formulation is an improvement on the current section 23A. Section 23A (2) provides as follows:

“Subject to this Constitution, every adult Zimbabwean citizen shall have the right –

- (a) to vote in referendums and elections for any legislative body established under this Constitution, and to do so in secret, and
- (b) to stand for public office and, if elected, to hold office”.

² 2005 (1) ZLR 171 (S)

The two underlined portions show the areas which have been improved. The current Constitution refers to every “adult” while the COPAC Draft is specific about the age of adulthood (which it puts at 18 years). The current constitution uses the word “adult” without defining it and this may be problematic as it does not follow that adulthood begins at 18 years. The second improvement relates to the COPAC Draft’s use of the words “all elections”.

The incorporation of the right to vote in the Bill of Rights is important. It puts the right to vote at the same level as other fundamental rights which can be enforced easily by direct access to the highest court. Further, it also sets the right tone for all legislation on elections as such legislation is thereby required to be consistent, in every respect, with the right to vote.

The incorporation of a right to vote for all citizens in the COPAC Draft raises the issue of the diaspora vote. In the Madzingo case referred to above, the Supreme Court rejected an application for a diaspora vote on the basis that the right to vote was not in the Bill of Rights. The question is: Now that the right to vote has been provided for in the Bill of Rights, does this translate to a diaspora vote? The answer is: not necessarily. In theory, if the Bill of Rights grants every citizen the right to vote, this necessarily includes a diaspora vote. However, whether or not the right to vote entails a diaspora vote depends on the limitations on the right. If the right to vote is subject to limitations, one of the most common limitations is the residence of the voter: Voters resident outside the country may be excluded from exercising the right to vote.

Is the right to vote in the COPAC Draft subject to limitations? The answer is YES. The COPAC Draft has what is called a “general limitation clause” which applies to most rights in the COPAC Bill of Rights. This is different from the current constitution which has “specific limitation clauses” in respect of given rights. There is no specific limitation on the right to vote but the right is subject to the general limitation clause. The general limitation clause is in 4.43(2) which provides as follows:

“The fundamental rights and freedoms set out in this Chapter may be limited only in terms of a law of general application and to the extent that the limitation is fair, reasonable, necessary and justifiable in an open, just and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

- (a) the nature of the right or freedom concerned;
- (b) the purpose of the limitation, in particular whether it is necessary in the interests of defence, public safety, public order, public morality, public health, regional or town planning or the general public interest;

- (c) the nature and extent of the limitation;
- (d) the need to ensure that the enjoyment of rights and freedoms by any person does not prejudice the rights and freedoms of others;
- (e) the relationship between the limitation and its purpose, in particular whether it imposes greater restrictions on the right or freedom concerned than are necessary to achieve its purpose; and
- (f) whether there are any less restrictive means of achieving the purpose of the limitation.”

This general limitation clause seeks to make it difficult to restrict a right in the Bill of Rights. For that reason, it may be difficult for the Electoral Act to continue to restrict the right to vote to citizens who are resident in the country. To deny citizens in the diaspora the right to vote, it must be shown that it is “reasonable, necessary and justifiable”. If the courts hold the absence of a diaspora vote to be neither reasonable nor necessary, then the COPAC Draft would be said to be incorporating a diaspora vote. If they hold otherwise, there would be no diaspora vote. Why should such a matter be left to the courts? That is a major weakness.

Rationale for external voting

The Constitution should be clear on the rights of all citizens to vote despite residence status. Zimbabwe is signatory to international and regional protocols that protect the rights of all citizens to suffrage. In addition, many Zimbabweans outside the country were forced to a large extent to migrate by structural economic and political problems that gripped the country and by a loose definition can be termed forced migrants. A significant number has kept close ties to their home country and have intentions of returning once the economy has improved. Their economic contribution cannot be ignored and therefore have a right to demand and be granted the opportunity to vote externally. While in the constitutional debate currently underway, the issue of dual citizenship has been part of the debate and the rights of Zimbabweans living outside the country have not been included though there has been token inclusion as they have been asked to input their views on the website. In addition, the fact that the Electoral Management Board (EMB) has been able to extend the postal vote to some citizens means that they have to some extent the capacity to implement this and they need to scale their efforts to include a broader cross-section of Zimbabweans living outside their country.

- Zimbabweans living and working abroad form a sizeable proportion of the population and have a legitimate claim to demand the right to an external vote.

- As dual citizenship is a contentious issue in Zimbabwe, there may be restrictions on the right to vote for Zimbabweans who have renounced their citizenship and adopted another country's citizenship. Given these considerations, citizenship should be the minimum requirement for eligibility for external voting.
- Registration of voters for external voting can be based on the number of Zimbabweans living in a country and who register to vote in that country to avoid wasting resources in countries where there are insignificant numbers.
- The EMB (Zimbabwe Electoral Commission) can work with the Ministry of Foreign Affairs which should be perceived as non partisan in the implementation of voting in embassies a viable option given that the government of Zimbabwe has a number of embassies and consulates. In addition, a number of Zimbabweans are resident in countries where Zimbabwe has Diplomatic missions or consular services such as South Africa, Botswana and United Kingdom where polling stations can be established.

However, the officials assigned with the implementation of external votes must be perceived to be unbiased and there need to be no room for suspicion of bias and electoral fraud. There is need for impartiality and non partisan ship to be developed as Zimbabwe works to extend external voting to all citizens.

- There should be provision for independent observation and monitoring of elections at embassies and consular offices.
- Postal votes and the application for postal votes have been shrouded in secrecy and may not be suitable to large number of citizens' resident outside the country.
- External voting may be limited to presidential elections given its simplicity while modalities for the implementation of constituency based votes are considered.
- A clear legal framework for external voting needs to be drawn up that ensures transparency, the secrecy of the ballot and balances up the politics that surrounds the external vote.
- External voting is complex and clear regulations need to be designed for how it is will be implemented.
- The security of the voter is of importance as a number of Zimbabweans have experienced intimidation or political violence and the need to ensure security before, during and after voting

is important. Retributive violence has been a reality in Zimbabwe's electoral processes more so after March 2008 Harmonized elections and in the run up to the Presidential run-off of June 2008.

- The capacity of the EMB needs to be scaled up for them to be able to implement external voting as considerable preparations are needed for its successful implementation including training embassy staff as polling officials, the printing of extra ballot papers, voter education across borders, voter registration and all other functions of the EMB extended to foreign territories where Zimbabweans have residence.
- In increasing its capacity to implement external voting, it is important to mobilize resources for the EMB, human and financial as well use best practices of other countries that successfully implement external voting within the region.
- The EMB needs to make use of expert knowledge in its implementation of external voting.

2.2 Freedom of Association and Freedom of Assembly

The freedoms of association and of assembly lie at the core of political rights. It has been said:

“... freedom of assembly is understood to be foundational for the life of a liberal democracy for two primary reasons. First, it helps create space for collective politics. This space for collective politics is crucial. While a single voice is likely to be drowned out in the political community, a collective voice is far more likely to get its message across. Secondly, assembly is essential for democratic politics because only through meeting and talking with fellow citizens can we critically explore the various beliefs and values which animate our political decisions. It is generally believed that the more we discuss the ideas we seek to put into practice, the better and the more legitimate our political decisions are likely to be”.³

Without adequate protection of the freedoms of assembly and of association, there can be no free and fair election. These two freedoms enable the formation of political parties, participation in the activities of political parties and the holding of campaign meetings and related activities.

The current constitution makes provisions for these two freedoms in section 21. What has been regarded as a weakness of the current constitution is that it allows restrictions on these freedoms in circumstances judged to be “reasonably justifiable in a democratic society”. It is because of this

allowance by the Constitution that the Public Order and Security Act (POSA) has not been found to be unconstitutional.

Unlike the current constitution which provides for these two freedoms in one section (that is, section 21), the COPAC Draft provides for these two freedoms in three sections. In 4.9, it provides for freedom of association while in 4.10 it protects the freedom of assembly. In 4.18, it expands on these two freedoms under the heading of political rights. In particular, 4.18 (2) says:

“Subject to this constitution, every citizen of Zimbabwe has the right –

- (a) to form, to join and to participate in the activities of a political party or organization of their choice.
- (b) to campaign peacefully for a political party or cause
- (c) to participate in peaceful political activity, and
- (d) to participate, individually or collectively, in gatherings or groups or in whatever manner, in peaceful activities to influence, challenge or support the policies of the Government or any political or whatever cause”.

It is clear that these four rights are an elaboration of the freedoms of association and of assembly. Thus, although stated separately in the COPAC Draft in 4.18 as political rights, these are ingredients of the freedoms of association and of assembly in 4.9 and 4.10 respectively. Put together 4.9 , 4.10 and 4.18 of COPAC provide for freedom of association and of assembly in the same manner as section 21 of the current constitution.

Like the current constitution, the COPAC Draft limits the freedoms of association and of assembly. These freedoms may be limited by a law of general application provided it is “reasonable and is necessary and justifiable in an open, just and democratic society”.⁴ The general limitation clause in the COPAC Draft has already been reproduced in full above. In the current constitution, the specific limitation to these freedoms applies where it is “reasonably justifiably in a democratic society”. With a conservative Supreme Court, the general limitation clause in the COPAC Draft will not outlaw POSA. The Supreme Court has already ruled that provisions of POSA which oblige organizers of public gatherings to give notice to the police are constitutional because it is “reasonably justifiable in a

³ Stuart Woolman and John de Waal “Freedom of Assembly: Voting with your Feet”, in Van Wyk et al, Right and Constitutionalism 292 at 299

⁴ See Clause 4.41

democratic society". The Supreme Court made this decision in the case of Tendai Biti and the MDC v Minister of Home Affairs⁵

The facts of that case related to campaign meetings for the 2002 Presidential election. They were summarized by the court as follows:

"On 28 January 2002, Biti, acting in terms of section 24(1) of (POSA) wrote to the officer commanding the Police, Harare Suburban District, Chief Superintendent Kupara, notifying her that the MDC would be holding twelve public meetings in the Harare East constituency from 2 to 23 February 2002. The date and venue of each meeting, as well as time at which each meeting was to commence, were given. In reply, Kupara informed Biti that only four of the twelve meetings could be held. The rest were prohibited for various reasons. Aggrieved by that decision the applicants approached this court and filed this application, alleging that section 24 of the Act infringed their rights of freedom of expression and freedom of assembly".

It was in the context of these facts that the court ruled in favour of POSA saying:

"... this court has recognized the need to reconcile the rights of freedom of expression and assembly with government responsibility to ensure the sound maintenance of public order. There must be a compromise which will accommodate the exercise of the protected rights within a framework of public order which enables ordinary people to go about their business without obstruction".

The Supreme Court's position on POSA provisions on notifying the police may not be changed by the COPAC Draft because the court may still interpret the general limitation clause in the same way as it did the clause in the current constitution. If that turns out to be the case, POSA would remain even under the COPAC Draft

2.3 Freedom of expression and freedom of the media

The current Constitution provides in section 20 for freedom of expression. The courts have given wide scope to section 20 so that although the "freedom of the media" is not specifically mentioned, it has been emphatically held that it is included.

The COPAC Draft is a significant improvement in that it mentions specifically some important issues which are implied by section 20 of the current constitution. In the COPAC Draft, the relevant clause is 4.12. It has the following specific features:

⁵ 2002 (1) ZLR 197 (S)

- Freedom of the press and other media stands on its own as a fundamental right and includes protection of confidentiality of journalists.
- Broadcasting and other electronic media are required to be independent of government control.
- All state-owned media are required to be impartial and to “afford fair opportunity for the presentation of divergent views and dissenting opinions”.
- Incitement to violence and advocacy of hatred or hate speech are specifically prohibited and cannot be defended as freedom of expression.

The approach of the COPAC Draft to freedom of expression is more conducive to free and fair elections than the current constitution because the matters specifically included have a direct bearing on the conduct of elections. For example, requiring the state media to be impartial and afford space to divergent views would enable all the different electoral campaign messages to be covered.

2.4 Access to information

The current constitution does not provide for a right of access to information held by institutions of the state. Modern constitutions around the world provide for a right of access to information in the Bill of Rights. The COPAC Draft joins this modern trend and provides for the right of access to information in clause 4.13. The most relevant portion of the clause reads:

“Everyone, including the press and other media of communication, has the right of access to –

- (a) Any information held by all institutions and agencies of the State and Government at all levels, in so far as the information is required for the exercise or protection of a right or in the interests of public accountability...”

The COPAC Draft leaves details of this right to legislation and allows restrictions to the right on the grounds of “the interests of defence, public security or professional confidentiality”. This may be another classic case of giving with the right hand and taking with left hand. The grounds permitted for restricting the right of access to information are notoriously vague. However, it is substantial progress for election purposes to have the right of access to information provided for the Bill of Rights. The press may utilize this right in furtherance of making electoral processes more transparent.

2.5 Rights of arrested and detained persons

One of the most common features of recent elections in Zimbabwe is the unlawful arrest and detention of opposition politicians and activists. The current constitution, in section 13, protects the right to personal liberty. However, the section is not sufficiently precise in a number of respects leaving room to security organs and agencies to abuse the power of arrest to curtail campaign activities of opposition candidates.

The COPAC Draft in 4.21 provides for some rights of arrested and detained persons which would make it difficult for security agents to engage in politically motivated arrests. The rights of arrested and detained persons specified in the COPAC Draft include:

- being informed at the time of the arrest of the reason for the arrest or detention.
- being permitted to contact, at the expense of the State, their spouse or partner or next of kin or close relative or legal practitioner.
- being brought before a court not later than 48 hours after the arrest.

It is an improvement that these rights are being specified in the Constitution itself. The current constitution is very vague on these rights. For example, regarding being informed of the reasons for an arrest, it says:

“Any person who is arrested or detained shall be informed as soon as reasonably practicable....”

Clearly, “as soon as reasonably practicable” can be several days after the arrest. The COPAC Draft avoids this by insisting that reasons must be given “at the time of arrest”. Another example of vagueness of the current constitution relates to the time within which an arrested person must be brought to court. It says:

“Any person who is arrested or detained... shall be brought without undue delay before a court...”

“Without undue delay” may take several days. The COPAC Draft insists on 48 hours whatever the nature of the alleged offence.

These specific rights in the COPAC Draft make it difficult to sustain random and politically motivated arrests and this is conducive to a free election environment.

2.6 Funding of political parties

The current constitution has no specific provision on the funding of political parties. Funding of political parties is regulated outside the Constitution by the Political Parties (Finance) Act. The COPAC Draft makes political party financing a constitutional issue by incorporating it in the Bill of Rights. The State is obliged to provide funding for political parties for “the purpose of promoting multi-party democracy”. The relevant clause of the COPAC Draft is 4.18 (4) which provides:

“For the purpose of promoting multi-party democracy, an Act of Parliament must provide for the funding of political parties, but such funding may be withheld from political parties which do not uphold the principles and values of this constitution or whose internal structures and procedures are not reasonably democratic.”

Under current law as contained in the Political Parties (Finance) Act, not every political party is funded. To qualify for funding, a political party must participate in a general election and obtain not less than 5% of the votes cast for Members of Parliament in that election. Votes cast in the presidential vote do not count.

The fact that the COPAC Draft has a specific provision on political party funding would have effect on the existing law. The COPAC Draft does not restrict funding to political parties participating in a general election of Members of Parliament. A political party may, for good reasons, decide to participate in local government elections only or only contest in the presidential election. It would be contrary to the spirit of the provisions in the COPAC Draft to exclude such political parties from funding.

3. Electoral System

3.1 Plurality System versus proportional representation

Under the current constitution, the electoral system is the winner-take-all or first-past-the post for parliamentary elections. This is for both the House of Assembly and Senate. For the presidential election the Electoral Act provides for an absolute majority system, calling for a second election between the top two candidates if the first election fails to produce a winner. In the COPAC Draft, the House of Assembly will be known as the National Assembly.

The COPAC Draft proposes to retain the winner-take-all system for the first 210 seats in the National Assembly and to introduce proportional representation for the Senate and for the additional 60 seats reserved for women in the National assembly..

For the National Assembly, the COPAC Draft proposes to increase the number of MPs from 210 by adding an additional 60 seats. However, the **first 210 MPs** will be elected on the current system of a winner-take-all in 210 constituencies. The additional 60 female MPs will be elected through a system of proportional representation based on the number of votes cast for the 210 MPs. In other words, the number of female MPs for each party on the additional quota would be determined by the proportion of its votes in the election for the 210 seats. It does not follow that a political party with most seats among the 210 will get most of the seats on the additional quota as it is possible under the winner-take-all system for a political party with less votes to get most seats.

This proposal by the COPAC Draft for the National Assembly follows the model being used by Lesotho. In Lesotho, the National Assembly has a total of 120 MPs. Of these, 80 are elected in terms of a winner-take-all system in 80 constituencies while the remaining 40 are allocated on the basis of proportional representation based on the number of votes cast in the election of the constituency seats.

It must be said that this model is not a substitute for proportional representation nor does it achieve any of the advantages of proportional representation.

Regarding proportional representation as a system of elections in the Senate, the COPAC Draft provides in 7.5 (2) for the majority of Senators to be elected “by registered voters in each province by a system of proportional representation based on the votes cast in the general election for members of the National Assembly.” There will be no separate election for the Senate. The allocation of Senatorial seats per province will be determined by the provincial vote.

For all intents and purposes, the limited scope given to proportional representation means that the COPAC Draft has rejected proportional representation as an electoral system for Zimbabwe.

What are the advantages of a mixed system?

The advantages of mixed systems are that it combines the FPTP election with a strong accountability with a more proportional representation. It enhances democracy, inclusivity and enables power sharing at the legislative level. It promotes reconciliation and tolerance and Zimbabwe is in much need of a peaceful election and the aftermath of the Presidential runoff requires both. It provides high possibility for gender balance in the legislature. It will go a long way in the emancipation and empowerment of women.

3.2 Quota for Women

There is a specific quota for women in the COPAC Draft for both the National Assembly and the Senate. In the National Assembly, 60 seats are specifically reserved for women. The other 210 seats for constituencies are available for both men and women. This means that out of 270 MPs, at least 60 will be women. This represents about 22%. This percentage will rise depending on the number of women elected among the 210. It is important to note that the reserved seats for women will be only available “for the life of the first two Parliaments” under the COPAC Draft. Thereafter, there will be no quota for women. The makers of the COPAC Draft seem to be of the view that “after the life of two Parliaments”, society would have accepted the concept of gender equality and therefore women would have overcome the current obstacles to being elected MPs. This is obviously mistaken. More critically, the “life of two Parliaments” is not necessarily ten years: it may be shorter because Parliament may be dissolved before its five-year term.

In the Senate, the COPAC Draft provides for women to constitute at least half of the sixty Senators representing provinces. The Senate has 28 other members: 18 chiefs, 8 provincial governors and 2 representing persons with disabilities. These other members need not be women. This means that out of 88 senators, at least 30 must be women. This represents about 34%. This percentage will rise depending on the number of women among the 28.

An electoral system based on proportional representation is the most effective model for accommodating gender balance in Parliament.

3.3 Number of Parliamentarians

For the lower house, the COPAC Draft provides for a total number of 270 MPs. The upper house has a total of 88 senators. The total number of legislators under the COPAC Draft is 358.. Under the current constitution, the total number of parliamentarians is 303 (210 + 93). The COPAC Draft therefore provides for an increase of 55. This increase will burden the fiscus and the already overburdened taxpayer.

3.4 Direct election of the President

The COPAC Draft maintains the position in the current constitution where the president is elected directly by all registered voters: clause 5.5. However, the COPAC Draft, like the current constitution is silent on whether the winner must have 50% plus one or a mere simple majority. A good constitution should prescribe for this in the Constitution itself and not leave it to the Electoral Act as is the case now.

3.5 Vice- Presidents as running mates

The COPAC Draft incorporates the American system of presidential running mates. Every presidential candidate is required to nominate two persons to stand for election with him or her as Vice- Presidents. The candidate must designate one of them as first Vice-President and the other as the second Vice-President. This means that the two Vice-Presidents will be jointly elected with the President. In the event of the President's death, the first Vice-President will automatically become President for the entire unfinished term of the President. The second Vice-President will become the first Vice-President and another person will be appointed by the new President to become the second Vice-President.

3.6 Announcing results of presidential elections

To avoid a repeat of the 2008 scenario where results of the presidential election were not announced for five weeks, it is advisable to introduce a time-limit for the announcement of presidential results. In addition, the current system in the Electoral Act of announcing the results at each polling station must be elevated to a constitutional position. Regrettably, the COPAC Draft has not provided for these matters. Regarding the announcement of election results, it merely says that "the results [must be] announced as soon as possible after the close of the polls".

3.7 Challenge to presidential election

Under the current constitution, there is no provision on challenging election results. The provisions are, however, in the Electoral Act, which provides for a challenge within 30 days of the announcement of the election result.

The COPAC Draft has specific provisions on challenging the validity of a presidential election. In terms of clause 5.6, "any aggrieved candidate" may challenge the validity of a presidential election in the Constitutional Court within seven days of the declaration of the result. Once a petition has been lodged, the Constitutional Court is required to hear and determine the matter within fourteen days after the lodging of the petition. If the Constitutional Court invalidates the election, there must be a fresh election within 60 days. The election of a Vice-President may be challenged only on the ground that he or she was not qualified for election.

The effect of the lodging of a petition challenging the election of president is that the "president-elect" cannot be sworn into office. The swearing in is put in abeyance pending the decision of the Constitutional Court, and the incumbent president continues in office: clause 6.7.

3.8 Assumption of Office of President-elect

Under the current constitution, the President-elect must be sworn in either on the day he/she is declared elected or not later than 48 hours thereafter: section 28(5).

The COPAC Draft proposes to delay the swearing in order to give room to those who might wish to challenge the presidential result. Accordingly, it provides for assumption of office on the ninth day after the declaration of the result if there is no petition challenging the election. If there is a petition, the assumption of office has to wait for the Constitutional Court to determine the matter. If the election petition is dismissed, the president-elect is sworn in within 48 hours of the decision of the Constitutional Court.

4. Delimitation of Constituencies

Under the current constitution, the delimitation of constituencies is undertaken by ZEC. This was introduced by Amendment No. 18 in 2007. The first delimitation by ZEC was for the 2008 election. Before 2007, delimitation was undertaken by a separate body called the Delimitation Commission.

The COPAC Draft retains the role of ZEC in this regard.

Significantly, the COPAC Draft proposes that the delimitation be undertaken “once every ten years”: clause 7.7(1). The rest of the provisions on delimitation follow the provisions of the current constitution. Even the problematic provision allowing a 20% variation in the number of voters per constituency are reproduced.

The “once every ten years” provision has no foundation whatsoever. The current practice of a delimitation every five years or before every general election is more conducive to democratic and credible elections as there is considerable voter mobility in the country.

Regrettably, the COPAC Draft maintains the 20% variation in delimitation which has been used for manipulating constituency boundaries. The common practice is not to allow variation beyond 5%.

5. Timing of Elections

Under the current constitution, the exact date of an election is determined by the President but it must not be more than four months after the dissolution of Parliament.

The COPAC Draft makes two changes to this position. First, a general election must be held before and not after the expiry of the five-year term of Parliament. It must be held not later than 30 days before the expiry of the term. However, where Parliament is dissolved before the expiry of its term, an election must be held within 90 days of the dissolution. In this latter respect, the COPAC Draft reduces the period from four months to 90 days. The second change is that in setting an election date, the President must act "after consultation with the electoral Commission". "After consultation" is different from "on the advice of". Where the expression, "on the advice of" is used, the President is bound by the views of the electoral Commission. Where the President acts "after consultation", he/she is not bound. This means that the COPAC Draft retains the current position where the exact dates for an election are determined by the President.

6. Electoral Commission

The Electoral Commission in the COPAC Draft is one of eight institutions "supporting democracy". In theory, all the other seven have some impact on elections but it is more appropriate to focus on the Electoral Commission.

The COPAC Draft follows closely the provisions of the current constitution on ZEC. However it proposes two changes..

These are:

- (i) There is an option for the Electoral Commission to be given the role of registering voters. Under the current constitution, ZEC merely "supervises" the registration of voters by the Registrar-General. This option will only apply if the Electoral Act provides for that role. If the Electoral Act maintains the current position, then ZEC will continue merely to supervise the registration of voters by the Registrar General. It is puzzling why the COPAC Draft leaves this crucial decision to the Electoral Act.
- (ii) The Electoral Commission will accredit observers. Under the current constitution, ZEC accredits observers "in accordance with an Act of Parliament". The current Act of Parliament, the Electoral Act does not give ZEC full control over the accreditation of observers. It shares that role with government ministers (Foreign Affairs & Justice).

7. Commencement of the Constitution/Transitional Provisions

The transitional provisions of the Constitution are contained in a special schedule, the Sixth Schedule. There are two relevant dates for the commencement of the constitution. The first date is the date when

the constitution, after being signed into law by the President, is published in the Government Gazette. That day is called the publication day. On that day, some provisions of the constitution, including all those on elections, become effective. The second date is the date when the new President assumes office. On that day, the rest of the constitution enters into force. The position therefore is that the constitution enters into force in two stages: some provisions start on publication day while others follow and start when the President has been sworn into office.

With specific reference to elections, the Electoral Act would have to be scrutinized, and if necessary amended, to ensure that it is in conformity with the constitution. However, it must be noted that no new delimitation is required for the first elections which follow immediately after the enactment of the constitution. The existing boundaries of provinces, constituencies and wards will apply. Further, regarding registration of voters, every voter on the existing voters roll automatically remains as a registered voter. There will be undertaken an intensive voter registration for those not on the voters roll and a voters roll inspection exercise for at least sixty days after the publication of the constitution. ZEC will continue as currently constituted but should any vacancy arise, it will be filled in accordance with the new constitution.