3 The Constitutional State and Traditionalism under the 2013 Zimbabwean Constitution: A Critique

James Tsabora[*]

1 Introduction

The nature and system of political governance adopted by constitutional societies is central to the progress and development of such societies. Institutions created to drive systems of political governance become essential in achieving the primary social deliverables required for the stability of such societies. For most Western states, the system of national political governance has been anchored in the structural philosophy bequeathed by the Treaty of Westphalia, promulgated more than three centuries ago in Europe. Such a state system is ordinarily complemented by other unique institutional systems that are aimed at enhancing its social, political and economic functions. Inevitably, the Westphalia model of state has been inescapable for African states due in part to both colonial history and choice. This Eurocentric state model has, however, attempted to accommodate, to varying degrees, traditional institutional governance systems that were prominent prior to colonialism, albeit with necessary structural modifications. Pertinently, the relationship created between these reservoirs of traditional governance and the modern constitutional state system is curious. The conflicts and tensions inevitable in the resultant structural framework are even more interesting.

There is no doubt that the 2013 Constitution of Zimbabwe is a compromise between traditionalism and the new constitutionalism. It establishes the traditional institutional governance system under Chapter 15 of the Constitution, which in turn engenders opportunities for antagonism and adversity. For this reason, the nexus between the republican state and the governance system created by Chapter 15 demands scrutiny. The fact that 17 of the 18 chapters of the 2013 Constitution are reserved for the modern state system, with only one dedicated to traditional political institutions, seems to suggest the superiority of the modern state system. This leads to the major assumption that underpins this paper, that the structural relationship between the modern state system and the traditional political institutional system in the 2013 Constitution is shaped and influenced by the need to align the interests of traditional institutions with the national constitutional value system. Such a constitutional value system clearly and predominantly favours the modern state system. In interrogating issues around this assumption, a number of questions are raised. Inescapably, the first question relates to the recognition of traditional political institutions under the Constitution, and the status, relevance and contribution of traditional political institutions to national political governance. Does the very existence of the modern state, it is pondered, question the validity, relevance and sustainability of the traditional political system? Further, to what extent, does the structural relationships between the modern state system and the traditional political system have any implications on the dual nature of Zimbabwe's legal system, and how so?

[*] Senior Lecturer, Faculty of Law, University of Zimbabwe. LLB (UZ), LLM (UKZN, South Africa) and PhD Law (Rhodes, South Africa). The author is grateful to the Raoul Wallenberg Institute for a research grant (financed by the Swedish International Development Cooperation Agency (Sida)) that made this research possible.

The above questions will be explored and interrogated in three parts that make up this paper. The first part explores the pre-colonial, colonial and post-independent traditional political governance system as an indigenous value system that existed prior to, during and after colonialism. The main argument sustained in this part is that the interactive relationship between the modern state and traditional institutions is born out of Zimbabwe's political and social history, and is a necessary part of modern governance.

The second part analyses the place and role of the traditional institutions in the 2013 Constitution, and the extent that these institutions interact, relate and compete with those of the modern state system. This part thus evaluates the contribution of traditional political structures and customary legal regimes to the functions and responsibilities of modern government in general, and the arms of the state in particular.

The final part is an overview of the main findings from the analyses in the three parts. This is followed by a conclusion on the general implications of the relationship between the traditional political governance system and republican system of state and government given effect by the Constitution.

2 The Traditional Institutional Governance Framework

It is a difficult task to extensively conceptualise traditional political institutions and their evolution throughout the three epochs of the pre-colonial era, the colonial era and the post-colonial period. A summary of the main developments suffices for purposes of this paper. In essence, prior to colonialism, the prominence and ubiquity of these institutions was beyond doubt. There was simply no alternative governance system, nor a competing leadership paradigm, despite the existence of varying forms of kingships, chiefdoms and other community leadership systems. That is not to say that these institutions remained static, and resisted development and evolution. Indeed, the heterogeneity of communities and societies these institutions presided over necessitated constant changes, adaptation and gradual evolution. However, such changes did not threaten the very existence of the traditional governance system or its superiority as the governance system of choice.

The African traditional political system thus had political, judicial and social functions that included social regulation, political leadership and judicial administration. In essence, the traditional system was the pivot around which society revolved. Zimbabwe's customary and traditional institutional system can only be understood as part of the larger African system that existed on the continent. Consisting of kingdoms, chiefdoms, tribal headman, village heads, kraal heads and other traditional political structures, the system had communitarian judicial, legislative and executive features usually centred in the chiefs and their traditional advisory councils.

Colonialism, however, changed the nature and form of traditional political systems drastically. In this vein, Bennett notes as follows:

> The chieftaincy too has changed. Admittedly this institution proved to be remarkably resilient to colonialism; but the tribal authorities were deliberately co-opted to colonial government in terms of the policy of indirect rule. And, later, independent African governments found it impossible to dispense with the services of chiefs. However, this does not mean that the institution is the same as its pre-colonial forebear. Throughout Africa colonial administrations intervened in the indigenous forms of government to appoint and depose chiefs, to divide or create new tribes, and to change powers of competence. The 'traditional'

> authorities were moulded into a cadre of local government officials compliant with the requirements of state … As a result they often lack any traditional basis of legitimacy. Instead of the support of their people, chiefs can now rely on the power of the state, and with state sanction they can now afford to rule autocratically.[1]

Indeed, the coming of European colonialism signalled a revolutionary moment in relation to the nature, shape, form and relevance of traditional political systems. Juma notes that the consolidation of colonial administration set out on a two-pronged mission, firstly "to create a system of administration that would be capable of adopting the traditional institutions of governance into its ranks", and secondly "to *reinvent* African custom and tradition, drain it of all the regenerative and adaptive qualities, and reduce its rigid concepts and rules so that it could be administered by the colonial judicial system".[2]

It is very clear that colonialism represented a serious threat to the African value system and its traditional political infrastructure. The European colonial regimes superimposed not only alien political and economic institutions on pre-existing African structures but also introduced a powerful social system that actively undermined the foundations of African social systems and cultural institutions. African socio-legal institutions were dealt a body blow, and could not withstand this superimposition. However, the objective of the colonial strategy was not to annihilate the traditional political governance system but, as Makoa argues, to incorporate them into colonial administration and use it to "control and govern the colonized population".[3]

Eventually, these indigenous legal systems were under compulsion to transform in one way or another. Transformation meant the creation of a puppet traditional political system that was at the beck and call of the colonial political administrators. Whether this was necessary for the survival of the African system remains in doubt, but a clear outcome of this is that this puppet system inevitably diminished the amount of respect and dignity that resided in the African traditional political system, and thus eroded its legitimacy. Thus, the end of colonialism saw an African society unable to identify with the cultural and institutional system that had for millennia presided over it, whilst at the same time unable to relate to and accept the colonial administration system as the legitimate governance mechanism.

It can therefore be argued that the rise of the modern state system brought by colonialism, and based as it is on a Western liberalistic framework, undermined the legitimacy that had resided in the African value system for centuries. The African traditional system suffered a crisis of legitimacy, and its ability to justify extant social institutions and norms was put under serious strain. Additionally, its ability to legitimate the power and authority that was located in traditional political and social systems was eroded by a nascent colonial agenda. As one author observes, the rise and existence of the modern state in Africa questioned the very existence and legitimacy of the African value system itself.[4]

---

[1] T. W. Bennet, 'Human Rights and the African Cultural Tradition', *Transformation* (1993) p. 35.
[2] L. Juma 'The Laws of Lerotholi: Role and Status of Codified Rules of Custom in the Kingdom of Lesotho', 23 *Pace International Law Review* (2011) p. 19.
[3] F. K. Makoa, 'Electoral Reform and Political Stability in Lesotho', available at <http://www.accord.org.za/ajcr-issues/electoral-reform-and-political-stability-in-lesotho/> (accessed on 21 September 2017).
[4] Juma, *supra* note 3.

2.1 *The Post-Independent State and the Traditional Customary System*

The dawn of independence did not signal any significant resurrection of the African customary and traditional system. Indeed, independence did not elevate this system to the same level as the liberal constitutional governance and administrative systems now pursued by the post-colonial state and government. In fact, the Zimbabwean government immediately moved to strip chiefs and other traditional political institutional systems of their powers,[5] making them irrelevant in the new order.[6] Although this policy was later abandoned, the indifferent approach by government meant that the indigenous customary value system continued to play second fiddle to the modern state and government system.[7]

A generational disdain of the African system had taken root especially within urban and semi-urban contexts, and in view of this the new African managers of the African state elected to pay only lip service to the domestic moral and social value system especially in its competition and contests with the modern state system.[8] There were no points of convergence to be sought between the African traditional political system and the infrastructure of the modern state. Similarly, and most importantly, there was no attempt at insisting for constant negotiation between the African cultural normative system and the liberalistic constitutional normative system introduced after 1980.

In clear terms, this illustrates the fact that the immediate post-independence state and government clearly struggled to meaningfully accommodate this traditional system under the wings of the new constitutional system. Legitimacy of power and authority had long ceased to be derived or sought from African socio-legal norms and customary traditional institutions, due to there being a new *grundnorm*, namely, the Constitution. This *grundnorm* had become the validator and all-important *legitimator* of power and authority in the modern state.

2.2 *The Constitutional Value System and the Modern State*

It is relevant to explore the value system adopted or preferred by the 2013 Constitution and check the implications of that value system to the relationship between the modern state system and the traditional political governance system. The Constitution of Zimbabwe is largely a human rights-centred document. Its main features, principles, institutions and substantive values are derived from international human rights law. Its preamble underscores desire for freedom, justice and equality and recognises the need for the rule of law, democracy and transparent political governance. It further reaffirms a commitment to "upholding and defending fundamental human rights and freedoms". However, the preamble also celebrates "the vibrancy of our traditions and cultures". This is critical in that the Constitution does not

[5] This policy had been experimented with in Ghana, Guinea and most famously by Julius Nyerere in Tanzania. *See* P. Lal, 'African Socialism in Post-Colonial Tanzania', *CUP* (2015) p. 46.

[6] *See* Report of the Economic Commission for Africa, *Relevance of African Traditional Institutions of Governance*, 23. According to the Report, Zimbabwe's government later reversed its earlier policy of dismantling chieftaincy and created a Council of Chiefs in 1993, available at <https://sustainabledevelopment.un.org/index.php?page=view&type=400&nr=442&menu=35> (accessed on 21 March 2017).

[7] For Nyerere, the reason for abolishing traditional political governance system was "to build a centralised territorial state and a common citizenship in the face of a colonial legacy defined by politically and legally enforced racial and tribal privilege". *See* M. Mamdani, 'Nation-state: Nyerere's legacy', *Mail and Guardian*, 15 March 2013, available at <https://mg.co.za/article/2013-03-15-00-nation-state-nyereres-legacy> (accessed on 15 September 2017).

[8] H. K. Prempeh, 'Africa's Constitutionalism Revival: False Start or New Dawn?', 5 *International Journal of Constitutional Law* (2007) p. 469.

ignore the worth or relevance of the customary law system and its institutional structures. In essence, therefore, the Constitution affirms the values of a dual system, namely the traditional value system, with all its customary rules and institutions and the human rights value system as guiding the modern state system. It may be argued that by so doing the Constitution, though less openly, seems to suggest the existence of a pluralist legal system with essentially two legal systems, namely the general civil law system and the customary law system.

Various other provisions in the Constitution seek to entrench human rights either by creating necessary institutions for their promotion or outlining the substantive human rights concepts, principles, values and positions for the purposes of their protection. For instance, one very important provision is section 3, entitled "Founding values and principles". This section establishes, among others, a human rights and democratic value system that underpins the Constitution. It recognises various human rights principles and concepts such as rule of law, equality, dignity and gender equality. In addition, section 11 creates an obligation on the state "to take all practical measures to protect the fundamental rights and freedoms" in the Constitution and to promote their realisation and fulfilment. Further provisions in Chapter 2 of the Constitution are underscored by human rights discourse on children's rights, persons with disabilities, gender, shelter, health, social welfare and education.

A critical component of human rights is found in the Declaration of Rights in Chapter 4. The rights in this Chapter are comprehensive, progressive and substantive. These rights can be classified under the three traditional categories of civil and political rights (first generation rights), socio-economic and cultural rights (second generation rights) and group/collective rights (third generation rights). It is important to note that there are some rights that were traditionally recognised as constitutional rights only, and not strictly human rights *per se*, such as right to access to information, right to administrative justice, media rights, political rights, labour rights and marriage rights. It could be argued that these rights are now recognised as human rights in Zimbabwe since they are situated in the human rights chapter. This expansion of human rights is welcome and provides an opportunity for the interpretation of such rights not only from a constitutional perspective but also from a human rights context.

It is also important to observe that the human rights entrenched in the Declaration of Rights echo and reflect the fundamental constitutional and human rights themes that have characterised Zimbabwe's political and legal history since colonial times. Examples of these important thematic concerns include the need to address inequities and oppression created by a patriarchal society, the need to embrace international human rights standards from international human rights instruments and finally the need to create an open, equal, just and democratic society. In view of this, it can be argued that the main objective of the human rights directions embraced in the Zimbabwean constitutional system is the achievement of socio-economic justice, political justice and the attainment of an open, free, just and equal society. These objectives are a direct result of various factors that shape Zimbabwean socio-political and cultural history such as colonial racial oppression, economic disenfranchisement, gender discrimination, inequalities engendered by patriarchy and political oppression in general.

Apart from this, the outcome of the interpretation of the Declaration of Rights has to achieve a number of human rights and democratic objectives such as openness, justice, human dignity, equality, freedom, among others. In addition, such interpretation should be guided by the need to develop the common law and customary law. The import of this is that customary law development now has to proceed within the precincts of the Declaration of the Rights;

customary rules can thus not be judicially developed independent of, or outside, the ambit of the Declaration of Rights.

In relation to custom, the 2013 Constitution clearly recognises custom and traditional cultural values in various sections. Firstly, custom is recognised as a part of the law to be administered in Zimbabwe on the day the Constitution came into force.[9] Secondly, the constitutional supremacy clause reiterates the supremacy of the Constitution and the legal invalidity of any other law, practice, conduct, *custom* or conduct inconsistent with it.[10] What this means is that custom, customary practices or rules of conduct or customary behaviour have to be consistent with the Constitution for their validity to stand. Thirdly, the Constitution recognises "the nation's diverse cultural, religious and traditional values" as a founding constitutional value underpinning the Constitution. The rights of ethnic, racial, cultural, linguistic and religious groups are envisaged as part of the broader understanding of the principle of good governance.

With specific reference to culture, the Constitution creates an obligation on the state and government "to promote and preserve cultural values and practises which enhance the dignity, well-being and equality of Zimbabweans". Further, the same provisions call for the state and government to promote and preserve Zimbabwe's heritage and take measures to ensure "due respect for the dignity of traditional institutions".[11]

Again, this can be interpreted as the call for the promotion of cultural values and practices that extend, promote and assist in the enjoyment of human rights. Cultural values are recognised in as far as they positively relate to human rights, and conversely those cultural behavioural practises that undermine dignity, equality and well-being are not recognised.

An important human right in the Declaration of Rights is the right to language and culture. In terms of section 63, every person has the right to use the language of their choice, and to participate in the cultural life of their choice. However, the limitation of this right is that the exercise of such rights must not be inconsistent with other rights in the Declaration of Rights. Quite clearly therefore the right to culture and language has to be exercised subject to other rights in the Declaration of Rights. To an extent, this is a massive internal limitation that undermines the right to culture. In essence, the import of this is that cultural practices and beliefs have to meet and comply with the general standards of constitutionalism and human rights for their legal validity to hold. Accordingly, the message from the Constitution is that the standards and values of human rights and constitutionalism entrenched in the Constitution take precedence over other value systems in society, and further that the human rights agenda can best be championed by the institutions and machinery of the modern state system and not any other seemingly contrasting political governance framework.

3 Traditional Institutions under the 2013 Constitution

As with its 1980 predecessor, the 2013 Constitution establishes a clear machinery for state and government based on the Western-oriented republican state system. Unmistakably, the major features include creating a state and government system based on the three arms, namely the executive, the legislature and the judiciary. The nature of political governance is

[9] Section 192 Constitution of Zimbabwe Amendment (No. 20) Act 2013.
[10] Section 2.
[11] Section 16.

unitary, meaning that there is less devolution of central government powers.[12] In this vein, the 2013 Constitution recognises and identifies a three tier government system based on the (i) national (central) government, (ii) provincial and metropolitan councils and (iii) local authorities, which includes urban and rural councils.

Other main features of the resultant republican system of government include establishing a civil service administrative system, national security apparatus, criminal justice institutions, democratic governance institutions and commissions supporting democracy. A novel feature in the 2013 Constitution is the establishment of a public administrative framework and its value system in Chapter 9, and a public financial management framework under Chapter 17. Traditional 'leadership' institutions are established in Chapter 15, and quite unsurprisingly not as another tier of government.

An analysis of the institutions for the modern state and government established by the Constitution provides interesting perspectives that relate to the role and place of traditional institutions. Firstly, the Constitution is clear on the modern state and government; it establishes a sovereign republican system of government based on the three tiers of government being the executive, the legislature and the judiciary. Clearly, this three-tier framework reserves little room if any for the direct participation of traditional institutions in spaces meant for its manifestation. But what are these spaces, it may be queried.

Under Chapter 15 of the Constitution, the traditional political system is given the responsibility of performing cultural, customary and traditional functions of a chief, head person or village head for a community. These functions are listed and consist of a mix of dispute resolution, administration of communal land and environmental affairs and taking measures for the preservation and promotion of their cultural value systems.[13]

Another important part of Chapter 15 are the list of principles that the traditional political system must observe. These principles include the principle of legality, fair and equal treatment, impartiality, non-partisanship, no to be members of political parties, among others.[14] Most importantly, traditional leaders are under an obligation not to violate the fundamental human rights and freedoms of any person. These principles are far reaching; they limit some of the rights that accrue to traditional leaders as persons in terms of the Declaration of Rights such as political rights. Curiously, these principles have a striking similarity to general principles that should be observed by members of the civil service. Such a similarity suggests that the Constitution implicitly regards traditional leaders as civil servants in the same manner as the colonial administration system had done or sought to do.[15]

This reality is also true with the traditional political system in various parts of Africa. Commenting on a similar structure, Juma observed this concerning the Lesotho chieftaincy system:[16]

> Although the chiefs played such a prominent role in governance immediately after independence, their significance has slowly dwindled in subsequent years due to the rapid political and social change that the

[12] Chapter 14 of the 2013 Constitution, however, creates a substantive framework for devolution, which framework is to be implemented 'whenever appropriate' (*see* section 264 specifically).
[13] Section 282.
[14] Section 281.
[15] This argument is generally proposed in reference to the relationship between the colonial administrators and the puppet traditional institutions. *See generally* Juma, *supra* note 3.
[16] *Ibid.*

country has been through. While *chiefs are firmly entrenched in the civil service* of the state and rely on ―their position [s] as [its] salaried functionaries, limitations on their powers are now explicit in many legislative regimes brought into force in the last three decades.

To echo this, the Constitution makes a call for an Act of Parliament to regulate the 'conduct of traditional leaders'. Whether this can be interpreted as suggesting a form of code of conduct with a disciplinary system remains to be seen. Currently, no such Act exists and a Traditional Leaders Declaration is still in the early stages of debate and discussion in Parliament.

Another very important development in the Constitution is the incorporation of traditional leaders into Zimbabwe's legislative system. In terms of section 120 of the Constitution, the Senate membership includes 16 chiefs, and also the president and deputy president of the National Council of Chiefs. This inclusion in the legislative arm of the state and government means that they take part in the main business of the legislature, namely initiating, preparing, debating and commenting on legislation. It is important to note that their double roles as traditional leaders on one hand and members of Senate on the other does not grant them special privileges in Parliament. They are thus treated as ordinary legislators, and lose or extend membership in similar terms as elected senators.

It can be argued that the co-optation of traditional leaders into the legislature has both symbolic and practical significance. The symbolism is in the respect that seemingly comes with incorporation of traditional institutions into the legislative structures of a modern state and government system. Indeed, the message this sends is that these institutions are not excluded from mainstream political and governmental activities carried out by the adopted government system that admittedly has superior organs and agencies for its administration. On the other hand, the practical significance is that by such co-optation, the traditional leaders in Parliament are exposed to modern constitutional processes of the day which constantly denounce and condemn patterns of social, cultural and political life that violate human rights, constitutional principles and the rule of law. Accordingly, the co-optation enables the chosen representatives of traditional leaders to appreciate human rights abuses committed in the name of culture and custom in their communities. To an extent, this exposure may be read, arguably though, as the opportunity for constant negotiation and renegotiation between the traditional political system and the constitutional legislative system.

Additionally, co-optation into a formal institution such as the legislature can also be interpreted on the basis that chiefs and village heads in traditional chieftaincies "constitute a forum where local interests are debated and articulated" and to that extent chiefs become "a valuable resource in informing the state about the interests of local communities they represent".[17] Thus the co-optation of the traditional political system in modern government enhances their representative roles and consequently the level of interaction between the modern state and local communities living in traditional settings and contexts.

Apart from the general advantages of co-optation, dangers lurk. There is a real risk that traditional institutions will be used as an instrument of state power and a conduit of the government in its various policies that might impact on human rights. This point needs further exemplification.

[17] T. von Trotha, 'From Administrative to Civil Chieftaincy: Some Problems and Prospects of African Chieftaincy' 37:38 *Journal of Legal Pluralism* (1996) pp. 79–108.

For the past decade, Zimbabwean politics has been characterised by attrition, vicious political contests and electoral mishaps that have tainted constitutional democracy.[18] Unsurprisingly, various reports have emerged of political parties, led by the ruling party, making use of traditional institutions and leaders such as chiefs, village heads, kraal heads and other leaders for political purposes.[19] Some reports have claimed that traditional institutions were central in vote buying, intimidation, hate speech, political manipulation, political campaigns, violence against supporters of political rivals, denial or withdrawal of benefits or privileges to people in their communities supporting certain political parties, espionage on behalf of political parties and various other misbehaviour.

A direct consequence of this has been that traditional institutions have descended onto the political space for their own survival, and in a manner that directly impacts on electoral freedom, freedom of speech, assembly, political rights, among other rights. Accordingly, there is no denying the conclusion that traditional institutions are generally regarded as a conduit of the government and an instrument to carry out or support political programmes of the government of the day.

4 General Overview

From a consideration of the various issues discussed above, certain fundamental themes and aspects of the constitutional system established by the 2013 Constitution emerge. The first observation that can be made is that the 2013 Constitution is clear on its constitutional objectives and priorities. It exalts the virtues of constitutionalism, constitutional supremacy, rule of law and human rights. The constitutional value system is anchored on these principles and the philosophy underpinning the whole constitutional document supports these values.

Secondly, the constitutional system is not apologetic of the modern state and government system it establishes; neither does it regret the fact that the existence of this modern state framework appears to question the validity of the continued existence of the traditional institutional system. To this extent, the constitutional system illustrates a desire to continuously and progressively develop the fundamental features of this modern state system, and not destroy them. Where there is need for any alterations or modifications of the modern state system, the constitutional system seems to suggest that this will not be in order to destroy the state system or subjugate it to the traditional institutional system. Indeed, there is nothing in the constitutional system that suggests that these two systems enjoy equality or will gradually attain that position in the foreseeable future. Inevitably, it can easily be observed

[18] *See generally* B. M. Tendi, 'Making History in Mugabe's Zimbabwe', *Politics, Intellectuals and the Media* (Lang, Germany, 2010).

[19] *See* 'Charumbira calls on chiefs to back Mugabe', *Newsday*, available at <https://www.dailynews.co.zw/articles/2017/10/31/charumbira-calls-on-chiefs-to-back-mugabe> (accessed on 31 October 2017); 'Chiefs endorse Pres Mugabe's candidature', *ZBC*, 28 October 2017; 'Chiefs backs Amai Mugabe's elevation', *Herald*, 10 September 2014; 'Chiefs appeal to President for power restoration', Herald, available at <http://www.herald.co.zw/chief-appeals-to-president-for-power-restoration/> (accessed on 20 September 2017).
'Chief empowered to prop ZANU PF', *The Independent*, available at <https://www.theindependent.co.zw/2005/01/07/chiefs-empowered-to-prop-up-zanu-pf/> (accessed on 21 October 2016); 'Chiefs now Mugabe's auxiliaries', *Daily News*, available at <https://www.dailynews.co.zw/articles/2016/02/29/chiefs-now-mugabe-s-auxiliaries> (accessed on 10 September 2016); 'Zimbabwe ballot papers spark row', *BBC News*, available at <http://news.bbc.co.uk/2/hi/africa/7310544.stm> (accessed on 13 September 2016); 'Opposition leader says voters forced to choose Mugabe', *CNN*, available at <http://edition.cnn.com/2008/WORLD/africa/06/27/zimbabwe.vote/> (accessed on 13 September 2016).

that the traditional system established by the Constitution is decidedly subservient to the modern state machinery, and where these two systems conflict, the modern state system triumphs. Accordingly, the Constitution does not compel constant negotiation and renegotiation between the traditional institutional system and the constitutional democratic system for purposes of finding points of convergence.

Thirdly, the customary legal system preserved by the Constitution is recognised only to the extent it is consistent, hence compliant, with the Constitution. This means that whilst the conclusion that there exist a pluralist legal system in Zimbabwe's constitutional framework holds water in theory, the reality is that this is of no practical relevance considering the subservient status of the customary law system to the general system established by the Constitution. Customary practices, social behavioural patterns, cultural values and various other traditional value systems are only legally valid to the extent that they are permitted by or consistent with the Constitution.

Most certainly, a functional position that can be established is that the customary system is only recognised to the extent it seeks to advance and promote the objectives and values in the Constitution. Accordingly, it can be concluded that the philosophical orientation of Zimbabwe's constitutional framework is underpinned by the requirement that the customary law and traditional political system is established not as a competing legal system but for the purposes of complementing and promoting modern constitutional values and principles considerations in the interests of the modern state system.

Finally, the relationship between traditional institutions and the modern state created by the Constitution puts traditional institutions at risk of instrumentation by the government of the day. Traditional institutions are independent on paper only as they are likely to always be manipulated by the government of the day in its implementation of social and economic policies that impact rural and traditional livelihoods. The Constitution does not insulate traditional institutions from this risk, and indeed Zimbabwe's politics of the past 20 years has illustrated this sad reality.

5 Conclusion

The 2013 Constitution creates a modern state system that has very little room for traditional institutions. Further, the constitutional system has very limited space for legal pluralism, at least to the extent that this can be taken to mean existence of two legal systems competing at an equal level. The values of the modern state system and modern constitutional values are superior to those of the African value system. Indeed, there is very little support for the discourse or 'myth'[20] of harmonisation or unification[21] of the traditional political system and the general modern state system given prominence by the Constitution.

In relation to the traditional political system, what the Constitution illustrates is the existence of a subservient traditional political institutional system whose validity, sustainability and continued existence depends on the discretion of the modern state system. Again, there is very little support for the substantive integration of the traditional political system within the modern state machinery in a manner that would elevate the relevance of traditional political

[20] *See* M. Boodman, 'The Myth of Harmonization of Laws', *American Journal of Comparative Law* (1991) p. 699.
[21] A. Allott, 'Towards the Unification of Laws in Africa', *International Comparative Law Quarterly* (1965) pp. 366–389.

systems. Thus, the traditional political institutional system can only be relevant to the extent that it advances the agendas not only of the modern state, but also of the constitutional value system in the 2013 Constitution such as democratic governance, constitutionalism, separation of powers and the rule of law. This means that the social, economic and political agendas to be advanced by the modern state system and enshrined in the 2013 Constitution are not imperilled by the conditional recognition of the traditional political framework. Indeed, the constitutional system seeks to ensure that the traditional institutions and customary legal system it creates promote the objectives of the modern state particularly where the agendas and objectives of the modern democratic state system lead to the consolidation of the state, its regeneration and its effectiveness.