

An Analysis of the COPAC Final Draft Constitution of 1 February 2013

(c) reserved, Zimbabwe Lawyers for Human Rights, February 2013

Section & Title	Summarised and Simplified Draft Provisions	General Comments
Preamble	<p>Recognises the supremacy of God; recalls the liberation struggle; celebrates Zimbabwe's natural resources, traditions and cultures, and democratic values such as good, transparent and accountable governance, the rule of law, equality, peace, justice, tolerance, and fundamental human rights and freedoms.</p>	<ul style="list-style-type: none"> ▪ 'We the People' acknowledges ownership of the Constitution by the people of Zimbabwe. ▪ Inspires, informs about historical basis of Constitution. ▪ Includes values such as rule of law to be respected. ▪ Does not recall atrocities such as <i>Gukurahundi</i> and <i>Operation Murambatsvina</i> as a caution and the requirement for redress and non-repetition. ▪ Does not emphasise adherence to constitutionalism and the "just" rule of law.
Chapter 1: Founding Provisions	<p><u>Country</u> – Defined as "unitary, democratic and sovereign republic."</p> <p><u>Status</u> – Constitution is the supreme law, binds everyone and all institutions, including government. Any law, practice, custom of conduct that is inconsistent with the Constitution is invalid. The Constitution is binding on all persons and state institutions.</p> <p><u>Values and principles</u> – Includes the rule of law, fundamental human rights and freedoms, dignity and equality (including gender equality), good governance, adequate representation of electorate, orderly transfer of power after elections, separation of powers, recognition of the rights of ethnic, racial, cultural, linguistic and religious groups, equitable sharing of natural resources, devolution and decentralisation (addition) of governmental power and functions.</p> <p>Recognises 16 official languages (previously 14), including sign language. Parliament can add other languages. State to ensure languages are treated equally and promote advancement, development and use of languages.</p> <p><u>State's duty</u> - To promote public knowledge of Constitution by translating and educating people (even members of the security services and civil service), teaching it in schools and encouraging civil society to disseminate it.</p>	<ul style="list-style-type: none"> • The unitary state remains protected even where there is devolution. ▪ Guarantee of supremacy of Constitution is key, as is the specific mention of government institutions being bound. ▪ These are key values that can be used to hold duty-bearers to account. ▪ Positively recognises 16 languages. State must be sensitive to language preferences. ▪ Places affirmative duty on State to educate people about the Constitution.
Chapter 2: National Objectives	<p>These direct and guide the State and all government institutions and agencies at every level in how to make laws and policy decisions to promote a sustainable, just, free and democratic society. They include: good governance, national unity, peace and stability; fostering fundamental rights and freedoms; foreign policy; national development; empowerment; food security; culture; gender balance; fair regional representation; children; youths; elderly persons; persons with disabilities; veterans of the liberation struggle; work and labour relations; protection of the family; protection of the family; marriage; education; shelter; health services; social welfare; legal aid; sporting and recreational facilities; preserving traditional knowledge; and domesticating international instruments. (Environmental protection has been removed.) State to ensure all international conventions, treaties and agreements it joins become part of domestic law.</p>	<ul style="list-style-type: none"> ▪ Makes reference to courts and permits application of national objectives to interpret laws and pass judgments. ▪ An impressive list of objectives that can guide interpretation and application of constitutional rights and duties. However actual compliance with these by duty-holders will be harder to achieve in practice. ▪ Unfortunate that international treaties, conventions and agreements which are accepted by the State are not immediately made part of our national law. ▪ Unfortunate that environmental protection has been removed.

An Analysis of the COPAC Final Draft Constitution of 1 February 2013

(c) reserved, Zimbabwe Lawyers for Human Rights, February 2013

	<p><u>Citizenship and Immigration Board</u> - Appointed by President with power to grant or revoke citizenship by registration, more functions can be specified in law passed by Parliament.</p> <p><u>Rights and obligations of citizens</u> – They have a right to a passport, travel documents, birth certificate, and the protection by State wherever they may be. Citizens must be loyal, observe the Constitution, respect the flag and anthem, and defend Zimbabwe and its sovereignty.</p>	<ul style="list-style-type: none"> ▪ Citizenship and Immigration Board appointed solely by President. Too much executive control and interference in matters of citizenship. ▪ Obligation on State to protect citizens, including those abroad; citizens have constitutional right to documents.
<p>Chapter 4: Declaration of Rights</p>	<p><u>Binding</u> - On all persons, including juristic persons, and all agencies and institutions of the State at every level. Their interpretation by the courts must take into account international law, all treaties and conventions to which Zimbabwe is a State Party, and courts can also consider foreign law. Other entitlements can be provided by law.</p> <p><u>Limit to rights</u> – Rights can be limited by law of general application and to extent the limitation is fair, reasonable, necessary and justifiable in an open, just and democratic society based on openness, justice, human dignity, equality and freedom. Must take into account the purpose of limitation and the nature of the right or freedom. Any limitation of rights in emergency situations must be proportionate to the circumstance and cannot justify unlawful acts by the State; the State will still be held to account for such acts.</p> <p><u>Rights that cannot be limited or violated</u> - Right to life (except for death penalty in terms of the Constitution); human dignity; not to be tortured or subjected to cruel, inhuman or degrading punishment or treatment; not to be in slavery or servitude; fair trial; and obtaining an order of <i>habeas corpus</i> (production of person who is missing).</p> <p><u>Enforcement</u>- Person with own interest in matter, person acting for those who cannot act for themselves, members of a class or group of person, person acting in the public interest, or an association acting in the interests of its members. Contravening a law is not a ground to prevent applicant from approaching courts for relief.</p> <p><u>Civil and political rights protected</u> – Right to life; personal liberty; rights of arrested and detained persons; human dignity; personal security; freedom from torture or cruel, inhuman or degrading treatment or punishment; freedom from slavery or servitude; freedom from forced or compulsory labour; right to equality and non-discrimination; privacy; freedom of assembly and association; freedom to peacefully demonstrate and petition; freedom of conscience; freedom of expression and freedom of the media; access to information; language and culture; freedom of profession, trade or occupation; labour rights; freedom of movement and residence; political rights; administrative justice; right to a fair hearing; rights of accused persons; property rights and agricultural land.</p> <p><u>Death penalty</u> – Provided by law if murder committed in aggravating circumstances. Death penalty not imposed on women, persons who were under 21 years when crime was committed, or who are over 70 years. Law gives court discretion to impose death penalty, and affected person can petition President for pardon or commutation.</p>	<ul style="list-style-type: none"> ▪ Courts must use and respect international law when deciding cases, as well as promote the values and principles that underlie a democratic society based on openness, justice, human dignity, equality and freedom, which is positive. • It remains to be seen whether limitations will be narrow or wide-ranging as the State in the past has abused this provision without adequate justification, and the safeguard here is still not specific enough. • This is in line with international law. Once again, it will remain to be seen if this will be respected by the State and there are no harsh consequences for any violation. This could be improved by additional safeguards. ▪ More people can bring constitutional cases; courts are not restricted by 'procedural technicalities'. Welcome addition. ▪ Rights protected are much broader, including protection of vulnerable groups. However there is no protection of rights of lawyers and judicial officers carrying out their professional duties, even though they have been targeted and had their rights violated in the past. Also no protection of sexual minorities. ▪ Non-discriminatory clause does not have catch-all phrase "or any other status," thereby narrows it to specific discrimination in section. ▪ Death penalty retained for men only and this is arbitrary discrimination.

An Analysis of the COPAC Final Draft Constitution of 1 February 2013

(c) reserved, Zimbabwe Lawyers for Human Rights, February 2013

	<p><u>Compulsory acquisition of agricultural land</u> – Agricultural land does not include communal land or land in the boundaries of an urban local authority or a township established under a law relating to town and country planning or land survey. Agricultural land required for a public purpose can be compulsorily acquired by the State without compensation (unless compensation is paid by the former colonial state). The acquisition and compensation for the land cannot be challenged in court. Discrimination not a basis to challenge acquisition of agricultural land. Compensation can be claimed for improvements made on the land prior to acquisition.</p> <p><u>Social and economic rights protected</u> – Environmental rights; freedom from arbitrary eviction; right to education; health care; food and water; and marriage rights. Same sex marriages are specifically prohibited. (addition)</p> <p><u>Rights of vulnerable and marginalised groups</u> – Protections for women, children, the elderly, persons with disabilities and veterans of the liberation struggle are specifically included.</p> <p><u>Amendment of Declaration of Rights</u> – this requires a 2/3 majority of Senate and National Assembly sitting together and must then be submitted to a national referendum.</p>	<ul style="list-style-type: none"> ▪ Provisions relating to agricultural land are contrary to SADC Tribunal ruling on discriminatory nature of land reform programme and contradict Chapter 16 of same Constitution. Also deny aggrieved persons the right to challenge this through the courts which is contrary to jurisprudence of the African Commission on Human and Peoples’ Rights. ▪ Progressive inclusion and protection of such rights, including wide-ranging protection of vulnerable groups. ▪ Silent on rights to development, use of natural resources. ▪ No protection of minorities and arbitrary discrimination against same-sex couples in relation to marriage. ▪ Ensures Declaration of Rights cannot be arbitrarily amended; but potentially entrenches “bad” provisions and makes it almost impossible to amend or remove them.
<p>Chapter 5: Executive Authority</p>	<p><u>Who has authority and obligations?</u> – President exercises authority through the Cabinet, with authority from the people of Zimbabwe. President is Head of State and Government and Commander-in-Chief of Defence Forces. President must uphold, defend, obey and respect the Constitution and all other laws. There is no Prime Minister.</p> <p><u>Election of President and Vices</u> – Carried out together, 2 vice presidents with same qualifications as President (citizen by birth or descent, over 40 years, resident in Zimbabwe, registered voter, elected in general election). However, for the first election after the Constitution becomes effective and for ten years thereafter, President does not nominate running mates and appoints up to two Vice Presidents after election. (addition)</p> <p><u>Disqualification and challenging election</u> – The new Constitutional Court hears election challenges within 14 days of filing. Case to be filed within 7 days of declaration of result. Court can declare winner, invalidate election, or make other just and appropriate order. Nullifying a presidential election also invalidates election of Vice Presidents. Nullifying election of 1 or 2 Vice Presidents means President must appoint replacement(s). President, Vice-Presidents start official duty on 9th day after declaration of election or 48 hours after declared winner by Court if challenged. However any challenge to the first Presidential election will be handled by the current Supreme Court as constituted under former constitution but applying provisions of new Constitution.</p> <p><u>Term of office, resignation and removal</u> - Term is 5 years running at same time with Parliament and there is a two-term limit for any individual. A presidential ‘term’ means 3 or more years in office as President or Vice President. The President cannot hold other public office or be employed elsewhere. Former Presidents receive State pension. President or Vice President(s) may resign or be removed after recommendations of a Parliament committee drawn from the two Houses set up by joint resolution of ½ total membership of Senate and National Assembly.</p>	<p>President can still make a number of decisions on his/her own, which is problematic.</p> <p>The requirement for Vice Presidents to be elected is welcome as they need to derive authority from the people. However the suspension of this provision for the first election and for 10 years after is a disappointment.</p> <ul style="list-style-type: none"> ▪ The time-frames for hearing of election challenges is welcome to ensure there are no delays, unlike in the past. ▪ A slight safeguard is provided by ensuring use of new provisions for first Presidential election challenge, but if there is lack of confidence in previous bench, this will be problematic for acceptance of the court’s findings. ▪ Commendably, there is Presidential term limit of 2 five-year terms. It is also positive that an effective term has been defined as three or more years in office.

An Analysis of the COPAC Final Draft Constitution of 1 February 2013

(c) reserved, Zimbabwe Lawyers for Human Rights, February 2013

Recommendations must be passed by 2/3 total membership of National Assembly and Senate. If President dies, resigns or is removed, 1st Vice President becomes President for rest of term. However for the first election, and for 10 years after, the Vice who was last Acting President at time of death, resignation or removal, acts as President until the new President assumes office, and the political party of the last President nominates the next President. In the case of a President who stood as an independent candidate, the Vice who last acted assumes Presidency. (addition)

Presidential immunity – This exists only while President is in office. Running of prescription for debts or liabilities arising before or during office is suspended. Good faith can be raised as defence for civil or criminal proceedings against a former President.

Appointment of Ministers and Deputies – By President from members of both houses of Parliament, guided by considerations of gender and regional balance. Five (previously 7) ministers/deputies may be chosen from outside Parliament on the basis of their 'professional skills and competence.' These ministers/deputies can sit and speak but not vote in Parliament. Vice Presidents, ministers/deputies not to hold other public office, or do other paid work to avoid conflict of interest. Required to attend Parliament, committees and inform on areas of responsible matters. Code of conduct must be prescribed for Vice Presidents, Ministers and deputies.

President may reserve administration of an Act, Ministry or department to himself/herself. (addition)

Terms of office of Ministers and Deputy Ministers and vote of no confidence – Term of ministers and deputies ends on resignation, removal by President, assuming office by new President, ceasing to be Member of Parliament if minister when elected and if circumstances arise leading to end of tenure of minister or deputy who is parliamentarian. Ministers and deputies continue to hold office after dissolution of Parliament until a new President assumes office. Vote of no confidence in Government needs joint resolution of Parliament passed by 2/3 of total membership. President can dismiss all Ministers and their Deputies, appoint replacements or dissolve Parliament, call general election in 90 days. If President does not do so in 14 days, Parliament remains dissolved.

Cabinets and Executive functions – Cabinet is composed of the President (head), Vice Presidents and Ministers. Cabinet conducts government business, directs government operations, develops national policy, laws and advises President.

President signs bills into law, calls elections and referenda, gives awards and honours, appoints ambassadors and other diplomats, deploys Defence Forces, refers bills to Constitutional Court for opinions and advice, summons Houses of Parliament for extraordinary sittings and receives foreign representatives. S/he concludes agreements with foreign states, governments and international organisations. Decisions taken in terms of legislation must be written. President declares war and peace unilaterally; both Houses of Parliament must be advised of this within 7 sitting days. Parliament may revoke the declaration of war or peace by joint resolution passed by 2/3 of the total

- Stability and clarity is provided in relation to what happens and who takes control in the event of the death/removal/resignation of the President or Vice Presidents.
- However the suspension of these provisions means an unelected individual will hold office as President, which is problematic.
- No provision for judicial review of Presidential actions. This should have been included in light of past challenges.
- Regrettably, there are no limits on number of ministers and deputy ministers who can be appointed. Is there any real need for deputy ministers?
- Appointment of ministers on basis of professional skills and competence is welcome; however more safeguards are needed as to how decision on appointment is made to prevent this being used for patronage purposes. Same for other ministers, as all should be appointed for their skills and competence in a clearly defined way.
- Unacceptable that President is not subject to the Code of Conduct like all others.
- President has too much power and unchecked discretion in relation to dismissal of ministers and deputies.
- Parliament will find it difficult to exercise vote of no confidence due to fear of dissolution by the President; his power in this regard is not acceptable.
- The President should not have authority to call for elections, as this allows for arbitrariness. Instead, the date of an election which is constant and predictable should be included as a constitutional provision.
- To allow the President to unilaterally declare war and also a state of emergency is not a good practice. This allows

An Analysis of the COPAC Final Draft Constitution of 1 February 2013

(c) reserved, Zimbabwe Lawyers for Human Rights, February 2013

	<p>membership of Parliament. However President only required to disengage if safe for troops and equipment. (Previously, this was subject to approval by both Houses of Parliament within 7 days of the declaration.) President exercises prerogative of mercy after consulting Cabinet and publishing in Gazette. President also proclaims state of public emergency unilaterally, subject to Parliamentary approval; if parliament does not approve, the state of emergency ceases after 14 days, and when approved it can last up to 3 months. Parliament has power to extend state of emergency for a maximum of 3 months and can limit geographical location where it applies. State of emergency and/or extension can be challenged by any interested person in the Constitutional Court. Other courts can determine validity of any law enacted or action taken as result of declaration of public emergency.</p> <p><u>Attorney General, appointment, qualification and functions</u> - Appointed by President, who is also the only person who can remove him from office. The AG is the Government's principal adviser, and represents Government in civil and constitutional proceedings. The AG is responsible for drafting laws, is obliged to uphold the rule of law and defend the public interest, and has other functions that may be stated in other laws. The AG may attend Cabinet meetings, sit, speak in both Houses of Parliament, but cannot vote. AG may appear as friend of the court in civil proceedings in which Government is not a party.</p>	<p>too much discretion and arbitrariness. Approval or non-approval by parliament after the fact will not be helpful. Such powers should be exercised by Cabinet and/or the legislature.</p> <ul style="list-style-type: none"> ▪ AG has no role in criminal prosecutions, which is now the responsibility of a Prosecutor-General who is not controlled by AG. ▪ The AG is not accountable to any person except the President, and it may prove problematic that only the President can remove him/her. This will also affect independence, as s/he will owe allegiance to the person appointing him/her. Actions should be subject to scrutiny by a body other than the executive. Currently Parliament cannot even start disciplinary proceedings against the AG. ▪ AG does not have to report to Parliament annually, and this is problematic for purposes of accountability and public scrutiny of actions.
<p>Chapter 6: The Legislature</p>	<p><u>Composition and powers</u> – Legislature is composed of Parliament (National Assembly and Senate) and the President, with powers to amend the Constitution, make laws and provide for passing of subsidiary legislation. Parliament exists to hold all government institutions and agencies (and the Executive) accountable.</p> <p><u>Senate</u> – Consists of eighty (80) members (down from 88, provincial governors have been dropped) – 60 members from provinces (6 per province on a party-list system of proportional representation based on votes cast in general election for members of the National Assembly. Female and male candidates are listed alternately, with every list starting with female candidate), 18 chiefs, and 2 other persons elected to represent persons with disabilities.</p> <p><u>National Assembly</u> – Consists of 270 members – 210 constituency-based, and an additional 60 women for the first 2 Parliaments after the adoption of the Constitution. The 60 women members are elected (6 per province) on proportional representation system based on votes cast in general election for members of National Assembly.</p> <p><u>Powers of Parliament and Quorum</u> – Presidential reservations on law overridden through 2/3 majority votes of National Assembly. President still has option to send such law to Constitutional Court for a ruling on constitutionality, but is required to sign it into law if Court rules that it is constitutional. Quorum for Parliament determined by Members through Standing Orders. Further, parliament controls its own sitting and can dissolve itself.</p>	<ul style="list-style-type: none"> ▪ Retention of Senate burdens the fiscus and is unnecessary ▪ Senate still retains parliamentarians who are not voted into office, which is problematic. Chiefs are not elected through popular elections and therefore owe allegiance to the appointing authority. ▪ The affirmative action will boost women's representation in House of Assembly. However quality of candidates and popularity are not guaranteed. Also the number of parliamentarians balloons - not affordable for Zimbabwe. ▪ Investing power in Parliament to control its own sittings is a welcome addition so that the Legislature is not held hostage by the Executive; this improves separation of powers and its independence.

An Analysis of the COPAC Final Draft Constitution of 1 February 2013

(c) reserved, Zimbabwe Lawyers for Human Rights, February 2013

	<p><u>Voting, Dissolution</u> - Voting by someone not entitled to vote does not invalidate proceedings. Houses of Parliament determine own sittings except the first sitting (determined by President but not later than 30 days after s/he assumes office). Unless provided otherwise, decisions are made on any motion by a majority of those present and voting. Any equality of votes means the motion is lost. Parliament can undertake a vote of no confidence in government by resolution of 2/3 majority. In that case, an election must be called within 90 days. The Parliamentary Legal Committee considers constitutionality of all enactments, amendments and subsidiary legislation.</p> <p><u>Term of office</u> – This ends for a parliamentarian upon written notice to Speaker of Parliament that the individual has ceased to belong to the political party they were members of upon election. It also ceases upon an individual joining a political party if the member was not a member of that political party upon election.</p>	<ul style="list-style-type: none"> ▪ No provision stating that opinions of Parliamentary Legal Committee are binding. ▪ Parliamentarians remain subject to control by their political parties to retain their seats. Floor-crossing remains prohibited, which impacts individual independence. ▪ There are no limitations on term of office for MPs.
<p>Chapter 7: Elections</p>	<p><u>Conduct of Elections and state obligations</u> – Provides for regular peaceful, free and fair elections, conducted by secret ballot, free from violence and other electoral malpractices. State to ensure that all eligible citizens are registered and have opportunity to vote, including persons with disabilities or special needs. State must ensure fair and equal access to electronic and print media for all political parties and candidates, who must also have 'reasonable' access to all material and information necessary for them to participate effectively. Provides for electoral disputes to be resolved in a "timely" manner and results to be announced <i>'as soon as possible after close of polls'</i>.</p> <p><u>Delimitation of constituencies</u> - Done by Zimbabwe Electoral Commission (ZEC) once every 10 years. President and either House of Parliament can refer 1st delimitation report back to ZEC for reconsideration of 'any matter or issue.' ZEC's decision is final on matters referred to it.</p> <p><u>Voter registration</u> – Requirements for registration are left to Electoral Act. Any changes made to Electoral law or law relating to an election after the calling of election is irrelevant for purpose of that election already called for.</p>	<ul style="list-style-type: none"> ▪ Silent about observers and monitors. ▪ Does not stipulate role of law enforcement agencies and agents during elections. ▪ No specific provision to safeguard process for constitutional amendment of electoral provisions. ▪ This is progressive as the process needs to be in the control of the election management body. However the Registrar General's role in elections has not been clarified. ▪ Leaving voter qualifications to an Act of Parliament is problematic as it is vague and open to abuse. ▪ No provision made for Diaspora vote
<p>Chapter 8: Judiciary & Courts</p>	<p><u>Authority lies in</u> - Constitutional Court, Supreme Court, High Court, Labour Court, Administrative Court, Magistrates' Courts, Customary Law Courts and other courts established by law.</p> <p><u>Exercise of authority and guiding principles</u> – Provides for independence and impartiality. All State and government bodies are bound by court decisions. Justice, efficiency, reasonable promptness, safeguarding human rights and the rule of law guide the work of the judiciary. Judges must not engage in political activities, hold office in or be members of any political organisations, solicit funds from or contribute to any political organisation, attend political meetings, accept gifts, loans or favours that may influence their conduct, must give their judicial duties preference over all other activities and must not engage in any activities which interfere with or compromise their judicial duties.</p>	<ul style="list-style-type: none"> ▪ Guarantees of independence of judiciary are important and principles guiding a judge's work are important if properly scrutinised and implemented. However both institutional and individual independence should be specifically guaranteed in the Constitution which is not the case at present.

An Analysis of the COPAC Final Draft Constitution of 1 February 2013

(c) reserved, Zimbabwe Lawyers for Human Rights, February 2013

Hierarchy of courts and powers –

Constitutional Court – Highest court in constitutional matters. Decisions bind all other courts. Deals only with constitutional matters or related issues. It has the powers to determine whether Parliament or the President has failed to fulfil a constitutional obligation. It also deals with electoral disputes from the election of a President, Vice-President or both and makes the final decision whether an Act of Parliament or conduct of the President or Parliament is constitutional. It must confirm any order of constitutional invalidity made by another court before that order has any force.

Supreme Court – Last court of appeal unless Constitutional Court can hear matter.

High Court – Hears and decides all civil and criminal matters, decides constitutional matters except those to be heard by Constitutional Court. Supervises lower courts. Other function can be provided by law.

Labour Court and Administrative Court – Hears labour, employment and administrative issues as provided by law.

Other courts - Law can provide for establishing, composition and power of magistrates' courts, customary law courts and other courts lower than High Court. Referrals to Constitutional Court can be made from other courts.

Laws administered - Those 'in force on the effective date, as subsequently modified.' Criminal jurisdiction resides with the Constitutional Court, Supreme Court, High Court, Magistrates' Courts and courts or tribunals for enforcement of discipline in the 'disciplined force'. Customary law courts do not have criminal jurisdiction.

Judicial Service Commission (JSC) – Consists of Chief Justice, Deputy Chief Justice, Judge President of High Court, one judge nominated by judges of the higher courts, the Attorney-General, 3 lawyers with at least 7 years' experience nominated by Law Society, Chief Magistrate, Chairperson of Civil Service Commission, person with 7 years experience as human resources practitioner nominated by association, person with 7 years' experience as public accountant or auditor nominated by association, and 1 professor or senior lecturer in law nominated by association.

Salaries, allowances, other benefits for judicial officers are fixed by JSC after consulting the Minister of Justice and obtaining the approval of the Minister of Finance.

Appointment of judges – By President from 3 names provided by Judicial Services Commission (JSC) after advertising **position (previously 'vacancy')** and public interviews. JSC can provide another list of 3 names if President not satisfied with 1st list. Appointments to be diverse and reflect gender composition. Judges of Constitutional Court appointed for non-renewable term of 15 years and can go to Supreme or High Court after term if eligible. Judges retire at 70.

- The introduction of a Constitutional Court is welcome as the ultimate protector of this new constitutional order.
- There is no clear provision for the Supreme Court to consider constitutional matters, unlike the High Court.
- Independence of JSC remains subject to question and executive/political control due to the number of people on the Commission who are appointed by the President.
- Commendably budget and conditions of service of judiciary determined by judges through JSC, but after consultation with Minister of Justice and the approval of Minister of Finance. **Regrettably budget and conditions of service remain subject to approval by executive.**
- Advertising vacancy and having public interviews increases openness, transparency of the appointment process and allows scrutiny of potential choices. This is likely to increase professionalism of judiciary.
- **Role of President in appointment process has been reduced, but still unacceptable that he can reject names of those who have been approved by JSC.**
- **No limit on number of judges to be appointed, open to manipulation by additions to alter majority.**

An Analysis of the COPAC Final Draft Constitution of 1 February 2013

(c) reserved, Zimbabwe Lawyers for Human Rights, February 2013

	<p><u>Removal of judges from office</u> - President sets up tribunal to investigate a judicial officer; the JSC is not involved in the investigation and can only recommend that a judicial officer be investigated. President to act on recommendations of the tribunal.</p>	<ul style="list-style-type: none"> ▪ Either the JSC must deal with disciplinary issues, or it must be done by an independent body. The involvement of the President is not acceptable. It impacts independence of the judiciary and violates the principle of the separation of powers.
<p>Chapter 9: Principles of Public Administration & Leadership</p>	<p><u>What is public administration and what qualities are required</u> - Government and state agencies and institutions, government controlled entities make up the public administration. They must be guided by ethics, be development-oriented, responsive, transparent, and representative of the diversity of communities of Zimbabwe. They must reflect equality of men and women, show inclusion of persons with disabilities and exhibit employment based on merit. In addition, State-controlled commercial entities are to maintain commercial viability and abide by generally accepted standards of good corporate governance.</p> <p><u>Role and accountability of public officials</u> - Exercise authority objectively, impartially and openly while demonstrating willingness to serve the people rather than rule them. Law to provide enforcement provisions, measures requiring public officers to regularly disclose their assets and establish a code of conduct for public officers.</p> <p><u>Terms of office</u> - An Act of Parliament may limit terms of office for chief executive officers and heads of government-controlled entities. (Previously this was limited to five years, renewable once, based on competence, performance and delivery and also covered statutory bodies.)</p>	<ul style="list-style-type: none"> ▪ Contains many positive provisions requiring enactment from Parliament for enforcement to achieve these ideals. ▪ No specific tackling of the issue of corruption, which is pervasive within the public service. ▪ Positively lays basis for legislation requiring disclosure of assets by public officials. ▪ The amendment is regrettable as the previous provisions limiting terms and providing benchmarks for performance were commendable and acted as an incentive for maintenance of good performance, independence and professionalism.
<p>Chapter 10: Civil Service</p>	<p><u>Members</u> - State employees are members of civil service, except for security service members, judges, magistrates and persons presiding over courts established by statute. Members of Constitutional Commissions and staff of Parliament are also not part of the civil service.</p> <p><u>Status and duties of civil service</u> - Members to be politically neutral and are not obey manifestly illegal orders.</p> <p><u>Civil Service Commission</u> - Consists of chairperson, deputy, and a minimum of 2 and maximum of 5 other members appointed by President. Members chosen for 'knowledge of or experience in administration, management or provision of public service.' This Commission is responsible for all appointments, conditions of service, remuneration and discipline of the Civil Service. Functions in accordance with written policy directives of the responsible Minister.</p> <p><u>Ambassadors and other principal representatives of Zimbabwe</u> - Appointed unilaterally by the President.</p> <p><u>Permanent Secretaries</u> - Appointed by President after consulting Civil Service Commission. They have a 5-year term, renewable once, subject to competence, performance and delivery.</p>	<ul style="list-style-type: none"> ▪ The inclusion of this constitutional obligation is positive; it remains to be seen how it will be enforced and what consequences will be imposed on transgressors. ▪ The independence of the Civil Service Commission is questionable as the members are appointed by the President and therefore executive control is likely. ▪ It is not proper that ambassadors are appointed unilaterally by the President without approval or input of anyone.
<p>Chapter 11: Security Services</p>	<p><u>Composition</u> - Defence Forces, Police Service, Intelligence Services, Prisons and Correctional Service, and other security service established by law. Subject to the authority of the Constitution, President and Cabinet and subject to Parliamentary oversight. Must reflect the diversity of the people of Zimbabwe.</p>	<ul style="list-style-type: none"> ▪ Establishes a police 'service' rather than a 'force', and starts to regulate the Intelligence Service for the first time.

An Analysis of the COPAC Final Draft Constitution of 1 February 2013

(c) reserved, Zimbabwe Lawyers for Human Rights, February 2013

Conduct of member of security services - Politically neutral and not be 'active members or office-bearers of political party or organisation', and must not prejudice the lawful interests of any political party or violate the fundamental rights and freedoms of any person. Must not be employed or engaged in civilian institutions except in public emergency.

National Security Council – Composed of President (chair), Vice Presidents, and such Ministers and other members of security services stated in Act of Parliament.

Independent Complaints Mechanism - To be provided by law to receive and investigate complaints about misconduct and remedy harm caused by members of security services.

Service Commissions – Defence Forces, Police Service, Prisons and Correctional Service Commissions. All are chaired by Chairperson of Civil Service Commission and have a minimum of 2 and maximum of 6 members appointed by President. Responsible for conditions of service, discipline and general well-being of their members.

Appointment of Commanders/Commissioners General - Defence Forces, Police Service, Intelligence Service, Prisons and Correctional Service commanders/commissioners are general appointments done by President after consulting responsible Ministers. All serve maximum of 2 terms only and each term not more than 5 years.

Defence Forces – Army and Air Force, not partisan, professional and subordinate to civilian authority. Deployed in Zimbabwe to assist police maintain public order or support civilian authority in emergency or disaster. Deployed by President. **Deployment outside Zimbabwe may be rescinded by 2/3 of 2 Houses of Parliament sitting together. (Previously subject to such approval within 7 sitting days of deployment and did not apply when fulfilling multilateral international commitment or peacekeeping missions.)** All deployments to be quickly reported to Parliament with details – numbers, location, duration and reasons.

Police Services - Deals with crime, law and order, internal security, security of lives and property. Under command of Commissioner-General of Police. Commissioner-General cannot command other security service after serving as such.

Intelligence services - Established by law or Presidential or Cabinet directive or order. Not be partisan, be national and professional. Director-General discharges duties according to general written policy directives from Minister **under the authority of the President. Director-General cannot command other security service after serving as such. (Both additions)**

Prisons and Correctional Services - Deals with detention, incarceration and rehabilitation of persons. Commissioner-General cannot command other security service after serving here. Commands according to general written policy directives given by responsible Minister **under the authority of the President. (Addition)**

- A good constitutional obligation; however it remains to be seen how this will be implemented and consequences that will be imposed for violations of this obligation.
- Independent mechanism is welcome, but it does not necessarily have to be civilian-problematic and too general
- Chairperson of Civil Service Commission appointed by President, chairs all Commissions, can influence all security services. No provision for scrutiny, transparency and accountability of security services. Commissions are not independent; subject to excessive executive control.
- Commanders/commissioners have fixed term which is positive as it allows for renewal. However, their appointment by President does not involve any relevant commissions or public oversight. This allows too much executive control and compromises independence.
- Parliament approval required for deployment of troops outside Zimbabwe commendable. However, this approval should be sought before deployment and not after, as this can be problematic.
- Regrettable that a Civilian Complaints Authority has not been constitutionally established to ensure accountability and transparency of operations and actions of police.
- This still allows too much interference from the Executive.
- This still allows too much interference from the Executive.

An Analysis of the COPAC Final Draft Constitution of 1 February 2013

(c) reserved, Zimbabwe Lawyers for Human Rights, February 2013

<p>Chapter 12: Independent commissions supporting democracy</p>	<p><i>Which ones?</i> - Zimbabwe Electoral Commission (ZEC), Zimbabwe Human Rights Commission (ZHRC), Zimbabwe Gender Commission (ZGC), Zimbabwe Media Commission (ZMC) and National Peace and Reconciliation Commission (NPRC).</p> <p><i>Independence, appointment and removal of Commissioners</i> – Provides for independence and subjects them to the Constitution. Members to be non-partisan and non-political. The Committee on Standing Rules and Orders (CSRO) provides nominees for appointment to the President after advertising position(s) and public interviews. (Previous provision only applied to their removal) Commissioners can be removed via the same procedure as judges.</p> <p><i>Chairpersons of commissions and other Commissioners</i> – They lead Commissions. ZEC, ZHRC, NPRC chairs appointed by President after consultation with JSC and CSRO. If chairperson appointed against advice of JSC, the CSRO must be informed. The ZMC, ZGC chairpersons are appointed by President after consulting CSRO. Other commissioners of ZEC, ZHRC, ZMC, NPRC - 8 other members appointed by President from 12 names provided by CSRO. ZGC has 7 other members appointed from 12 names provided by CSRO and 1 more nominated by Council of Chiefs.</p> <p>Zimbabwe Electoral Commission – Responsible for elections for President and Parliament, provincial assemblies and local authorities, supervising the elections of President of Senate and Speaker (the previous provision for ZEC to conduct these elections has been removed), election of members of Council of Chiefs and referendums. Does voter education, compiles and maintains voters’ roll and is responsible for voter registration (previously left to the Registrar General under Electoral Act). Accredits election and referendum observers, receives complaints from public and takes action. Required to table report to National Assembly on conduct of every election, referendum through the Minister of Justice.</p> <p>For the upcoming elections, however, the Constitution provides that the Registrar-General will remain responsible for voter registration and control of the voters’ roll (see Chapter 18).</p> <p>Zimbabwe Human Rights Commission – Protects the public against abuse of power, maladministration by State, provides remedies including recommending prosecution of offenders, and directs Commissioner-General of Police to investigate cases. Tables reports to Parliament and requires reports to be submitted from any person, institution or agency.</p>	<ul style="list-style-type: none"> ▪ Commendable that specific commissions relating to human rights, gender issues, and national peace and reconciliation are established. However the retention of the ZMC is retrogressive in light of civic position advocating media self-regulation. The ZMC should be scrapped. ▪ Positive that independence of commissioners is made clear. ▪ The same concerns relating to removal of judges above applies to the removal process for commissioners. ▪ Problematic that the President can overlook advice from JSC for appointment of ZEC, ZHRC and NPRC chairpersons as long as he informs CSRO. ▪ Commissioners do not have capacity to choose their own leaders from amongst themselves, which impacts negatively on independence and effectiveness as the Chair owes his/her position to the President. ▪ Positive provision that ZEC is required to table a report on each election and referendum before parliament, opening it to legitimate scrutiny and criticism. ▪ Role of Minister is problematic as s/he can block the report from being tabled in Parliament, which adversely affects transparency, accountability and independence of commission. ▪ Also positive that accreditation of observers and voter registration is now handled by ZEC. ▪ The retention of control of voter registration and the voters’ roll for the next election by the Registrar General, is unacceptable. ▪ Role of Minister is problematic as s/he can block the report from being tabled in Parliament, which adversely affects transparency, accountability and independence of commission. ▪ Protective mandate still not strong enough and independence is not properly safeguarded.
--	--	--

An Analysis of the COPAC Final Draft Constitution of 1 February 2013

(c) reserved, Zimbabwe Lawyers for Human Rights, February 2013

	<p>Zimbabwe Gender Commission – Researches on gender and social justice issues and makes appropriate recommendations, investigates possible gender rights violations. Does everything necessary to promote gender equality. May table reports before Parliament.</p> <p>Zimbabwe Media Commission - Regulates broadcasting in the public interest, ensures fair and wide access to information and use and development of all official languages, encourages adoption of new technology and regulates conduct of media practitioners. Provides that ZMC must encourage self-regulation of press and may table reports to Parliament through appropriate Minister.</p> <p>National Peace and Reconciliation Commission – Ensures post-conflict justice, healing and reconciliation, encourages truth telling, provides justice and makes amends. It develops rehabilitative programmes for victims of persecution, torture and other abuse. Facilitates dialogue between political parties and other groups nationally and receives complaints from public. May report to Parliament through relevant Ministry. To be in place for ten years after the date the Constitution comes into effect. (Addition)</p>	<ul style="list-style-type: none"> ▪ Role of Minister is problematic as s/he can block the report from being tabled in Parliament, which adversely affects transparency, accountability and independence of commission. ▪ As previously stated, this ZMC should be scrapped. The civic position and best practice regionally and internationally favours media self-regulation. Anything else is a violation of constitutional freedom of expression and media freedom. It is not enough to 'encourage' self-regulation; this must be a lived reality. ▪ This is a welcome addition to deal with past conflicts and provides for a range of forms of redress. ▪ Greater efforts need to be made to improve provisions safeguarding this commission's independence, as for the ZHRC and setting a comprehensive framework for its establishment and mandate. ▪ Provisions relating to criminal justice and fighting impunity are not strong enough. ▪ Role of Minister is problematic as s/he can block the report from being tabled in Parliament, which adversely affects transparency, accountability and independence of commission.
<p>Chapter 13: Institutions to Combat Corruption and Crime</p>	<p>Zimbabwe Anti-Corruption Commission (ZACC) – ZACC's mandate is to combat corruption, misappropriation, theft, and other improper conduct in public and private sectors. Can direct Commissioner-General of Police to investigate cases and can refer cases to NPA for prosecution. May submit reports to Parliament through relevant Minister. Government is responsible for ensuring power to secure arrest of suspects. Other provisions on conduct of staff, independence and political neutrality of independent commissions also apply to ZACC. Chairperson appointed by President after consulting CSRO. 8 members appointed by President from 12 names provided by CSRO.</p> <p>National Prosecuting Authority (NPA) - Responsible for prosecutions on behalf of the State. Led by Prosecutor-General (PG), appointed by President on advice of JSC (same procedure as appointment of judges). PG appointed for 6 years and can only serve maximum of 2 terms (12 years). PG has powers to direct Commissioner General of Police to investigate cases. PG is accountable to Parliament, reporting to it annually through the Minister. PG is independent and not subject to direction or interference. PG and NPA officers bound by Zimbabwean law and must be politically neutral, non-partisan and professional. PG removed in same way as judge.</p>	<ul style="list-style-type: none"> ▪ The power to investigate corruption and refer matters to NPA is welcome as corruption needs to be fought intensively. ▪ CSRO has huge influence over the appointment of ZACC and can be problematic where it is politically polarised. ▪ No mandatory requirement for ZACC to report to Parliament or some other independent body. Also Ministerial authority required, which is problematic. ▪ Removal of criminal prosecutions from AG to NPA commendable, as is creation of Prosecutor-General. The fixed term of office for PG good; prevents abuse and increases independence. However appointment should be through independent and public process not by JSC as this violates separation of powers. ▪ Reporting to Parliament increases accountability and

An Analysis of the COPAC Final Draft Constitution of 1 February 2013

(c) reserved, Zimbabwe Lawyers for Human Rights, February 2013

		<p>transparency of NPA, but Minister should not have a role.</p> <ul style="list-style-type: none"> ▪ Removal of Prosecutor-General same procedure as that of judge, with same concerns as previously expressed.
<p>Chapter 14: Provincial and Local Government</p>	<p>Preamble recognises need for national unity, prevention of secessionism, popular participation by communities and equitable allocation of national resources. (Addition)</p> <p><i>Devolution</i> - Government responsibilities are devolved 'where appropriate' to recognise right of communities to manage own affairs, ensure equitable sharing of resources, enhance participation and promote democracy. Existing 10 provinces are maintained; a law may provide for alteration of district and provincial boundaries after consulting ZEC and people in areas concerned. All provinces except Harare and Bulawayo have Provincial Councils led by Chairperson (previously a Provincial Governor) who is elected by the Provincial Council (was previously a Presidential appointment) from a list of 2 submitted by the political party that wins the most National Assembly seats in the province or party with most votes in province. Chairperson must be an individual eligible for election as a member of the Senate. In addition to chiefs, Mayors/chairpersons of local authorities, members of National Assembly, Senate and women elected in that province, ten further members are elected by a system of proportional representation and list based on votes cast for candidates running for the National Assembly. Metropolitan councils are led by Mayors of cities of Harare and Bulawayo.</p> <p>Provincial and metropolitan councils are responsible for social and economic development of provinces through development activities, promotion of tourism, management of natural resources, coordination and implementation of governmental programmes and monitoring and evaluation of use of resources. Accountable to residents of province and to national government. Funds allocated to provincial governments must not be less than 5% of national revenue from financial year.</p> <p><i>Local authorities</i> - For urban areas, managed by councils elected by registered voters. Chairperson or Mayor must be directly elected in order to have executive powers provided by law. Districts shall be provided for through statute as well as local authorities for rural areas and election of their councils. Election of local authorities happens at same time as general elections. Councillor loses seat in similar circumstances to those of a Member of Parliament. An Act of Parliament may provide for the establishment of an independent tribunal for the removal of mayors, chairpersons and councillors from office. (Previously through a resolution passed by 2/3 of the entire council's membership)</p>	<ul style="list-style-type: none"> ▪ Whilst the preservation of national unity is important, the right to secession is internationally recognised and cannot be legislated against. ▪ Positive that provision has been made for devolution of power and creation of provincial structures for management of provincial matters. ▪ Also positive that Provincial Governors appointed by President have been scrapped and elected Provincial Chairs will lead provinces. ▪ However, there are no substantive provisions to indicate how the process will work, what structures are to be set up, and how the provincial councils will work. There are also limited legislative or executive powers given to provincial councils and no guarantee that they will be able to formulate and manage their own budget and utilise local resources for the benefit of people in that particular region, essentially making practical devolution academic.
<p>Chapter 15: Traditional Leaders</p>	<p><i>Who are they and what is their focus area?</i> - Chiefs and headmen are traditional leaders. They perform cultural, customary, and traditional functions.</p> <p><i>Status, duties, operations, appointment-related matters</i> - Must not be active in politics; must be neutral, treat people in area equally and fairly. They administer communal land, resolve disputes based on customary law, promote and preserve cultural values and traditions and facilitate development in their areas. Operate in communal land, power to decide on matters arising in that communal land. Appointed by President on recommendations of the Council of Chiefs in accordance with the practices and traditions of the community concerned. Act of Parliament provides for the rest of the procedures on suspension, succession and removal.</p>	<ul style="list-style-type: none"> ▪ Commendable recognition of traditional leaders and their functions, with a role limited to cultural, customary and traditional matters. ▪ Positive inclusion of obligation to be politically neutral. ▪ Good that a body shall be set up to settle their disputes and enforce integrity and ethical conduct. ▪ Power to hear civil matters arising from communal land. ▪ Regrettably no provisions to protect against negative customary practices and also no provisions to clarify

An Analysis of the COPAC Final Draft Constitution of 1 February 2013

(c) reserved, Zimbabwe Lawyers for Human Rights, February 2013

	<p><u>Composition of National Council of Chiefs, functions and location</u> - President and Deputy elected for a 5-year term, renewable once, but a person who has served two terms as Deputy is eligible for election as President. (Addition) Each provincial assembly of Chiefs elects chiefs to Senate (previously done by the National Council). Provincial council of chiefs set up in all provinces except Harare and Bulawayo Metropolitan provinces.</p> <p><u>Complaints</u> - Against traditional leaders, resolution of disputes between them and enforcement of integrity and ethical conduct done through the Integrity and Ethics Committee established by an Act of Parliament.</p>	<p>interaction between the traditional courts and other courts established via Constitution and Acts of Parliament, even though this has been a problem in the past.</p>
<p>Chapter 16: Agricultural Land</p>	<p><u>Title/authority over land</u> - Right of usage/occupation of agricultural land vests in State once Constitution is effective. Occupiers with a lease or other agreement with State, continue to be entitled to use and occupy land under new Constitution.</p> <p><u>Principles guiding land policy</u> – every Zimbabwe citizen regardless of race or colour has right to acquire, hold, occupy, use, lease or dispose of agricultural land; allocation and distribution must be fair and equitable and have regard to gender balance and diverse community interests; land use should promote food security, good health and nutrition, generate employment and increase productivity and investment; no arbitrary deprivation of right to use and occupy agricultural land.</p> <p><u>State's obligation and transfer of ownership</u> – Must give lawful owners and occupiers security of tenure.</p> <p><u>Ownership</u> can be transferred by individuals or State if they own it, for value. However the State cannot transfer more than 1 piece of land to same person or his/her dependants.</p> <p><u>Right of compensation</u> – Compensation (land and improvements) will be provided by the State to any indigenous Zimbabwean whose land was acquired before Constitution came into force; and any person whose property rights were protected by agreement between Zimbabwe government and the government of another country. Any other person whose land was acquired by the State is only entitled to compensation by the State for improvements. The manner of assessment and payment is to be provided for by Act</p> <p><u>Zimbabwe Land Commission (ZLC), functions and composition</u> – Established to ensure accountability, fairness and transparency in administration of agricultural land. Has Chairperson appointed unilaterally by President (previously appointed after consulting CSRO), a minimum of 2 and maximum of 7 (previously 8) other members unilaterally appointed by President (previously appointed from 12 names given by CSRO). Clause providing for 2 members nominated by Council of Chiefs has been dropped.</p>	<ul style="list-style-type: none"> • Continued retention and implementation of land nationalisation policy. ▪ This seems to be an attempt to deal with the long-standing challenge of multiple land ownership. ▪ Payment of compensation is progressive and in line with principles of natural justice. The distinction between compensation for indigenous Zimbabweans, as well as government-to-government protected land can potentially be challenged as discriminatory. There is a further contradiction between provisions here and those in the Declaration of Rights which states that only compensation for improvements can be paid, payment subject to funds being provided by former colonial power. ▪ Creating Zimbabwe Land Commission is welcome, but regrettable that President appoints all its members without regard to the recommendations of any other body or that body's approval.
<p>Chapter 17: Finance</p>	<p><u>State revenues and expenditures</u> - Parliament has oversight. Limits on borrowing by State, public debt, debts and obligations guaranteed by State and allocations to provincial governments to be provided by law. Allocation to provinces and local authorities must be not less than 5% of national revenue in financial year. Minister responsible</p>	<ul style="list-style-type: none"> ▪ No provision to ensure information relating to inflows and expenditure is transparent and easily accessible to public. ▪ No requirement that Ministries publicly report on how they

An Analysis of the COPAC Final Draft Constitution of 1 February 2013

(c) reserved, Zimbabwe Lawyers for Human Rights, February 2013

	<p>for Finance must report to Parliament 2 times a year on performance of loans raised or guaranteed by State. When estimates of revenue and expenditure are presented before National Assembly, responsible Minister is required to give comprehensive statement of the public debt of Zimbabwe.</p> <p><u>Consolidated Revenue Fund</u> - Holds all state revenue unless law provides otherwise. State debt charged to Fund and money is appropriated through Appropriations Bill. Law may allow President to withdraw money from Fund for unforeseen expenditure not in excess of 1.5% of total amount appropriated in law. Money for use before an Appropriations Act comes into force in first 4 months of financial year to be provided by law, if not in excess of 1/3 of amount appropriated in previous financial year. Law can provide for appropriation of money if Parliament is dissolved before appropriating money; such appropriation must be included in a law. Unauthorised expenditure requires responsible Minister to table a bill before House of Assembly for expenditure to be allowed.</p> <p><u>Auditor General</u> – Independent office responsible for auditing accounts, financial systems of all departments, institutions and government agencies. Appointed by President with approval of Parliament for 6 years and can serve 2 terms only. Can only be removed from office after a tribunal set up by President recommends such action. Tribunal is set up on recommendation of Finance Minister with agreement of Public Accounts Parliamentary Committee. Recommendations of tribunal bind President.</p> <p><u>Procedure for procurement, other government contracts, terms of office</u> - Provided by law; must be cost-effective, honest, fair, competitive and transparent. Law to provide for management of statutory bodies. Chief executive officers of such bodies serve limited periods renewed based on efficient performance of duties. Regulation of Zimbabwe’s monetary system, protection of currency and formulation and execution of monetary policy done by Reserve Bank of Zimbabwe. Structure, organisation and function provided by law.</p>	<p>spent resources and neither is Auditor General required to report to any independent body.</p> <ul style="list-style-type: none"> ▪ No provision for a comprehensive public consultative process prior to drawing up national budget or for gender- and regional-sensitive budgeting. ▪ Auditor General appears independent; however is again appointed by President albeit with Parliamentary approval, and can only be removed on recommendations of a tribunal. Undue executive control may impact independence and propriety of removal procedures. ▪ Commendable that the chief executive officers of statutory bodies have limited time in office that is renewed based on efficiency of performance of duties.
<p>Chapter 18: General & Supplementary Provisions</p>	<p><u>Constitutional Commissions</u> – Commissioners have a 5-year term, renewable once unless Constitution provides otherwise. Members serve at President’s pleasure except Independent Commissions, JSC, ZACC and ZLC (additions). Commission Chairs, Deputies to be of different gender. No MPs, provincial/metropolitan councils, local authorities or government-controlled entities can be members. Annual activity report to be submitted to Senate and National Assembly by March every year. Decisions taken by half of members; presiding individual casts vote in event of tie. Government must ensure that commissions, Parliament and other state institutions are adequately funded.</p> <p><u>Customary international law; international treaties</u> – Part of Zimbabwe law unless contrary to Constitution or local law; to be applied by Courts, tribunals in interpreting legislation. International treaties are binding once approved by Parliament and made part of local law; treaties imposing fiscal obligations need parliamentary approval, but this can be waived if no budgetary implication on Consolidated Revenue Fund/where it does not modify the law.</p> <p><u>Amendment of Constitution</u> – Requires prior notice and 2/3 affirmative votes from each House of Parliament; subject to referendum if amending Declaration of Rights or Agricultural Land provisions. Amendment to lengthen term-limits not applicable to person who held office before amendment. Cannot amend the Declaration of Rights and extend term limits in the same constitutional Bill.</p>	<ul style="list-style-type: none"> ▪ Provisions advance gender parity and equality. ▪ Requirement to submit reports to Parliament increases accountability and transparency of those institutions. ▪ Problematic that Commissioners serve at pleasure of President, as is fact that President still has undue influence and control over service commissions. ▪ Correct to ensure compliance with customary international law. What is problematic is an attempt to circumvent such law and international obligations using Constitution or local laws. This is not possible under international law. ▪ This is progressive and ensures that amendments to key provisions must have peoples’ consent and cannot be done easily or arbitrarily. However problematic provisions will also be difficult to amend.

An Analysis of the COPAC Final Draft Constitution of 1 February 2013

(c) reserved, Zimbabwe Lawyers for Human Rights, February 2013

Appointing power – This power (in many instances exercised by President) includes reappointing, promoting, transferring, fixing and varying conditions of service, and suspension or removal from office. If Senate approval required for appointment, no functions of office is performed until approval

Emergency law – Does not limit fundamental rights and freedoms. Allows preventive detention, but must be reviewed by tribunal appointed by President on advice of JSC after consulting CSRO. Detainees to be informed of reasons of detention, may elect to consult own lawyer or use one provided by State. Detained persons retain rights to access courts to challenge lawfulness of detention.

Qualification as voter – Individual must be over 18 years and Zimbabwe citizen. Electoral law may provide additional requirements but must be consistent with political rights protected in constitution. Disqualified from voting if mentally disordered or intellectually handicapped, incapable of managing affairs, or convicted of offences under Electoral Law, or disqualified by High Court.

Commencement of Constitution - Comes into force (with transitional provisions) on publication of Constitution in Gazette together with provisions relating to citizenship; Declaration of Rights; election and assumption of office by President; election of MPs and summoning Parliament after general election; elections; principles of public administration and leadership; conduct of members of the security services, ZEC, and provincial and local government. All other provisions of the Constitution come into operation on day the President-elect assumes office; when the former Constitution is finally repealed.

Transitional provisions –

First Elections

- Provincial and electoral boundaries are maintained as before the publication date.
- Any person lawfully on voters' roll previously remains a registered voter.
- Registrar-General, under ZEC's supervision, responsible for registering voters, compiling voters' roll and carrying out special, intensive voter registration for at least 30 days after publication of Constitution.
- Challenge to validity of presidential election to be handled by Supreme Court and not new Constitutional Court under the former constitution but applying provisions of new Constitution. Electoral Law for first elections must be in line with the draft Constitution after it is published in Gazette.

Office Bearers

- Those in public office continue to hold such office or equivalent in new Constitution on same conditions of service until expiry of their term, or they resign, retire or are removed from office in terms of new Constitution or old conditions of service.
- President, Vice Presidents, Prime Minister, Deputy Prime Ministers, Ministers and Deputy Ministers will retain current officer holders until the President-elect assumes office under new Constitution.

- Problematic that preventive detention can be done first, and then only reviewed later once rights may already have been violated.
- The potential danger is that the Electoral Law may impose additional suspicious or harsh voter registration requirements to may make registration more problematic, in violation of Constitutional safeguards.
- Problematic that Registrar General remains in control of voters' roll and registration as his role is much disputed.
- Not clear why Constitutional Court cannot consider any presidential election challenge.
- A slight safeguard is provided by ensuring use of new electoral provisions, but if there is lack of confidence in previous bench, this will be problematic for acceptance of the court's findings in such an electoral challenge.
- It is disappointing to note that all office-bearers within the public service, judiciary, office of the Attorney General, amongst others, will retain their office without some form of audit to assess their work output, efficiency and professionalism, amongst other requirements under the new Constitution. This will not assist in strengthening public confidence in the public administration and state institutions and actors and will adversely affect efforts to strengthen such institutions under this new Constitution.

An Analysis of the COPAC Final Draft Constitution of 1 February 2013

(c) reserved, Zimbabwe Lawyers for Human Rights, February 2013

Existing Laws and Standing Orders

All laws continue in force but must be applied and interpreted in conformity with new Constitution. Standing Orders of Parliament remain in force until amended or replaced in accordance with new Constitution.

Public Protector's Office

This office is removed, its Act repealed and pending matters transferred to the Human Rights Commission.

Judicial officers

Supreme Court, High Court, Labour and Administrative Court judges remain as constituted under new Constitution and their decisions still have effect. Persons presiding over Labour Court and Administrative Court will become judges of Labour Court and Administrative Court on same conditions of service as High Court judges with their service prior to the effective date deemed to have been that of a High Court judge. Magistrates' courts and traditional courts also remain in force and decisions remain effective.

Constitutional Court

For first 7 years after new Constitution is effective, the Constitutional Court will consist of current Chief Justice, Deputy Chief Justice and seven other judges of the Supreme Court (previously this was 4 most senior judges of Supreme Court and 3 new judges appointed in terms of new Constitution). Vacancies in the Constitutional Court are filled by an additional, acting or other judge of the Supreme Court in the first seven years after the effective date. (Previous requirement was that the Court must be set up within 6 months after the first election, with its powers being exercised by the current Supreme Court in the intervening period) Once set up, constitutional cases must be transferred to it from other courts.

Prosecutor General

Decisions by the AG relating to criminal proceedings before new Constitution takes effect will be deemed to have been taken by the Prosecutor-General. The current Attorney-General under former Constitution will become the Prosecutor-General when new Constitution becomes effective.

Tenure of First President and appointment of Vice Presidents – For the first election after the effective date and for ten years thereafter, President does not nominate running mates and appoints up to two Vice Presidents after election. In the event of death, resignation or removal of President the Vice, or where there are two the Vice who was last Acting President, acts as President until the new President assumes office. The political party represented by the last President nominates the next President. In the case of a President who stood as an independent candidate, the Vice assumes Presidency and if there are two, the Vice who last acted as President assumes Presidency. (addition)

- This is welcome as the Public Protector's Office has been ineffective and inefficient for many years.
- This entrenches the status quo, promoting the entire Supreme Court bench upwards without allowing for a public process and scrutiny of acceptability for this important role. Appointment of 6 out of 9 judges of Constitutional Court is already pre-determined.
- These provisions are highly problematic as there is no possibility of scrutinising the acceptability of the incumbent and previous prosecution decisions. The Prosecutor General is a technical, professional position, whilst the Attorney General is a political appointee. To transfer the latter to the new office will ensure political tainting of the new office, lack of public confidence, and a compromised office right from the start. There should be a public appointment process, with proper scrutiny of any candidates.