**8 mistakes in Zimbabwe's 2013 Constitution**

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On May 22, 2023, Zimbabwe's Constitution turned 10, having become effective on 22 May 2013. This year, we mark the 10-year anniversary. I choose to mark this day with a reflection, and my reflection is on the mistakes we made when we crafted that Constitution.

That we made mistakes is not the death of our constitutional project. Firstly, yes, we made monumental mistakes, but the fact remains that we are not where we used to be, and our Constitution ranks among some of the best in the region and elsewhere.

Secondly, we are a young constitutional democracy. We have no experience with these things; we are learning. Thirdly, constitutions are living documents; they will forever be in a never-ending state of pursuing perfection and weaving through to cover any loopholes, those apparent in the instant, and those to become apparent later. It is experiences and testing times that show us the weak points.

Thus, even as I attempt this exercise, many mistakes remain embedded, camouflaged from the naked and discerning eye, simply because time and experience are yet to test the relevant provisions. In this paper, I discuss what I believe to be apparent mistakes that have been illustrated by our experiences in the first decade of our nascent Constitution.

We have many great and novel aspects of modern-day constitutionalism in our Constitution: Chapter 12 institutions supporting democracy; and an expansive and justiciable Declaration of Rights with first, second and third-generation rights. Section 44 is novel in its formulation: it imposes obligations to respect, promote, fulfil and protect the Declaration of Rights to all, state and non-state, juristic and natural persons, alike.

Thus, we will find no equivalence elsewhere. We have 16 official languages (section 6(1)); this has no match. We have devolution of power and responsibilities (Chapter 14). We have a transitional justice mechanism — the National Peace and Reconciliation, albeit with a 10-year sunset clause (sections 251-253). And never mind the controversies and ineffectuality this body has been up to. We have a corruption-fighting mechanism, the Zimbabwe Anti-Corruption Commission (sections 254-257) – something many constitutions do not have.

The President is not allowed to veto legislation in law-making (section 131); this is a great thing. And many more.

But there are things I think we should have done better, some of them only in hindsight. These are architectural issues. I am alive to the fact that the Constitution was negotiated; there were many drafts. There were long days and nights and debates. There were walkouts. There were stalemates. There were compromises. Nonetheless, even compromise documents must be critiqued.

**We missed an opportunity to clearly stipulate an election date, and we now have to deal with secrecy**

Why should the next election date be a secret, to be pronounced by the incumbent, when he or she feels ready and feels like pronouncing the date? What if he or she does not feel like pronouncing it, or decides to pronounce it on short notice? Who suffers what prejudice?

There is no reason why a whole nation and an entire world should be kept guessing about when we are having elections unless someone somewhere wants to do something with election timing to derive a benefit. Assuming nothing is done or is about to be done in manipulating timing, the optics and perception are enough to taint credibility.

In other countries, take Kenya for instance, we already know that the next general elections will be held on August 9, 2027. Why? Because the Constitution stipulates the day of polling in an election year.

In hindsight, not stating the polling date when we developed the Constitution was a mistake. Ordinarily, it should not be an issue that the Constitution does not stipulate the polling date. But context matters: Zimbabwe is an arena for disputed elections which has all sorts of manipulations.

In the case of Douglas Togaraseyi Mwonzora and Movement for Democratic Change-T v Zimbabwe Electoral Commission, the President of the Republic of Zimbabwe and the Minister of Justice, Legal and Parliamentary Affairs CCZ 20/2023 sought to interdict the President from proclaiming elections when they become constitutionally due, on account of a defective 2023 delimitation report, was a constitutional crisis in the making had the Court decided to go with Mwonzora's extraordinary relief sought. Fortunately, this was averted when the Court dismissed the matter this May 2023.

The issue of election date was, in fact, the very first case to be determined by the then-new Zimbabwe Constitutional Court in 2013 in the case of Jealousy Mbizvo Mawarire v Robert Gabriel Mugabe N.O., Morgan Richard Tsvangirai N.O., Arthur Guseni Oliver Mutambara N.O., Welshman Ncube and The Attorney-General CCZ 1/13 under the old Constitution.

Interestingly, in that case, Mawarire was seeking the opposite of a delayed election, but an order for the then President Robert Mugabe to proclaim an election at a sooner date, in the process undermining the efforts that SADC as the guarantor of the Global Political Agreement was undertaking. A Sadc meeting that was scheduled for Maputo in early July 2013 was postponed on account of the Constitutional Court judgment in Harare.

Sadc was meant to ensure that Zimbabwe could actually hold an election that would be credible, peaceful, free and fair, which included dealing with matters that were arising from the Global Political Agreement and the electoral road map. We were plunged into an early election without Sadc accompaniment that ended the Government of National Unity. The Mawarire case was an apparent "tortoise on a lamppost litigation", suggesting a scheme designed to defeat Sadc processes.

The Constitution of Zimbabwe states that general elections are held no later than 30 days before the end of the current term, which current term commenced on 26 August 2018 and will end on 25 August 2023. In the case of the 2023 elections, section 161(2) which states that "If a delimitation of electoral boundaries is completed less than six months before polling day in a general election, the boundaries so delimited do not apply to that election, and instead the boundaries that existed immediately before the delimitation are applicable", to conclude that given when the delimitation report was gazetted, we only have the window of August 20– 26, 2023 for the election.

Then, polling should be held no sooner than 30 days after the nomination of candidates. Such nomination must be set at least 14 days after the publication of the election proclamation.

Why should we crack our heads to calculate an election date? This was and remains unnecessary. The actual polling day in an election year should have been stated in the Constitution, given that in this country we do harmonised elections as required by the Constitution — where the election of the President, Members of Parliament and local councillors happen at one go.

**We allowed the Constitution's basic structure and the structure of government to be amended without a referendum**

We only entrenched three parts of the Constitution: Chapter 4 (Declaration of Rights), Chapter 16 (Agricultural Land), and Section 328 (Amendment of Constitution). Entrenched provisions refer to provisions that cannot be easily amended; they require a special procedure. Under section 328 of the Constitution, Zimbabwe's Constitution can be amended without resort to a national referendum by a two-thirds majority vote in both houses of Parliament, save for Chapters 4 and 16, and section 328 itself. We entrench because we consider provisions to be important. This means we chose Chapters 4 and 16 and Section 328 as the most important. It is not difficult to understand why: Chapter 4 is a critical part — it is the Declaration of Rights. Chapter 16 is on agricultural land — the history of Zimbabwe has to do with land dispossession and land repossession, so it makes sense to entrench such a provision. Section 328 is a protective clause. I find no fault in the entrenchment of these parts of our Constitution. But was that all we needed to entrench?

Therein lies a big problem: we should have insulated from the parliamentary amendment, changes to the Constitution that alter the basic structure of the Constitution and of government, including principles of limited government, separation of powers and checks and balances. We should have required a referendum to alter things like appointment and extension of tenure of the head of an arm of government.

The absence of this scaffolding is what allowed for the Constitution of Zimbabwe Amendment (No. 2) Act to allow for the President to extend the tenure of the Chief Justice and to allow the President to control promotions within the judiciary from one superior court to another.

The prevailing perception is that the incumbent Chief Justice was preserved in May 2021 through Amendment (No. 2) Act for these 2023 elections, to deliver the kinds of judgments that will be expected of him by the authorities that kept him there. That the election results will be disputed is obvious: there have been no meaningful reforms between the last election and now; the same trouble-causing factors that were there in the last elections are there in this one. So, we cannot expect a different outcome. Yet the perception is that the incumbent has lined up the courts and has prepared for that battle.

This perception dissuades meaningful participation by voters; and shakes whatever little confidence people may have in the elections. It does not help that the extension of the Chief Justice's tenure through an amendment to the Constitution was in breach of section 328(7) of the Constitution which states that "Notwithstanding any other provision of this section, an amendment to a term-limit provision, the effect of which is to extend the length of time that a person may hold or occupy any public office, does not apply in relation to any person who held or occupied that office, or an equivalent office, at any time before the amendment."

The Constitutional Court had to employ legal sophistry in Marx Mupungu v Minister of Justice, Legal and Parliamentary Affairs; Judicial Service Commission; Musa Kika; Young Lawyers Association of Zimbabwe; Frederick Charles Mutanda; Attorney-General and President of Zimbabwe CCZ 07/21 to arrive at a conclusion that defeats the import of section 328(7).

It also does not help that the way our courts have handled election dispute resolution in the past has left much to be desired. The Chamisa v Mnangagwa & 24 Ors case of 2018 was criticised by the Malawian courts in their own presidential election challenge in 2020 in Mutharika & Anor. v Chilima & Another.

Following the Constitution of Zimbabwe Amendment (No. 2) Act, which effectively rearranged judicial appointments and the state of judicial independence, the Chief Justice Malaba crisis wherein his continuance in office was legally challenged, almost ushered us into a constitutional crisis.

Here is an example of the sort of entrenchment we needed: in Kenya, section 255(1) ("Amendment of this Constitution") requires a referendum if the amendment relates to any of the following matters: (a) the supremacy of the Constitution; (b) the territory of Kenya; (c) the sovereignty of the people; (d) the national values and principles of governance referred to in Article 10(2)(a) to (d); (e) the Bill of Rights; (f) the term of office of the President; (g) the independence of the Judiciary and the commissions and independent offices; (h) the functions of Parliament; (i) the objects, principles and structure of devolved government; or (j) the provisions of the Chapter on amendment of the Constitution.

**We did not provide for people-driven amendments to the Constitution**

We omitted to clothe "we the people" with the power to initiate amendments to the Constitution.

Zimbabwe's Constitution is more emphatic than many on the status of "the people". Four times, the Constitution mentions that power and authority derive from the people. Section 3(2)(f) on founding values and principles states as one of the founding values and principles, is "respect for the people of Zimbabwe, from whom the authority to govern is derived".

Section 88(1) on Executive authority states that "Executive authority derives from the people of Zimbabwe and must be exercised in accordance with this Constitution". Section 117(1) on the nature and extent of legislative authority, states that "The legislative authority of Zimbabwe is derived from the people and is vested in and exercised in accordance with this Constitution by the Legislature". Section 162(1) on judicial authority states that "Judicial authority derives from the people of Zimbabwe and is vested in the courts".

People-driven or people-initiated processes to amend the Constitution have been infused in various constitutional architectures, Kenya being an example. The Kenyan people can formally initiate a process to amend the Constitution. This process is in section 257 of the Kenyan Constitution of 2010, and is called "Amendment by popular initiative".

In Kenya, an amendment to the Constitution where a referendum is not required, may be proposed by a popular initiative signed by at least one million registered voters (Kenya has a population of over 53 million), and a popular initiative for an amendment to this Constitution may be in the form of a general suggestion or a formulated draft Bill. The other route to amending the Constitution is "Amendment by parliamentary initiative" under section 256 of the Constitution.

**There is no transitional mechanism for the transfer of power**

Zimbabwe's Constitution contains no transitional arrangements from one administration to another, and no statute covers this. The only provisions which inadequately deal with transition are section 94 (Assumption of office by President and Vice Presidents), section 3(2)(c) on the founding values and principles of Zimbabwe which requires "the orderly transfer of power following elections", and section 145 (First sitting of Parliament following general elections). But that is where it ends and nothing else is said anywhere in the Constitution on how this orderly transfer is to be done. Neither is there a stated obligation for legislation to be put in place to attend to this.

Section 94(1) states that a President-elect (and Vice-President) must be sworn in "on the ninth day after they are declared to be elected; or in the event of a challenge to the validity of their election, within forty-eight hours after the Constitutional Court has declared them to be the winners". Further, section 94(2) states that "The incumbent President continues in office until the assumption of office by the President-elect in terms of subsection (1)". Another provision is section 145(1) titled "First sitting of Parliament following the general election" which states that "The first sitting of Parliament after a general election must take place at a time and date determined by the President, but the date must not be later than thirty days after the President-elect assumes office in terms of section 94".

Transition is anticipated under our Constitution. The Constitution sets a maximum of two five-year terms for the presidency. Thus every 10 years a new President should assume office, whether from the ruling party or an opposition party. Not having a transfer of power framework was a grave oversight, but perhaps one that was not entirely deliberate because Zimbabwe has never really experienced such a moment of change. The change of President in November 2017 was not occasioned by an election, and simply obtained a change of the President and not the governing party or administration. The absence of a regulatory mechanism poses a threat to democratic consolidation in Zimbabwe, in that this leads to manipulation of a transition, and may potentially cause a failed transition. I am of the view that the challenges of March 2008 would possibly have been averted had we had a transitional mechanism tightly in place.

Not only do we need to prepare for a change in presidency, but the consequential change in mandates, policies, and, in many cases, new departmental leadership. Turnover of leadership in government agencies and departments is a reality in a presidential transition — that too must be prepared for.

A transitional framework is necessary to ensure a smooth transition of power, including eliminating power vacuums and allocating responsibilities and powers during a transitional phase. Without a transitional law, we are essentially relying on the goodwill and even discretion of the incumbent. Should we simply trust that the incumbent will not only hand power but will hand over the necessary tools by which and through which power is to be exercised? It is not unusual for a new administration to come in and find the coffers empty, or for an incoming administration to be denied certain information.

But there is also an interesting subtle power to having a clear transitional framework: giving the people a picture of what change looks like facilitates for change. And change is an inherent component of democracy. A clear transitional framework assures those who are fearful of change; fearful because they do not know what change may mean or will look like, and those fearful because of fear of accountability. It is part of ingraining normalcy in change, and the thinking that change is possible and indeed desirable. The whole constitutional architecture is built on the premise that power must change — hence we do elections every five years, and we have term limits in many other offices. As former South African Deputy Chief Justice Dikgang Moseneke has argued in a debate, democracy is premised on the insecurity of tenure — not the security of tenure.

A transitional mechanism will strengthen the country's democracy by clearly stipulating how power and responsibility exchange hands at points of change of administration following elections. Such a mechanism will deal with questions such as: What kind of body/agency/structure/committee/entity/authority will be set up to manage the transition? Who may be appointed to such an entity and by whom? What are the terms of reference? What are the powers of the structure? For how long must this structure-function? Who manages handover and takeover? How do we sign functionaries out and in? How do we protect assets and resources from capture and seizure? Who orients incoming leadership? How is security for the incoming and the outgoing managed?

Who decides what documents and what materials are handed over to an incoming government or an incoming President? How long should it take until swearing happens? What happens before then? How is a transition funded? How are the Zimbabwean people kept informed? What is the communication system like during this transitional phase?

The whole transition is not something that starts when elections are called or when polling happens. This is a process that must start months ahead to prepare for the possibility of a change of President, but also a change of the governing party in toto. While some of these questions may be resolved through convention which gets established over time, for the security of our democracy, we need to bring clarity, certainty and completeness in provisions, in one source of law.

Other countries have these mechanisms. For instance, in the United States of America, the Presidential Transition Act directs the President and the incumbent Administration to establish a specified transition-related infrastructure, with some features ongoing and others active during a presidential election year only. The American presidential transition mechanism is one of the hallmarks of that democracy.

In Ghana, the Presidential (Transition) Act 843 of 2012 provides for what is called a Transition Team and was designed after dramatic transitions gone wrong in that country. In Zambia, the recently adopted Transitional Period and Inauguration of the President Act, of 2016, set up the Presidential Inauguration Committee and facilitated the power transition recently witnessed in 2021.

Namibia attempted to work on a Presidential Transitional Bill in 2014, but this was shelved with the caveat that this would be revived when required in future. Kenya has the Assumption of the Office of President Act No. 21 of 2012, and in Nigeria, there is a Presidential Transition Council to facilitate and manage the handing over of power by the government. For the 2023 elections, the Nigerian President signed Executive Order No. 14 of 2023 on the Facilitation and Management of Presidential Transitions. The new Executive Order puts in place a legal framework for the seamless transition of power from one presidential administration to another and approved the establishment of a Presidential Transition Council to be chaired by the Secretary to the Government of the Federation (SGF), to facilitate and manage the 2023 Presidential transition programme.

**We created an imperial President — this is not good for limited government and checks and balances**

In the Constitution of Zimbabwe, 2013, we created an imperial President, an omnipresent President without whom things do not move. This is what the centralisation of power looks like. I did a search: the word "President" appears 512 times in the Constitution!

Per section 88(2), the executive authority of Zimbabwe vests in the President who exercises it, subject to this Constitution, through the Cabinet. The President is the Head of State and Government and the Commander-in-Chief of the Defence Forces. The powers are mind-boggling. Let me illustrate: The President appoints Ministers and assigns functions to them, including the administration of any Act of Parliament or of any Ministry or department, and may reserve to himself or herself the administration of an Act, Ministry or department.

The President appoints Deputy Ministers. Permanent Secretaries of Ministries are appointed by the President after consultation with the Civil Service Commission. Only the President knows polling day and has the prerogative to proclaim an election. Chapter 12 Commissioners are appointed by the President, with the appointment of the Chairpersons being done by the President without any other limiting authority.

The Chapter 12 Commissions are the Zimbabwe Electoral Commission; Zimbabwe Human Rights Commission; Zimbabwe Gender Commission; Zimbabwe Media Commission; and the National Peace and Reconciliation Commission. Then there are Chapter 13 institutions: the President appoints commissioners of the Zimbabwe Anti-Corruption Commission, with the appointment of the Chairperson being done by the President without any other limiting authority. With the National Prosecuting Authority, the Prosecutor-General is appointed by the President on the advice of the Judicial Service Commission following the procedure for the appointment of a judge.

The President appoints judges — and now he also promotes them from one superior court to another, in his power. He appoints the Chief Justice, Deputy Chief Justice and Judge President of the High Court. The President appoints some members of the Judicial Service Commission. The President appoints the Citizenship and Immigration Board consisting of a chairperson and at least two other members. The President appoints the Civil Service Commission consisting of a chairperson and deputy chairperson and up to five other members. The President has the prerogative of mercy (pardon of prisoners).

The President chairs the National Security Council consisting of the President as chairperson, the Vice-Presidents and Ministers and members of the security services and other persons as may be determined in an Act of Parliament. The President appoints the Defence Forces Service Commission consisting of a chairperson who must be the chairperson of the Civil Service Commission, and up to six other members. Every Commander of the Defence Forces, and every Commander of a service of the Defence Forces, is appointed by the President after consultation with the Minister responsible for the Defence Force.

The Commissioner-General of Police is appointed by the President after consultation with the Minister responsible for the police. There is also a Police Service Commission consisting of a chairperson, who must be the chairperson of the Civil Service Commission, and up to six other members, all appointed by the President. The Director-General of Intelligence Services who commands the national intelligence service is appointed by the President.

The Commissioner-General of the Prisons and Correctional Service is appointed by the President after consultation with the Minister responsible for the Prisons and Correctional Service. And there is a Prisons and Correctional Service Commission consisting of a chairperson, who must be the chairperson of the Civil Service Commission, and up to six other members, again all appointed by the President.

For clarity, "after consultation" means the President is not bound by the views, advice or recommendation of whomever he or she consults.

The President has the powers to assent to and sign Bills; to summon the National Assembly, the Senate or Parliament to an extraordinary sitting to conduct special business; to call referendums on any matter in accordance with the law; to deploy the Defence Forces; to confer honours and awards; to appoint ambassadors, plenipotentiaries, and diplomatic and consular representatives; and to receive and recognise foreign diplomatic and consular representatives. The President has the power to declare war and make peace, and the President may declare a state of public emergency in the whole or any part of Zimbabwe. The President appoints the Attorney General.

When it comes to traditional leaders, the appointment, removal and suspension of Chiefs must be done by the President on the recommendation of the provincial assembly of Chiefs through the National Council of Chiefs and the Minister responsible for traditional leaders and in accordance with the traditional practices and traditions of the communities concerned. Disputes concerning the appointment, suspension and removal of traditional leaders must be resolved by the President on the recommendation of the provincial assembly of Chiefs through the Minister responsible for traditional leaders.

The President appoints members of the Zimbabwe Land Commission, consisting of a chairperson and deputy chairperson; and a minimum of two and a maximum of seven other members. The Auditor-General is appointed by the President with the approval of Parliament. The President appoints the Detainees Review Tribunal on the advice of the Judicial Service Commission and after consultation with the Committee on Standing Rules and Orders, as the Constitution requires that an emergency law that permits preventive detention must provide for the establishment of a tribunal to review the cases of detainees.

Per section 320(2) of the Constitution, members of Commissions, other than the independent Commissions; the Judicial Service Commission; the Zimbabwe Anti-Corruption Commission; and the Zimbabwe Land Commission, hold office at the pleasure of the President.

Whomever the President appoints, he can fire, subject to whatever safeguards there are for some positions — to the extent that such safeguards can withstand political decision- making. For some offices that require a tribunal inquiry prior to removal, such tribunals are appointed by the President. This is the case with judges and constitutional commissioners.

In addition to what the Constitution confers, the President exercises powers granted to him by some of the hundreds of statutes in the country. Among these is the Presidential Powers (Temporary Measures) Act [Chapter 10:20], a statute that has time and again caused problems, and that allows the President to become the legislature and the executive all in one.

More power should have been given to institutions, as opposed to the President. Curiously, both the Constitution of Zimbabwe Amendment (No. 1) Act and (No. 2) Act had a running theme of increasing presidential powers, including removing the running mate clause and instead giving the president the power to hire and fire the Vice President(s). The functions of the Vice President, including the administration of any Ministry, department or Act of Parliament, are assigned by the President.

Now there is also a lot of informal power being concentrated on the President. What this does is promote and facilitate patronage. It erodes the power, authority and efficacy of institutions. It is no wonder the President is now referred to as the "father" of the nation and his wife is now our "mother". Our chances of achieving limited government and checks and balances as our Constitution demands, are inherently defeated. Yes, we copied other constitutions in these things, but not only did we make a mistake, we went overboard.

**We gave political parties the power to recall MPs instead of voters**

One of the most abused constitutional mistakes in the last decade has been the recall provision. Section 129(1)(k) of the Constitution states that the seat of a Member of Parliament becomes vacant "if the Member has ceased to belong to the political party of which he or she was a member when elected to Parliament and the political party concerned, by written notice to the Speaker or the President of the Senate, as the case may be, has declared that the Member has ceased to belong to it".

This clause has been litigated before the courts. The reality is that all parties have been perceiving benefits out of the recall provision, in that it gives them power over their representatives and prevents floor crossing. Most of the political players in today's political arena in Zimbabwe have used the recall provision at one point or another, including those who later became victims or potential victims of this clause. MDC, as led by Morgan Tsvangirai, used the recall provision in 2015. Zanu-PF used it in 2018.

Douglas Mwonzora's MDC outfit has had a field day at it. Other smaller parties such as the People's Democratic Party - Zimbabwe have also enjoyed themselves under section 129(1)(k). But here we are not interested in what is in the interest of the parties. Our interest is what is in the interest of our constitutional democracy.

We made a mistake in giving parties the power to recall elected representatives, which representatives would have been elected by the people.

This is unlike a proportional representation party-list system such as South Africa where people vote for a party and the party appoints representatives. Here in Zimbabwe people directly vote for their representatives, albeit candidates mostly run on party tickets. But running on a party ticket does not mean the representative belongs to the party; the representative belongs to the people. The proportional representation MPs should have been the only exception — those the nominating parties may recall.

The people choose their parliamentary and council representatives; the people must recall. That must have been the position. The people should have been given the power to recall when floor crossing happens; they must recall when they feel they are no longer served by the person. How does someone go quiet for five years in Parliament? How does someone not show up in their constituency for five years? But parties care less for this; they will only recall if they feel the person is no longer loyal or has left the party — as opposed to failure to discharge their mandate. One can see the way section 129(1)(k) is phrased that it protects not the interest of the constituents or the voters, but of the parties. Notice that one is recalled on the basis that they have left the party – not that they are sleeping on duty and not doing their job!

Parties must not have the powers to recall MPs and councillors without authorisation from the people. We have learnt the kind of damage that could result from people like Douglas Mwonzora, wielding such power.

What has been happening in practice is that recalls have been used by political parties to deal with internal dissent. In the process, recalls have resulted in the people being rendered unrepresented. But who cares about the people – political parties? No.

Since COVID-19 started and a statutory instrument was gazetted indefinitely suspending by-elections, a long time passed without by-elections, such that when by-elections were eventually proclaimed for 26 March 2022, there were 28 vacancies in National Assembly seats and 122 in local authorities, mostly attributed to recalls by Douglas Mwonzora's MDC-T party. The by-elections were held long after the lapse of the 90-day period within which vacancies should be constitutionally filled in. This had left hundreds of thousands unrepresented. This is not how democracy should work.

Our Constitution also says by-elections are not required when a vacancy occurs within 9 months to a general election. This means whatever position becomes vacant may not be filled (section 158(3)). Now, this is very dangerous in a context like Zimbabwe. As of March 2023, we were still seeing recalls. MDC-T leader Douglas Mwonzora had by then recalled 13 more party councillors from four local authorities Norton, Kwekwe, Kadoma and Mutare, for alleged disloyalty. Imagine a situation where a party can recall so many MPs – as there is no limit to recalls – that balance of power could be offset in Parliament, and critical legislation would be passed within that period? We created a dangerous situation with this recall provision.

We excluded a significant part of our economically active group from voting

We should have expressly included the diaspora vote in the Constitution and not leave it to interpretation. The Constitutional Court has now tragically interpreted the Constitution against the diaspora vote.

With the diaspora vote or external voting, there are attitudinal and political blockages which have been clothed with legalities. The incumbents believe that the estimated over 3 million in the diaspora, are mostly pro-opposition and will tilt the vote in favour of the opposition given that most in the diaspora are of voting age and many have an active interest to vote if given the opportunity. A side note here is that the official figures of the 2022 census report state that there are 908,913 Zimbabwean nationals that make up the diaspora, and South Africa is officially home to 773,246 of these.

However, unofficial reports state that there are over three million Zimbabweans in the diaspora. The government itself once made this latter claim. The attitudinal and political blockages have now been turned into law through the Constitutional Court decisions Bukaibenyu v ZEC Chairman & Ors [2013] ZWCC 12 and Shumba & 2 Ors v Minister of Justice, Legal & Parliamentary Affairs & 5 Ors [2018] ZWCC 4. In the latter, the Constitutional Court wrongly and regrettably pronounced that our current Constitution, as presently framed, does not allow for the diaspora vote, which is a contestable position.

Not only is this position archaic; even some repressive societies are introducing the diaspora vote. Within Sadc, many countries allow the diaspora vote. These include South Africa, Botswana, Namibia and Mozambique. Both Zambia and Malawi are making moves for the diaspora vote. In Zambia, the Electoral Commission is working towards actualising diaspora voting ahead of the 2026 general elections.

In Tanzania, there are ongoing legislative efforts to institute the diaspora vote. Further afield even Rwanda has a diaspora vote, and Uganda is working towards setting one up for the 2026 elections.

Diaspora vote need not be in a constitution. But in Zimbabwe, it must be, as we have seen, that even the highest court meant to be the most progressive in promoting transformative constitutionalism, will defeat the overt intentions and spirit of the Constitution. So, we must have it there, in black and white. We made a mistake and have prolonged a struggle that could easily have been dealt with at the constitution-making stage.

**At 40 years, we set a high minimum age for presidency**

We set the minimum age for the presidency at 40 years. In 2018, we almost had a situation with Nelson Chamisa who turned 40 on January 13, 2018, just under 6 months ahead of the election, and even fewer months before the nomination court where candidature is certified. What would have happened if he were to turn 40 later?

We would have had a situation where the preferred candidate in his party, that party's president, could not run because of age.

Let's look at some data. With young people constituting the largest and fastest-growing demographic grouping in Africa, Africa has the youngest population on the globe and is set to maintain that status. Africa's population will be 1.6 billion by 2030, according to the UN Department of Economic and Social Affairs, and the rapidly growing youth population will constitute 42% of that number. Yet despite these numbers, Africa has the oldest leadership globally. Young people's political power has not reflected their demographics.

The average age of African leaders is 62, which means that the continent with the youngest citizens has the oldest rulers. A 2015 article appearing on CNN noted that the average age of the ten oldest leaders in Africa was 78.5 compared to 52 for the world's ten most-developed economies. The issue of old leaders is coupled with that of long-serving leaders.

These include Paul Biya, 89, who has been in power in Cameroon for 39 years; Teodoro Obiang, 80, who has ruled Equatorial Guinea since 1979; and 81-year-old Abdelaziz Bouteflika who, although confined to a wheelchair for some five years, intended to seek a fifth presidential term in Algeria, only to be stopped by his death in 2019. Zimbabwe's Robert Mugabe was only stopped by a coup in 2017 at 93, having ruled for 37 years.

In today's Africa, however, the fact that most heads of state are older than the median is not attributed to young people not stepping up for the top office. Ethiopia's Abiy Ahmed, who was elected Prime Minister at 41, is an example. In Rwanda in 2017, the rule of 60-year-old Paul Kagame was challenged by Diane Rwigara, a 38-year-old accountant. In Senegal in 2019, Ousmane Sonko ran for presidential office as the youngest of the five candidates at 45. In the 2018 general election in Zimbabwe, Nelson Chamisa at 40 ran against 76-year-old Emmerson Mnangagwa. In the 2023 general elections, Mnangagwa at 81 is again likely to run against Nelson Chamisa, who will be 44. South Africa will go to the polls in 2024, with President Cyril Ramaphosa at 71 potentially hoping to win a new mandate.

A quarter of the eligible voters, over 10 million, will be under 30. One of the main opposition parties, the Economic Freedom Fighters (EFF), will likely continue to have Julius Malema as its leader and presidential contender, who will be 43 then. In Uganda in 2021, 38-year-old Robert Kyagulanyi Ssentamu (Bobi Wine) endured a gruesome campaign to challenge the long-serving and 76-year-old Yoweri Museveni in a country where two-thirds of registered voters are younger than 30.

The elections were in large part generational and, as the Washington Post aptly described it: "the contest between the grandfatherly incumbent and the spindly singer-turned-politician, Bobi Wine, has come to embody the most essential of democratic divides: change vs. stability, idealism vs. wisdom, the frustrated young vs. the fearful old".

The context is that most voters are in fact youths per the definition of the African Youth Charter (15-35 years old). In Zimbabwe, for instance, 60% of the 5.3 million registered voters in the 2018 elections were under 40, according to the Zimbabwe Electoral Commission. In South Africa's 2024 national elections, a quarter of the eligible voters, over 10 million, will be under 30. It would thus seem a natural trajectory for young people to dominate the list of electoral contenders, but that is not the case.

There is no legal or policy bar at the African Union level for young people to run for the highest office, or indeed any elected office. Quite the contrary: the policies in fact encourage it. The AU Agenda 2063: Africa We Want in Aspiration 5 states that "Africa's women and youth shall play an important role as drivers of change. The intergenerational dialogue will ensure that Africa is a continent that adapts to social and cultural change."

Aspiration 6 envisages "An Africa whose development is people-driven, relying on the potential of African people, especially its women and youth, and caring for children". Agenda 2063 recognises that "No society can reach its full potential, unless it empowers women and youth and removes all obstacles to women's full participation in all areas of human endeavours. Africa must provide an enabling environment for its women, children and young people to flourish and reach their full potential."

The African Charter on Human and Peoples' Rights in Article 13(1) states that "Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law". Article 31 of the African Charter on Democracy, Elections and Governance states that "State Parties shall promote the participation of social groups with special needs, including the Youth and people with disabilities, in the governance process".

The illustrative cases above of Rwanda, Senegal, Zimbabwe, Uganda, Ethiopia and South Africa show that the young are stepping up. In Nigeria, the youth-led 2016 No Too Young to Run Campaign shows that the appetite to drive youth representation is there. After the Not Too Young to Run campaign, the Nigerian government ratified a constitutional amendment that reduced the age limit for state legislators and those in the federal House of Representatives from 30 years to 25 years; for senators and governors from 35 to 30; and for the president from 40 to 35.

When Cameroon headed for local and parliamentary elections in November 2019, young people organized country-wide protests against the ageing political leadership.

What penning such an age to presidential office does is to institutionalise obstacles to young people's access to the highest political office. These include resistance from established old political guards and systemic barriers – which include legal barriers. The old have been keeping out the young by removing or changing constitutional presidential term limits to secure more time in office and removing presidential age limits to achieve the same.

According to an Open Society Initiative of Southern Africa 2021 publication, presidential term limits were changed 47 times in 28 countries from April 2000 to July 2018, with at least six failed attempted changes. In 23 cases, spread over 19 countries, the changes strengthened term limits by introducing or imposing stricter temporal boundaries on presidential mandates, but in 24 instances in 18 countries, the temporal restrictions on holding presidential office were removed or loosened.

The changes in term limits have been executed in four different ways. The first set of amendments extended the length of presidential terms of office: from five to seven years in Guinea (2001), the Democratic Republic of Congo (DRC) (2002), Rwanda (2003) and Burundi (2018); and from five to six years in Chad (2018). Presidential terms were also extended in instances of intra-state conflict and capacity problems when elections were postponed in South Sudan (2015 and 2018) and the DRC (2016).

Second, the number of terms in which a person may hold presidential office were increased, such as from two to three terms in the DRC (2015).

Third, changes were made to reset the clock for the incumbent president, as was witnessed in Zimbabwe (2013), the DRC (2015), and Rwanda (2015), where the incumbents had reached their absolute term limits but argued that a new or revised constitution enabled them to start with fresh mandates unrestricted by previous constitutional limits.

Fourth, term limits were removed altogether in Guinea (2001), Togo (2002), Tunisia (2002), Gabon (2003), Chad (2005), Uganda (2005), Algeria (2008), Cameroon (2008), Niger (2009) and Djibouti (2010).

Other habits of limiting young people have included the rhetoric of immaturity and doing third-party bidding, and naked violence and use of State systems. Yet young people wielding political and economic power is central to securing a future that speaks to the needs and desires of the changed world of today and tomorrow.

The reality is that young people are the backbone of any socio-economic and political development, and failure or refusal to harness the creative talent and energy of the young in time spells inertia and even retrogression for African democracies and societies. Zimbabwe is no exception.

**Conclusion**

What I have pointed to here as constitutional mistakes, are not all there is. There is more. But I have selected these to reflect what we have experienced in the first 10 years of the Constitution, and what I perceive to be most consequential based on these experiences.

Some of these defects can be remedied through legislation; some will require an amendment to the Constitution. As always, the full contours and import of any constitution are seen and determined over time, and the full extent of the mistakes can only become apparent years and decades later as we invoke and experience the many provisions of the Constitution which are yet to be tested. The reality is that the majority of the provisions of our Constitution are yet to be tested. When that happens, we can be sure we will pick new mistakes.

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