LEGAL ENCOUNTERS: LAW, STATE AND SOCIETY IN ZIMBABWE, c. 1950-1990

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This study examines the role of law in the constitution and contestation of state power in African history. Using Zimbabwe as a case study, it analyses legal struggles between Africans and the state, and amongst Africans themselves between 1950 and 1990. In doing so it intervenes in a number of scholarly debates on the relationship between law, state power and agency in African history. Firstly, I examine the role of law in constituting state power by exploring the interplay between legitimation and coercion in long term perspective. Secondly, I interrogate legal centralism as an approach to understanding developments in the legal sphere in African history and make the case for legal pluralism as a more appropriate approach. I argue that during the period under study, Zimbabwe witnessed a process of evolving legal pluralism characterised by the mutual appropriation of forms, symbols and concepts between state law and the 'customary law'. Thirdly, I contribute to the debate on African legal agency by demonstrating that its significance went beyond the utility of the law in specific social, economic and political struggles. I argue that it also gave expression to emergent political imaginaries, shifting ideas of personhood and alternative visions of the social and political order. Lastly, I argue that, by undertaking a historical examination of legal struggles, this study provides a useful foundation from which to analyse contemporary legal struggles in Zimbabwe and in Africa more generally. The findings presented here caution against being drawn in by the apparent novelty of contemporary legal struggles. In addition, they suggest the means by which human rights discourse in Africa might be reinvigorated.

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This study examines the role of law in the constitution and contestation of state power in African history. Using Zimbabwe as a case study, it analyses legal struggles between Africans and the state, and amongst Africans themselves between 1950 and 1990. In doing so it intervenes in a number of scholarly debates on the relationship between law, state power and agency in African history. Firstly, I argue that, while the post-modern turn has led to a greater appreciation of the symbolic, discursive and productive functions of law, sight should not be lost of its repressive capacity. Consequently, I examine the role of law in constituting state power by exploring the interplay between legitimation and coercion in long term perspective. I also highlight a central tension regarding law, states and power *viz* the law was central in constituting the state itself, at the same time, it was also a source of division within the state. This explains its centrality in the generation and assertion of state power, as well as its role in opening up fissures within the state which could be taken advantage of by citizens. Secondly, I interrogate the legal centralist assumptions that undergird studies of the legal sphere in African history and make the case for legal pluralism as a lens through which to examine developments in this sphere. I argue that the experience in Zimbabwe's legal sphere might usefully be thought of as a process of evolving legal pluralism that was characterised by mutual appropriation of symbols, forms and concepts between the 'customary' and state law. This was driven by the desire by state officials and 'traditional' leaders alike to borrow legitimacy from the alternative legal system. At the same time, the respective legal systems were also evolving as a result of internal contestation and the broader social, economic and political changes in the country.

Thirdly, I contribute to the debate on African legal agency by demonstrating that the significance of Africans' use of the law went beyond its utility in the particular social, economic or political struggles. It was also a reflection of emergent political imaginaries, shifting ideas of personhood and alternative visions of the social and political order. These had their roots in long term social and economic processes which were triggered or accelerated by colonisation such as the spread of Christianity, rural-urban migration, education, entry into wage labour, and membership in African associations of various descriptions. The political currents of the post-World War Two period, which included ideas such as national self-determination, universal human rights, socialism and pan-Africanism, influenced African political aspirations and imaginaries. Lastly, I argue that, by undertaking a historical examination of legal struggles, this study provides a useful foundation from which to analyse contemporary legal struggles in Zimbabwe and in Africa more generally. The findings presented here caution against being drawn in by the apparent novelty of contemporary legal struggles. In addition, they suggest the means by which human rights discourse in Africa might be reinvigorated.

The main body of this study consists of seven chapters. Chapter One provides the historical background and covers the period between 1890 and 1950. It briefly outlines the history of the Southern Rhodesian legal system, focusing on its establishment, its key features, as well as its operation. It highlights the tensions that emerged within the state over the administration of the law. In addition, the chapter examines the evolution of colonial policy regarding indigenous legal systems. The chapter goes on to examine Africans' engagement with the colonial legal systems and the development of African legal consciousness. Chapter

Two focuses on the role of chiefs' courts in the settler government's designs between 1950 and 1980. It discusses the emerging consensus between NAD officials and chiefs in the 1950s on the question of expanding 'traditional' leaders' jurisdiction and the settler government's efforts in the 1960s to draw the chiefs' courts more firmly into the service of the state. I argue that the elevation of chiefs' courts during this period was accompanied by attempts to treat Africans as ethnic subjects who were bound by customary obligation, as opposed to rights-bearing citizens. I show that these attempts failed owing to the resistance of chiefs and 'ordinary' Africans, as well as the pressure being exerted by the guerrilla war.

In Chapters Three and Four I turn to the political sphere and examine the legal responses of successive settler governments to the rise of African nationalism. Chapter Three focuses on the period between 1950 and 1964. It examines the government's attempt to come to terms with increasing political agitation by Africans and some of the early legal encounters between the settler government and African nationalists. I argue that the laws that were passed during this period, which criminalized African political activity and granted the government broad powers to clamp down on it, emerged out of lengthy debates within settler society over the principles that were supposed to inform the relationship between law and state power. The repressive laws that were enacted during this period were justified by drawing on a range of racial tropes which corresponded with the severity of measures being passed into law. I also demonstrate that nationalists' success in their legal battles with colonial officials during this period resulted in calls by officials for more repressive laws by the mid-1960s. Chapter Four picks up the story from 1965 and explores the role that law played in the political sphere during the fifteen years leading up to Zimbabwean independence in 1980. The period witnessed a shift in the government's use of the law away from legitimation towards coercion and the build-up of an elaborate legal armoury which was used to suppress political dissent. I

argue that this was one of the significant legal legacies of settler rule. The chapter also examines the range of responses amongst Africans to these changes in the legal arena. I show that the legal system lost its legitimacy in the eyes of nationalists and guerrillas.

In Chapter Five I focus on the involvement of African lawyers in the struggles in the legal arena between 1950 and 1980. I argue that the struggle by African lawyers to enter the legal profession, in the face of opposition from the government and European lawyers, represented another front in the legal struggles between Africans and the settler government: that over the distribution of the symbolic capital of the legal profession. I show that these lawyers played an important role as legal intermediaries in the struggles between Africans and the state, and amongst themselves. I highlight their role as 'translators' who translated the concepts and stipulations of state law for their clients and translated their clients' grievances into the language of the law. The chapter also examines their role as intellectuals who formulated and articulated critiques of the Rhodesian legal system and of settler rule.

Chapters Six and Seven extend the story into the first decade of independence. They examine the two contrasting dimensions of transformation and continuity that characterised developments in the legal sphere during this period. Chapter Six explores the ways the new ZANU (PF) government tried to transform the legal system it inherited. I explore three key efforts at legal reform during this period: the 'Africanisation' of the legal system, the reorganisation of 'customary law' courts, and reforms to the legal status and rights of women. I argue that the efforts at transforming the legal system were at times compromised due to resistance from sections of the population. In addition, where transformation was viewed as a threat to state power it was moderated or abandoned altogether. Chapter Seven assesses the

continuities in the legal arena focusing on the political sphere. I show that the ZANU (PF) government continued the practises of the settler governments that preceded it by using the law to criminalise and persecute its political opponents. I argue that these continuities were the result of a combination of factors which included the institutional legacies of the settler state, the ruling party's authoritarian tendencies, the history of tensions between ZANU (PF) and ZAPU, as well as the political calculations of the 1980s.

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CONTENTS

GLOSSARY OF ABBREVIATIONS

ANC	African National Congress
BSAP	British South Africa Police
BSAC	British South Africa Company
CAS	Capricorn Africa Society
CCJP	Catholic Commission for Justice and Peace
CYL	City Youth League
DC	District Commissioner
ICU	Industrial and Commercial Workers Union
IDAF	International Defence and Aid Fund
ILIC	Interdenominational Legal Information Centre
IRA	Inter-Racial Association
LRF	Legal Resources Fund
MIA	Ministry of Internal Affairs
MP	Member of Parliament
NAD	Native Affairs Department
NC	Native Commissioner
NDP	National Democratic Party
NLHA	Native Land Husbandry Act
PC	Provincial Commissioner
PNC	Provincial Native Commissioner
PO	Presiding Officer

RF	Rhodesian Front
RICU	Reformed Industrial and Commercial Workers Union
SRANC	Southern Rhodesian African National Congress
TLA	Tribal Land Authority
UANC	United African National Council
UDI	Unilateral Declaration of Independence
YWCA	Young Women's Christian Association
ZANU	Zimbabwe African National Union
ZANLA	Zimbabwe African National Liberation Army
ZAPU	Zimbabwe African People's Union
ZIPRA	Zimbabwe People's Revolutionary Army

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INTRODUCTION

Law, Power and Agency in African History

In 1968 Thomas Mutete Makoni and three other ZANLA guerrilla soldiers were charged in the Salisbury High Court with possession of arms of war.[1] In his final words to the court, Makoni defiantly rejected the whole process: 'I know that your lordship is about to pronounce the death sentence upon me now. I still maintain that I have not been lawfully tried.' Throughout the trial Makoni and his colleagues had challenged the legitimacy of Rhodesian laws, the courts and the state itself. They had also asserted the legitimacy of their political grievances and their decision to take up arms against the Rhodesian state. For his part Justice Lewis, who presided over the case, dismissed their 'political harangue' and maintained that 'the legislature does not regard that as a lawful excuse; lawful authority or reasonable excuse means lawful permission to have possession of these weapons.'

A number of things are striking about the exchanges during this trial. The first is the deployment of the idea of the law for diametrically opposed purposes. While Justice Lewis invoked the idea of law in order to enforce the settler state's efforts to suppress African political demands, Makoni invoked it in order to assert them. Underlying the statements by the judge and the defendants were contrasting understandings what made law 'lawful'. The second is the way the guerrillas made use of the courtroom as a site in which to articulate critiques of the Rhodesian government and in effect place it on trial as well. The law

[1] National Archives of Zimbabwe (hereafter NAZ), S3385, Salisbury High Court Criminal Cases 11496 – 11502. ZANLA stands for Zimbabwe African Nationalist Liberation Army. This was the armed wing of the nationalist party Zimbabwe African Nationalist Union (ZANU).

provided both the language and the locale for debates between Africans and settler authorities over the political questions that were vexing the Rhodesian body politic, bringing into clear focus the complex relationship between law, power and agency in African history.[2] This study examines the role law played in the constitution and contestation of state power in Zimbabwe between 1950 and 1990. It allows for an intervention into scholarly debates on the role of law in the constitution of state power, the contributions of indigenous legal systems in this process, as well as into the efficacy of the law as a means of domination and resistance. In addition, it provides the historical background needed to understand the dramatic struggles in the legal arena in Zimbabwe since 2000.

Law and the Constitution of State Power

Historical and anthropological studies of the role of law in constituting state power in colonial Africa have adopted two main approaches. The first approach emphasized the coercive uses of the law. This was an important feature in the Marxist and Dependency theory inspired work of the 1970s and 1980s that examined the emergence of capitalist production in colonial Africa. In the agrarian history literature, for example, the law is portrayed as one of the key instruments by which the colonial state undercut African agrarian livelihoods. Through legal measures colonial governments imposed a range of taxes, effected land dispossession and compelled Africans to enter into wage labour.[3] The work on labour history has similarly pointed to the coercive role of the law in building a labour system that

[2] S. E. Merry, 'Resistance and the Cultural Power of Law', *Law and Society Review,* 29 (1995), p. 14.
[3] G. Arrighi, 'Labour Supplies in Historical Perspective: A Study of the Proletarianization of the African Peasantry in Rhodesia,' *Journal of Development*, 6 (1970). See also R. Palmer and N. Parsons (eds), *The Roots of Rural Poverty in Central and Southern Africa* (Berkeley, 1977) and C. Bundy, *The Rise and Fall of the South African Peasantry* (London, 1979).

provided cheap African labour to mines, plantations and industries.[4] Legislation such as pass laws, vagrancy laws, and the Master and Servants Act enabled employers to establish stringent disciplinary regimes in the workplace and compel Africans to work despite sub-economic wages and poor working and living conditions.

The literature on colonial violence has also captured graphically the coercive functions of law and highlighted the intimate connection between law and violence. Studies of corporal punishment, in particular, reveal the ways that violence and ideas of racial difference were embedded in the legal system.[5] As Anupama Rao and Steven Pierce aptly observe, 'the body of the colonized was a critical site both for maintaining colonial alterity and enacting colonial governance.'[6] Historical studies of the turbulent period of decolonisation have also demonstrated that law underwrote some of the extreme cases of violence at the end of colonial rule. This was often achieved through the invocation of states of emergency which led to brutal operations to quell African political opposition.[7] These studies have also shown

[4] Jeffery Crisp, *The Story of an African Working Class: Ghanaian Miner's Struggles, 1870-1980* (London, 1984); C. van Onselen, *Chibaro: African Mine labour in Southern Rhodesia, 1900-1933* (London, 1976); R. Turrell, 'Kimberly: Labour and Compounds, 1871-1888', in S. Marks and R. Rathbone (eds), *Industrialisation and Social Change in South Africa: African Class Formation, Culture, and Consciousness, 1870-1930* (Essex, 1982); P. Richardson and J. van Helten, 'Labour in the South African Gold Mining Industry, 1886-1914', in S. Marks and R. Rathbone (eds), *Industrialisation and Social Change in South Africa: African Class Formation, Culture, and Consciousness, 1870-1930* (Essex, 1982) and A. Clayton and D. C. Savage, *Government and Labour in Kenya 1895-1963* (London, 1974).

[5] A. Rao and S. Pierce, 'Discipline and the other Body: Correction, Corporeality, and Colonial Rule,' *Interventions*, 3 (2001). See also S. Pete and A. Devenish, 'Flogging Fear and Food: Punishment and Race in Colonial Natal', *Journal of Southern African Studies*, 31 (2005); D. Anderson, 'Punishment, Race, and "The Raw Native": Settler Society and Kenya's Flogging Scandals, 1895-1930', *Journal of Southern African Studies*, 37 (2011); D. Killingray, 'The "Rod of Empire": The Debate over Corporal Punishment in the British African Forces, 1888–1946', *Journal of African History*, 35 (1994); S. Pierce, 'Punishment and the Political Body: Flogging and Colonialism in Northern Nigeria', *Interventions*, 3 (2001) and F. Bernault, 'The Shadow of Rule: Colonial Power and Modern Punishment in Africa, in F. Dikotter (ed), *Cultures of Confinement: A History of the Prison in Africa Asia and Latin America* (New York, 2007).

[6] Rao and Pierce, 'Discipline and the other Body', p. 61.

[7] D. Anderson, *Histories of the Hanged: The Dirty War in Kenya and the End of Empire* (London, 2005); C. Elkins, *Britain's Gulag: The Brutal End of Empire in Kenya* (London, 2005); John Darwin, 'The Central African Emergency', *Journal of Imperial and Commonwealth History*, 21 (1993); M. Vaughan, 'Words, Resistance and Colonial Laws of Sedition', unpublished paper; O. J. M. Kalinga, 'The 1959 Nyasaland State of Emergency in Old Karonga District', *Journal of Southern African Studies*, 36 (2010) and M. Munochiveyi, '"It

how the courts were frequently enlisted in efforts to punish African opposition to colonial rule, all too often through the use of the capital sentence. In his work on the last years of colonial rule in Kenya, David Anderson points out that 'British Justice in 1950s Kenya was a blunt, brutal and unsophisticated instrument of oppression.'[8]

The second approach in the literature has been to focus on the more subtle ways that law was used by colonial authorities. This literature has dwelt on the symbolic, legitimating and 'productive' functions of the law. It has drawn its inspiration from the works of scholars such as Antonio Gramsci, Michel Foucault and Pierre Bourdieu. While Gramsci and Foucault did not devote much attention to the subject of the law, their insights into the nature and exercise of power have significantly influenced the way scholars have tried to understand law and its relationship to state power in colonial contexts. In the case of scholars who draw on Gramsci, it is his concept of hegemony that has proved most productive. For Gramsci, domination was not achieved solely by coercion.[9] Rather ruling classes strove to elicit the consent of the ruled to their subordination. This was achieved through the control of civil society, which was used to disseminate a world view that naturalised the dominance of the ruling class. Drawing on these insights, scholars have tried to explore the ways that colonial states used law to aid their hegemonic projects. For the most part scholars are agreed that colonial states were not hegemonic, not least because the colonial experience was characterised by a significant amount of violence.[10] In addition, 'colonial rulers [we]re

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was Difficult in Zimbabwe": A History of Imprisonment, Detention and Confinement during Zimbabwe's Liberation Struggle, 1960-1980' (Ph.D. Thesis, University of Minnesota, 2008).

[8] Anderson, *Histories of the Hanged*, p. 7.

[9] D. Litowitz, 'Gramsci, Hegemony and the Law,' *Brigham Young University Law Review*, 515 (2000).

[10] D. Engels and S. Marks, 'Introduction: Hegemony in a Colonial Context', in D. Engels and S. Marks (eds), *Contesting Colonial Hegemony: State and Society in Africa and India* (London, 1994). See also R. Guha, *Dominance without Hegemony: History and Power in Colonial India* (Massachusetts, 1997).

clearly of a different culture, and their norms and values [we]re easily recognized as not part of the "natural" social order of the society at large.'[11]

These observations have led to a revision of Gramsci's view of an overarching hegemony, with some scholars resorting instead to the idea of a fragmented hegemony.[12] In this regard Sally Engle Merry has argued:

> Instead of an overarching hegemony, there are hegemonies: parts of law that are more fundamental and unquestioned, parts which are becoming challenged, parts which authorize the dominant culture, parts which offer liberation to the subordinate. Law cannot be viewed as either hegemonic or not as a whole, but instead as incorporating contradictory discourses about equality, justice and persons.[13]

This reformulation of the concept of hegemony has led scholars to direct their efforts to the search for instances where law was been used to authorize colonial hierarchies and political arrangements or to generate consent. Merry's own work looks at the culturally productive role of the law and sees courts as important sites where new cultural meanings are introduced.[14] Richard Rathbone's work on the Gold Coast provides an example of the partial hegemony of English law amongst the coastal trading elite. He concludes that, due to its utility in commercial transactions: 'English law, its language, assumptions and great texts had been absorbed into the culture of much of the Southern Gold Coast, but that implied no necessary acceptance of the totality of the system which had introduced it.'[15] He further points out that: 'While colonial law acquired a degree of acceptance and even had a strong

[11] D. Jeater, *Law, Language and Science: The invention of the "Native Mind" in Southern Rhodesia, 1890-1930* (Portsmouth, 2007), p. 4.
[12] Litowitz, 'Gramsci, Hegemony and the Law', p. 536.
[13] S. E. Merry, 'Courts as Performances: Domestic Violence Hearings in a Hawai'i Family Court', in M. Lazarus-Black and S. F. Hirsch (eds), *Contested States: Law, Hegemony, and Resistance* (New York, 1994), p. 54. See also D. Anderson, 'Policing the Settler State: Colonial Hegemony in Kenya, 1900-1952', in D. Engels and S. Marks (eds), *Contesting Colonial Hegemony: State and Society in Africa and India* (London, 1994), p. 263.
[14] S. E. Merry, 'Law and Colonialism', *Law and Society Review,* 25 (1991), p. 892.
[15] R. Rathbone, 'Law, Lawyers and Politics in Ghana', in D. Engels and S. Marks (eds), *Contesting Colonial Hegemony: State and Society in Africa and India* (London, 1994), pp. 246-247.

influence on the sensibilities of the modern elite, that acceptance was partial and conditional.'[16]

Scholars who have taken their cue from the work of Foucault have been inspired by his rethinking of the nature and operation of power. Foucault argued for a move away from Marxist state-centric analyses of power that saw it as a largely repressive phenomenon. Instead, he maintained:

> We must cease once and for all to describe the effects of power in negative terms: it 'excludes', it 'represses', it 'censors', it 'abstracts', it 'masks', it 'conceals'. In fact power produces; it produces reality; it produces domains of objects and rituals of truth. The individual and the knowledge that may be gained of him belong to this production.[17]

In addition to this, Foucault developed concepts such as 'discipline' and 'governmentality' to describe the different ways that the modern state exercised power. Historians of Africa have, however, been hard pressed to find parallels to Foucault's account of the shift in the way European states exercised power. This has been amply demonstrated by studies of colonial medicine and punishment.[18] There has thus been a move to sever the link between Foucault's insights about the operation of power and the historical experiences of Europe and use his concepts as tools for analysing the ways that law functioned in colonial contexts. It is in this sense, for example, that Derek Peterson has argued that: 'Legal bureaucracy was an instrument of colonial governmentality….'[19]

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[16] *Ibid*, p. 247.
[17] M. Foucault, *Discipline and Punish: The Birth of the Modern Prison* (London, 1977), p. 194.
[18] See M. Vaughan, *Curing their Ills: Colonial Power and African Illness* (Palo Alto, 1991), pp. 9-12; D. Branch, 'Imprisonment and Colonialism in Kenya, c.1930-1952: Escaping the Carceral Archipelago', *The International Journal of Historical Studies*, 38 (2005); Pete and Devenish, 'Flogging Fear and Food', and T. C. Sherman, 'Tensions of Colonial Punishment: Perspectives on Recent Development in the Study of Coercive Networks in Asia, Africa and the Caribbean', *History Compass*, 7 (2009).
[19] D. R. Peterson, 'Morality Plays: Marriage, Church, and Colonial Agency in Central Tanganyika, ca. 1876-1928', *American Historical Review*, 111 (2006), pp. 987-988. See also J. Comaroff, 'Governmentality, Materiality, Legality, Modernity: On the Colonial State in Africa', in J. Deutsch, H. Schmidt and P. Probst

In trying to understand the role of law in the constitution of state power in Zimbabwe between 1950 and 1990, I attend to the ways that law was used in constituting and legitimising the colonial social and political order. However, I take issue with Foucault's rejection of the repressive nature of power. I argue instead that the operation of law in colonial Africa often exemplified the ways that power was simultaneously repressive and productive, coercive and constitutive. However, the degree to which it was either, and the level of success states achieved, varied over time. Examining this shifting balance between repression and legitimation allows for the complexity of the role of law in colonial contexts to be more clearly grasped. In addition, it reveals important changes in the nature of colonial rule.

Thinking about how, when and why the balance in the use of the law shifted over time also casts light on the shifting and often fragmented nature of colonial states. Law was not simply a tool in the hands of the state, it was central to the constitution of the state itself. The establishment of legal institutions was part of the process of state construction and these institutions played a role in the projection of state authority across space. In addition, the efforts to establish colonial courts as the final arbiters of justice in the colonies were part of the means by which the state was established as the apex of society. Furthermore, as Thomas Hansen and Finn Stepputat point out, the construction of states entailed 'the institutionalization of law and legal discourse as the authoritative language of the state and the medium through which the state acquire[d] discursive presence and authority to

(eds), *African Modernities: Entangled Meanings in Current Debate* (Oxford, 2002) and D. Scott, 'Colonial Governmentality', *Social Text*, 43 (1995).

authorize.'[20] While law was important in the constitution of states, it should also be noted that it was often the source of division within the state. Historians have long noted that colonial states were 'bearer[s] of complex and conflicting values, with internal tensions and disputes about the most appropriate way to rule'.[21] The law was one source of this internal tension and different branches of the state often clashed over its content and administration. In this study I use the shifts in the role of the law in constructing state power as a means of exploring the shifts in the nature of colonial rule, the continual process of state construction and legitimation, as well as the efforts by the state to constitute Africans as subjects or citizens.

Colonial States and Indigenous Legal Systems

An important issue that scholars of African history have grappled with has been the role that indigenous legal systems played in aiding, or indeed undermining, colonial rule. Martin Chanock's study of 'customary law' in Northern Rhodesia and Nyasaland was important in driving the debate on this subject.[22] Chanock challenged the view amongst anthropologists that 'customary law' was a carry-over from the pre-colonial African past. He argued instead that it was manufactured during the colonial period as a result of the coincidence of interests between colonial governments and male African elders. Colonial officials were concerned about the breakdown of order and the need to mobilise African labour. For their part, male elders were anxious to regain control of women and youth. This had been eroded by colonial

[20] T. B. Hansen and F. Stepputat, T. B. Hansen and F. Stepputat, 'Introduction: States of Imagination', in T. B. Hansen and F. Stepputat (eds), *States of Imagination: Ethnographic Explorations of the Postcolonial State* (Durham and London, 2001), p. 7.
[21] Cited in J. Alexander, *The Unsettled Land: State-making and the Politics of Land in Zimbabwe, 1893-2003*, (Oxford, 2006), p.11.
[22] M. Chanock, *Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia* (Cambridge, 1985). See also F. G. Snyder, 'Colonialism and Legal Form: The Creation of "Customary Law" in Senegal', *Journal of Legal Pluralism*, 49 (1981).

laws that enabled young women to resist patriarchal control and the new avenues for wealth accumulation that gave young men greater independence from male elders. The result, Chanock argues, was the freezing of what had hitherto been a flexible body of practices within African society into rigid codes which came to be recognised as 'customary law'.

Underlying Chanock's study is a 'legal centralist' perspective that views the colonial legal system as a single entity, incorporating statute law as well as invented 'customary law', both of which are tied to the state. Kristin Mann and Richard Roberts' edited volume on law in colonial Africa similarly adopted a legal centralist perspective and explicitly eschewed the concept of 'legal pluralism'. In their introduction, Mann and Richards point out: 'Most chapters in this anthology adopt the perspective not of plural legal systems – indigenous, Muslim, European, and customary – but rather of a single, interactive colonial legal system. Europeans did not impose this system fully developed. It was forged over time by Africans and Europeans pursuing interests and beliefs of their own.'[23]

Subsequent studies have cast doubt on Chanock's conclusions. They show that he allocates too much power to colonial administrations and sees far more success in their projects than may have been achieved in reality. Sally Falk Moore's research among the Chagga in Tanzania shows that, while 'customary law' retained the outward appearance of being unchanging, it was in fact responsive to changing social and economic conditions. 'In the colonial period', she argues, 'the Native Authorities could make new rules. "Customary law" could be added to, bits of it replaced. It could be reinterpreted. Parts of it could remain

[23] K. Mann and R. Roberts, 'Introduction' in Mann and Roberts (eds), *Law in Colonial Africa* (London, 1991) pp. 8-9.

unused. But as labelled, it was an entity which was conceived as static.'[24] Focusing on the subject of access to land, Sarah Berry has similarly questioned the view that the attempts to invent 'customary law' were successful.[25] She observes that the rise in the value of land, due to increased agricultural commercialisation, made access to land the focus of struggles within African society. In this context: 'Colonial "inventions" of African tradition served not so much to define the shape of the colonial social order as to provoke a series of debates over the meaning and application of tradition which in turn shaped struggles over authority and access to resources.'[26] Terence Ranger has also revisited his earlier arguments on the 'invention of tradition' and indicated the need to '…trace a constant process of imagining and reimagining, and the ways in which Africans exploited "inventions" useful to the colonial rulers so as to preserve areas of autonomy in which unexpected and disconcerting changes might take place.'[27]

Thomas Spear has argued that there were limits built into the strategy of drawing on 'tradition' as a means of stabilising the colonial state:

> If colonial administrators were to capitalize on the illusion of traditional authority, their rule was limited by the need of those authorities to maintain their legitimacy. Nor could traditional authority simply be invented if it was to resonate with people's values and be effective. Rather it had to emerge from the discourse of tradition, and once colonial administrators acknowledged the sovereignty of traditional discourse, they too became subject to it….[28]

Brett Shadle's research on 'customary law' in colonial Kenya shows that administrative officials in Kenya were in fact opposed to codification, for fear that a 'crystallized,

[24] S. Falk Moore, *Social Facts and Fabrication: Customary Law on Kilimanjaro* (Cambridge, 1986), p. 317.
[25] S. Berry, 'Hegemony on A Shoestring: Indirect Rule and Access to Agricultural Land', *Africa*, 62 (1992).
[26] *Ibid*, p. 328.
[27] T. Ranger, 'The Invention of Tradition Revisited: The Case of Colonial Africa', in T. Ranger and O. Vaughan (eds), *Legitimacy and the State in Twentieth Century Africa: Essays in Honour of A. H. M. Kirk-Greene* (London, 1993), p. 105.
[28] T. Spear, 'Neo-Traditionalism and the Limits of Invention in British Colonial Africa,' *Journal of African History*, 44 (2003), p. 12-13.

unalterable customary law would allow them little room to adjust the law in order to control local African courts and, by extension, African societies.'[29] He also notes that even after codification African court elders 'followed a much more nuanced customary law in the courts than the one spelled out in colonial texts.'[30] He thus offers the conclusion that: 'Customary law and African courts, which colonial officials believed to be basic to the reproduction of state legitimacy and authority, lay largely outside the purview of the state.'[31] Diana Jeater's work on the early colonial period in Southern Rhodesia has highlighted the existence of distinct legal systems each with different legal procedures, concepts and jurisprudential underpinnings, all of which proved to be resilient in the course of the colonial period.[32] In addition, she shows that there was no codification of 'customary law' in the colonial period in Southern Rhodesia.

The empirical evidence proffered by these scholars suggests the need to rethink not only the idea of the 'invention' of 'customary law' but the legal centralist assumptions that undergird the work by Chanock and others. This perspective tends to underplay the distinct nature of the legal systems involved and the complex and sometimes antagonistic relationships between them which developed over time. It is therefore useful to revisit the alternative approach of legal pluralism. For Sally Engle Merry, legal pluralism referred to 'a situation in which two or more legal systems coexist in the same social field.'[33] A key objective of proponents of the concept is to decentre the state as a source of law. Among other things, legal pluralism as an approach explores the ways that 'state law penetrates and restructures

[29] B. L. Shadle, '"Changing Traditions to Meet Current Altering Conditions": Customary Law, African Courts and the Rejection of Codification in Kenya, 1930', *Journal of African History*, 40 (1999), p. 413.
[30] *Ibid*, p. 414.
[31] *Ibid*, p. 430.
[32] D. Jeater, *Law, Language and Science: The Invention of the "Native Mind" in Southern Rhodesia, 1890-1930* (Portsmouth, 2007).
[33] S. E. Merry, 'Legal Pluralism', *Law and Society Review*, 22 (1988), p. 871.

other normative orders through symbols and through direct coercion and, at the same time, the way non-state normative orders resist and circumvent penetration or even capture and use the symbolic capital of the state.'[34]

The concept of legal pluralism has been the subject of substantial debate within the field of legal anthropology since the 1980s.[35] Its critics have pointed out analytical flaws in the concept, such as the fact that its proponents have no agreed definition of what constitutes law. Furthermore, the definitions they do proffer often do not sufficiently distinguish 'law' from other social norms.[36] However, there has been increasing convergence amongst scholars and some of the most trenchant critics of the concept, such as Brian Tamanaha have come to embrace it.[37] This has partly been because of the concept's utility as a means of exploring the existence of multiple normative orders in a single social sphere. In addition, notwithstanding the analytical problems with the concept, the proponents of legal pluralism are not alone in the struggle to come up with an agreed definition of law. The debate over what law is remains unresolved in the field of legal philosophy.[38] Ultimately, the value of legal pluralism, as Richard Wilson notes, is that it provides a useful 'descriptive model' for the study of contexts where multiple conflict resolution forums are present in a single social sphere.[39] I argue that the concept of legal pluralism offers a better lens through which to view the shifting and mutually constitutive relations between the different legal systems in the Zimbabwean legal sphere than legal centralism or ideas of top-down invention.

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[34] *Ibid*, p. 881.
[35] For an overview of this debate see; Merry, 'Legal Pluralism'; B. Tamanaha, 'The Folly of the Social "Scientific" Concept of Legal Pluralism,' *Journal of Law and Society*, 20 (1993) and R. Wilson, 'Reconciliation and revenge in Post-Apartheid South Africa: Rethinking Legal Pluralism and Human Rights', *Current Anthropology*, 41 (2000).
[36] Tamanaha, 'The Folly of the Social "Scientific" Concept,' p. 192.
[37] B. Tamanaha, 'A Non-essentialist Version of Legal Pluralism', *Journal of Law and Society*, 27 (2000).
[38] B. Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global', *Sydney Law Review*, 30 (2008), p. 392.
[39] Wilson, 'Reconciliation and Revenge', p. 77.

Law and African Agency

Thinking about the role of law in the constitution of state power in colonial Africa raises a number of questions about African responses. Could law be used by Africans in pursuit of their own interests? What room, if any, existed for resistance within the legal arena? Breaking ranks with other Marxist scholars, Edward Thompson argued that law could occasionally provide access to justice for subordinate social groups:

> If law is evidently partial and unjust then it will mask nothing, legitimize nothing, contribute nothing to any class's hegemony. The essential precondition for the effectiveness of the law, in its function as ideology, is that it shall display an independence from gross manipulation and shall seem to be just. It cannot seem so without upholding its own logic and criteria of equity; indeed, on occasion, by actually being just.[40]

John Comaroff has pointed out that the existence of tensions within the colonial state provided opportunities for Africans to make use of the law in contesting the actions of state officials.[41] Such tensions, he adds, did not necessarily make colonial rule any less exploitative. Merry has also demonstrated that subordinated individuals could harness the symbolic power of the law in their efforts to challenge oppressive structures and relationships.[42] In addition, they could mobilise the language of law in clashes with the state and appropriate state-instituted legal spaces for their own performances.

However, there has been increasing hesitance among scholars to classify all instances of African legal agency as resistance. Many have instead drawn attention to the complex nature

[40] E. P. Thompson, *Whigs and Hunters: The Origins of the Black Act* (New York, 1975), p. 263.
[41] J. Comaroff, 'Colonialism, Culture and Law: A Foreword', *Law and Social Inquiry*, 26 (2001), p. 311. See also F. Cooper and A. Stoler, 'Introduction Tensions of Empire: Colonial Control and Visions of Rule', *American Ethnologist*, 15 (1989).
[42] S. E. Merry, 'Resistance and the Cultural Power of Law,' *Law and Society Review*, 29 (1995), p. 15.

of legal struggles. In her study of cases brought before Islamic Khadi Courts in Kenya, Susan Hirsch notes that:

> Courts are "complex sites of resistance" in part because they have the potential to play pragmatic, ideological, and symbolic roles in contestations over power... this complexity is generated as well by the fact that people use courts to contest multiple relations of power, reworking understandings of gender, race, class, and other hierarchies sometimes simultaneously. Thus, oppositional practices in courts, emerging in response to a range of dominations, assume many forms and generate diverse outcomes.[43]

Part of this complexity is due to the fact that use of the courts can at times yield contradictory results. Stephen Ellman has argued that 'anti-apartheid lawyering' in South Africa had the contradictory result of legitimizing the legal system among some groups of Africans.[44] This, he argues, was not necessarily harmful in the long run as it contributed to the legitimacy of the South African legal system after apartheid. Derek Peterson's study of marital disputes amongst Africans that were heard in church courts during the early colonial period in Tanganyika shows how litigants represented themselves in ways that harnessed the authority of these courts in their favour. He argues that: 'This mode of agency did not work against power. Kaguru and Gogoi litigants contracted with colonialism.'[45] By appealing to these courts, they effectively invited closer church involvement in their lives. These studies raise the question as to whether appealing to colonial courts drew Africans more closely into the grasp of the state and legitimised the legal system while at the same time rendering them some advantages in pursuing their interests among each other?

This and other questions about African legal agency are best answered in concrete historical contexts. This study sets out to do so using the case of Zimbabwe. I explore the ways

[43] S. Hirsch, 'Khadi Courts as Complex Sites of Resistance: The State, Islam and Gender in Post-colonial Kenya', in M. Lazarus-Black and S. F. Hirsch (eds), *Contested States: Law, Hegemony, and Resistance* (New York, 1994), p. 120.
[44] S. Ellman, 'Law and Legitimacy in South Africa', *Law and Social Inquiry,* 20 (1995).
D. R. Peterson, 'Morality Plays', p. 1009.

Africans used the law in struggles which each other and with the state. I examine the instrumental and discursive uses of the law, as well as people's performances in the legal arena. I explore African litigants' legal consciousness or 'the ways ordinary people understand the legal system and their rights to use it.'[46] I analyse the ways in which Africans developed their knowledge about how to use the courts. In addition, I extend the analysis to ideas of personhood and the political imaginaries that underlay legal action by African litigants.

Methods and Sources

My study will focus on legal struggles between Africans and the state in Zimbabwe between 1950 and 1990. Zimbabwe provides a useful case study in which to explore these questions because of the importance of the law as a mode of rule for the settler state. In addition, the period covered by this study witnessed important socio-economic and political processes that fuelled conflicts between Africans and the state, and amongst Africans themselves. Very often these conflicts found their way into the courts. These processes included the ambitious top-down efforts to restructure African agriculture in the 1950s, which triggered a crisis in state legitimacy; the moves to re-legitimise the state through chiefs and draw 'customary law' and chiefs' courts more firmly into the service of the state in the 1960s and 1970s; the rise of African nationalism and increasing challenges to the colonial state, as well as the a bitter guerrilla war which culminated in Zimbabwean independence in 1980. The period covered by the study extends through to the first decade of independence and so explores the legacies and the discontinuities in the legal sphere, both in the way the new government drew on the law and how citizens used it as a means of engaging each other and the state.

[46] S. E. Merry, 'Anthropology, Law and Transnational Processes', *Annual Review of Anthropology*, 21 (1991), p. 361.

I focus on three major types of cases. First, those that occurred in the rural areas and which often concerned access to land, the regulations governing its use, and 'customary' legal authority. Second, the overtly political cases that pitted the government of the day against those it deemed its political enemies such as nationalists or opposition party leaders and their supporters. Third, those that involved the negotiation of gender relations. These types of cases were amongst the most prominent cases of the period and they therefore provide a prism through which to examine the important struggles of the time. They also allow for an examination of the role played by statute law and 'customary law' in constituting state power and the extent to which these efforts succeeded. In addition, such cases provide an insight into legal encounters in both rural and urban areas.

Writing about legal struggles in this way presents a familiar problem facing historians of colonial Africa: that of striking a balance between portraying African agency and colonial violence. On the one hand, too much emphasis on African agency risks underplaying the extent of colonial violence; on the other too much discussion of state violence denies African agency. I have tried to chart a path between these two ends of the spectrum. Nevertheless, it is important to underscore the fact that the legal encounters I discuss were usually between unequally matched parties. The Rhodesian settler state had significant coercive capacity, and as settler rule was increasingly challenged, it resorted to more and more violence. In these circumstances, legal victories by Africans were often short-lived as the state found other, often non-legal, means to achieve its goals. However, it is important to note that whether people won or lost in their legal encounters with the state, this was only one dimension of the legal struggle. As the law was being used instrumentally, discursively, and performatively,

defeat at one level could be translated into victory at another. Importantly, the law was not the only means by which the struggles in question were being pursued. In the 1960s and 1970s, for example, the liberation war was underway.

An important set of sources for this study has been court records. I have read the trials they document in a number of ways. At one level I have tried to understand these legal struggles in the context of broader social and political struggles. I have thus focused on the events leading to the court case, the case's passage through the legal system and its significance in relation to broader struggles. At another level I have used legal disputes as a way of exploring African legal agency by focusing on the underlying ideas of personhood and the political imaginaries that animated it. I have therefore paid close attention to the courtroom statements made by African litigants as well as their 'performances'.

The use of court records as sources has, however, presented a number of challenges that I have had to grapple with. In the first instance, studying the colonial period through the prism of legal struggles runs the risk of giving the impression that colonial power could always be negotiated with, or that it was always or primarily rule-bound. I have therefore had to be constantly aware of the fact that the legal arena, like other sites of struggle such as the plantation, the mine compound, the rural areas or the township, has its own unique possibilities and limitations for historical actors, and indeed for historians. To this end I have tried to show how Africans' fortunes in the courts varied depending on the court they were appealing to, the period and the 'crime' in question.

Focusing on struggles in the legal arena also raises the question as to whether this narrows the focus onto elites who had the means to institute legal action and thus introduces a bias into the analysis. Pursuing legal action certainly required resources which many Africans did not always have. However, I focus on cases instituted by Africans as well as those instituted by the state. Given the legalism of the Southern Rhodesian state, there were numerous legal encounters between Africans from all walks of life and state officials. These increased with the implementation of the Native Land Husbandry Act of 1951 and the rise of African nationalism from the 1950s. It is worth pointing out that there were a number of cases where villagers combined their resources in order to afford legal fees. In addition, during the 1960s and 1970s organisations such as the International Defence and Aid Fund (IDAF), Christian Aid, the Catholic Commission for Justice and Peace and Amnesty International provided financial assistance to enable thousands of Africans involved in politically related cases to access legal representation.

Given the abundance of court cases each year across the period of study, an issue I had to deal with was the selection of cases. As indicated above I have focused on those types of cases that were linked to broader struggles during the period under study and therefore allow me to reflect on the place of law in these broader struggles. However, my selection of court cases was also inevitably shaped by what was available in the archives. During my time in the field the National Archives of Zimbabwe had processed and accessioned Magistrates Court and High Court records up to the late 1960s. I tried to overcome the subsequent gap in a number of ways. Firstly, I was able to consult the IDAF files, which contained correspondence and reports from lawyers in Rhodesia to the secretariat in London giving detailed accounts of the cases they were handling and their experiences in the courts. Secondly, I travelled to the regional offices of the National Archives of Zimbabwe located in

Bulawayo and Masvingo where I was able to gain access to unprocessed court records from those regions. Thirdly, I was also able to negotiate access to the private archives of Siwanda Kennedy Mbuso Sibanda, who was amongst the few African lawyers in the 1970s, and whose practice dealt with a significant number of political cases.

In dealing with court cases I had to choose from a number of approaches. The first approach, which is on one end of the spectrum, is to do an in-depth study of a single case drawing out the multiple strands in it. This is best exemplified by David Cohen and Eisha Atieno Odhiambo's study of the legal battle over the remains of S. M. Otieno. They show that 'the contest over SM's body became the site and the moment for a great national debate over the meaning of culture, and over the place of national and customary law within the intimate lives of Kenyans.'[47] Another approach, which lies at the opposite end of the spectrum, is to base the study on numerous cases which are only briefly entered into. I have chosen a middle of the road approach by focusing on cases that illustrate broader trends and entering into them in some depth. This has allowed me to explore the shifting uses of the law by the state over the four decades while still exploring the diverse ways that the law was used in specific moments.

Court records, it should be pointed out, have a number of limitations. They often record the 'narrow thread of organised dispute' at the expense of the 'broader lattice of contention'.[48] In addition, while they are amongst the few instances in which African voices are captured in

[47] D. Cohen and E. S. Atieno Odhiambo, *Burying SM: The Politics of Knowledge and the Sociology of Power in Africa* (Portsmouth, 1992), p. 16. See also C. Ginzburg, *The Cheese and the Worms: The Cosmos of a Sixteenth-Century Miller* (London, 1976).
[48] D. W. Cohen, '"A Case for the Basoga": Lloyd Fallers and the Construction of an African Legal System', in K. Mann and R. Roberts (eds), *Law in Colonial Africa* (London, 1991).

the colonial archive, 'these voices speak in ways which have been profoundly shaped by the procedures of the court and by the circumstances surrounding the transformation of testimony into text.'[49] Not only have they been filtered by translation and transcription, but litigants often frame their cases to meet the 'discursive traditions' of the court. These limitations were evident in many of the cases I came across in the archives. However, African litigants were not always bound by these courtroom conventions and such instances where they challenged them were especially significant. For example, by the late 1960s nationalists and guerrillas were rejecting the conventions of the courts and this signified both a loss of legitimacy of the courts in their eyes, as well as their efforts to defy the attempts by the courts to frame their actions within a discourse of crime and terrorism.

I have tried to mitigate the limitations of court records by consulting a diverse set of sources which includes newspapers, government correspondence as well as autobiographies and memoirs. I have also relied extensively on Parliamentary Debates. These debates were particularly useful because the presentation of proposed legislation in Parliament was always accompanied by a speech by the relevant Minister which outlined the policy considerations that informed the Bill. This was followed by a debate in the House which often gave a good indication of the diverse opinions on the legislation in question. The added advantage of Parliamentary Debates for my study was their consistent availability across the four decades that it covers. By following debates on specific laws, I was able to track shifting opinions over time and to draw parallels in the way successive administrations thought about the relationship between law and state power. In addition, by combining the legislative debates with court records and other sources I was able to trace legislation from the time of its

[49] R. Roberts, 'Text and Testimony in the Tribunal de Premiere Instance, Dakar, during the early Twentieth Century', *Journal of African History*, 31 (1990), p. 450.

formulation, the debates over it, its implementation and the resultant legal encounters between Africans and the state.

I have also relied significantly on oral history. I conducted interviews with 53 informants who included litigants, lawyers, judges and politicians. These interviews were important in filling the gaps in the archival record. In addition, they helped me to interpret the information that I was finding in the archives. However, the collection and interpretation of the interviews themselves was not always a straightforward matter. The political context in which I undertook many of my interviews coloured the ways that the past was remembered by some of my informants. It also influenced what I was able to ask and what informants were willing to disclose. Many of the interviews were undertaken between 2010 and 2011, in the aftermath of the violent and contested election of June 2008 which brought the Zimbabwean political crisis to a head. An important impact of the political violence was to deepen the political polarisation in the country. The urban areas were seen as allied to the major opposition party, the Movement for Democratic Change (MDC), while the rural areas were seen as aligned to the ruling ZANU (PF). Despite the relative political and economic stability during the period I conducted my interviews, the political landscape was still characterised by political contention and suspicion. In addition, there was the potential of a return to political violence because the government was expected to announce the date of the constitutional referendum and subsequent elections. As a result local ZANU (PF) political structures such as youth bases which had been used to carry out political violence were being reactivated.

This political context had an impact on my research on chiefs' courts, which was conducted in the rural district of Zaka located in the province of Masvingo. With the help of family contacts I was able to gain access to Chief Ndanga and the village heads in his chieftaincy, and was allowed to attend one of their meetings (*dare*). However, the fact that I was a young man from the urban areas, which are considered to be MDC strongholds, while 'traditional' leaders are generally viewed to be aligned to ZANU (PF), meant that I had to be careful about the questions I asked. During my interviews it proved to be much easier to talk about social issues around marriage customs and maintenance cases as well as the events during the Smith era, than questions about the policies of the Mugabe government in relation to chiefs.

The political context also influenced the accounts of the lawyers I interviewed. The current problems in Zimbabwe related to human rights violations, the rule of law and judicial independence have given rise to a narrative, amongst human rights activists and lawyers, that traces the roots of these problems to the early years of the ZANU (PF) government. In some cases informants maintained that the administration of the law during the Rhodesian years was better than the 1980s. However, a closer examination of the events in the 1980s shows that the developments in the legal arena during these early years of ZANU (PF) government cannot be reduced to a story of solely repressive law. In addition, the extreme violence of the 1980s was followed by relative stability in the 1990s. There is also little to suggest that the administration of the law during Rhodesian years was 'better' than in the first decade of independence.

I have therefore treated these accounts as narratives that were shaped by my informants' social and political backgrounds. In drawing on such narratives I have thus tried to avoid

what Martin Chanock has described as 'reverse Whig history' where the problems of the present are located further and further in the past.[50] Reading history backwards in this way loses sight of the more immediate roots of historical events and the multiple trajectories that were possible at those junctures.[51] The 1980s proved to be a difficult period to talk about for lawyers who were working closely with the new government as many did not want to be associated with the violence of that period. Consequently, the narratives of these lawyers are marked by a distinct shift from the flowing accounts about their numerous encounters with the settler government in the 1970s in their effort to defend political prisoners, to reflective passages that recounted their dilemmas during the 1980s.

Chapter Outline

The main body of this study consists of seven chapters. Chapter One provides the historical background and covers the period between 1890 and 1950. It briefly outlines the history of the Southern Rhodesian legal system, focusing on its establishment, its key features, as well as its operation. It highlights the tensions that emerged within the state over the administration of the law. In addition, the chapter examines the evolution of the policy regarding indigenous legal systems. The chapter goes on to examine Africans' engagement with the legal systems and the development of African legal consciousness. Chapter Two focuses on the role of chiefs' courts in the settler government's designs between 1950 and 1980. It examines the settler government's efforts in the 1960s to draw the chiefs' courts more firmly into the service of the state. I argue that this turn to the chiefs' courts was accompanied by attempts to construct Africans as ethnic subjects bound by customary

[50] M. Chanock, 'Writing South African Legal History: A Prospectus', *Journal of African History*, 30 (1989), p. 265.
[51] Cooper, *Colonialism in Question: Theory, Knowledge, History* (Berkeley, 2005), pp. 18-19.

obligation as opposed to rights-bearing citizens. I show that both attempts failed owing to the resistance of the chiefs and 'ordinary' Africans as well as the pressure being exerted by the guerrilla war.

In Chapters Three and Four I turn to the political sphere and examine the legal responses of successive settler governments to the rise of African nationalism. Chapter Three focuses on the period between 1950 and 1964. It examines the government's attempt to come to terms with increasing political agitation by Africans and some of the early legal encounters between the settler government and African nationalists. I argue that the laws that were passed during this period, which criminalized African political activity and granted the government broad powers to clamp down on it, emerged out of lengthy debates within settler society over the principles that were supposed to guide the relationship between law and state power. I demonstrate that nationalists' success in their legal battles with colonial officials during this period resulted in calls by officials for more repressive laws by the mid-1960s. Chapter Four picks up the story from 1965 and explores the role that law played in the political sphere during the fifteen years leading up to Zimbabwean independence in 1980. I argue that the period witnessed a shift in the government's use of the law away from legitimation towards coercion. It also saw the build-up of a significant legal armoury which was used to suppress political dissent. I argue that this was one of the significant political legacies of settler rule. The chapter also shows how the shift in the state's use of the law was accompanied by a corresponding shift in the attitudes of nationalists and guerrillas towards the Rhodesian legal system.

In Chapter Five I focus on the involvement of African lawyers in the struggles in the legal arena between 1950 and 1980. I argue that the struggle by African lawyers to enter the legal profession in the face of opposition from the government and European lawyers represented another front in the legal struggles between Africans and the settler government: that over the distribution of the symbolic capital of the legal profession. I show that these lawyers played an important role as intermediaries in the struggles between Africans and the state, and amongst themselves. I highlight their role as 'translators' who translate the concepts and stipulations of state law for their clients and translate their clients' grievances into the language of the law. The chapter also examines their role as intellectuals who formulated and articulated critiques of the legal system.

Chapters Six and Seven extend the story into the first decade of independence. They examine the two contrasting dimensions of transformation and continuity that characterised developments in the legal sphere during this period. Chapter Six explores the ways the new ZANU (PF) government tried to transform the legal system it inherited and to use it as a means of state construction. I explore three key areas of legal reform during this period: the 'Africanisation' of the legal system, the reorganisation of 'customary law' courts, and reforms to the legal status and rights of women. Chapter Seven assesses the continuities in the legal arena focusing on the political sphere. I show that the ZANU (PF) government was in large part a continuation of the practises of the settler governments that preceded it and used the law to criminalise and persecute its political opponents. I argue that these continuities were the result of a combination of factors which included the institutional legacies of the settler state, the party's own authoritarian tendencies, the history of tensions between ZANU (PF) and ZAPU, as well as the political calculations of the 1980s.

In sum, this study explores the role of law in the constitution and contestation of state power using the case of Zimbabwe between 1950 and 1990. In doing so it intervenes in three major scholarly debates on the role of law in African history. Firstly, I examine the role of law in constituting state power by exploring the interplay between legitimation and coercion in long term perspective. Secondly, I interrogate the legal centralist assumptions that undergird studies of indigenous legal systems in African history and make the case for legal pluralism as a lens through which to examine developments in this sphere. Lastly, I contribute to the debates on African legal agency by analysing the sources of African legal consciousness as well as the political imaginaries and ideas of personhood that underlay it. In order to provide a historical background to the rest of the study, the following chapter examines the establishment and operation of the legal system in colonial Zimbabwe between 1890 and 1990.

Chapter I

Historical Background, 1890-1950

Introduction

The immediate impetus for the colonisation of Zimbabwe was the search for the famed 'Second Rand'. Having failed to secure profitable gold mines in Witwatersrand, Cecil John Rhodes and his partners in the British South Africa Company (BSAC) began to look northwards to the lands between the Limpopo and the Zambezi which were thought to possess rich gold deposits that rivalled those found in the South African Transvaal.[52] The search for this 'Second Rand' was spearheaded by the BSAC which was granted a Royal Charter in October 1889 by the British monarchy to colonise the territory on its behalf. Among other things, the Royal Charter charged the BSAC with the responsibility of establishing governmental structures in the new territory. One of the first tasks the Company government undertook was the establishment of a legal system.

In this chapter I provide an overview of the establishment and operation of this legal system between 1890 and 1950. I draw largely on secondary literature in order to make four main arguments. Firstly, I argue that the establishment a legal system was an integral part of the colonial project and the making of the colonial state. I show that it was a complex project which proceeded incrementally and provoked tensions within the state and the settler community. The second argument I make is that the interaction in the legal sphere between

[52] I. Phimister, *An Economic and Social History of Zimbabwe, 1890-1948: Capital Accumulation and Class Struggle* (London, 1988), p. 6.

the imposed and the indigenous legal systems is best understood using the framework of legal pluralism. Thirdly, I demonstrate that the law played an important role in the creation and maintenance of the social, economic and political order envisioned by colonial authorities. Lastly, I intervene in the debates over African interaction with the colonial system and make the case for an analysis of African legal agency that goes beyond opportunism and takes account of the political imaginaries and the ideas of personhood that underlay this legal agency. The chapter begins by exploring the establishment of legal institutions and a particular legal culture on the part of the state before turning to the shifting policy of the government with regards to the indigenous legal systems. In the third section I focus on the role of the legal system in reproducing the colonial social order. Lastly, I examine African engagement with the legal system in the period before 1950.

Establishing the Colonial Legal System

The imposition of a legal system was an integral part of the colonial project. As Rene Maunier points out, without this, colonists would have assumed the status of immigrants and would be subject to local laws.[53] Establishing legal institutions also contributed to the process of state construction. Setting up colonial courts and the endeavour to ensure that they were seen as the final arbiters of justice was part of the process of establishing the ascendancy of state institutions and projecting state authority across the territory.[54] However, implanting a new legal system was not a simple process. Colonial authorities had to deal with numerous practical problems which included drawing up laws, staffing legal institutions with qualified personnel and ensuring their smooth operation. At the same time the question

[53] Cited in E. Saada, 'The Empire of Law: Dignity, Prestige, and Domination in the "Colonial Situation"', *French Politics, Culture and Society*, 20 (2002), p. 105.
[54] T. B. Hansen and F. Stepputat, 'Introduction: States of Imagination', in T. B. Hansen and F. Stepputat (eds), *States of Imagination: Ethnographic Explorations of the Postcolonial State* (London, 2001), pp. 5-6.

of incorporating the 'colonized' population and ensuring their recognition of the new legal institutions had to be dealt with. In addition, the content and the administration of the law was often the source of significant friction within the state and in the wider settler society. In the case of Southern Rhodesia such tensions were a permanent feature of the legal system.

One of the first steps taken towards establishing the legal system in Southern Rhodesia was the BSAC Administrator's decision in 1890 that Roman-Dutch law which was applicable in the Cape Colony would also apply to the new protectorate.[55] The process of creating formal judicial structures was initiated in 1891 when magistrates were appointed in Mashonaland. These magistrates were authorised to exercise criminal and civil jurisdiction over Europeans and could only hear cases involving Africans in circumstances where this was deemed 'necessary in the interests of peace or for the prevention or punishment of acts of violence to persons or property.'[56] Until 1894, a magistrate could appoint two or four assessors 'to aid him in the decisions of any matter coming before him in his judicial capacity.'[57] With the promulgation of the 1894 Matabeleland Order in Council a number of steps were taken to establish the legal system on a firmer basis.[58] This led to the extension of magistrates' jurisdiction to all residents in the colony regardless of race. Magistrates were empowered to hand down sentences of fines of up to £25, a maximum imprisonment term of three months and up to 15 strokes.[59]

[55] C. Palley, *The Constitutional History and Law of Southern Rhodesia, 1888-1965* (Oxford, 1966), p. 493.
[56] *Ibid*, p. 513.
[57] Report of the Courts of Inquiry Commission 1971, Government of Rhodesia (Salisbury, 1971), p. 20. This provision was reintroduced in 1964.
[58] An 'order in council' was an order made by the High Commissioner which had the force of law.
[59] Courts of Inquiry Commission, pp. 26-27. In 1942 the limit with respect to imprisonment was raised to six months and the maximum fine was increased to £50.

The 1894 Matabeleland Order in Council also provided for the establishment of the Matabeleland High Court which had jurisdiction over all the inhabitants of the colony. This court was later reconstituted as the Southern Rhodesia High Court by means of the 1898 Order in Council. High Court judges were to be appointed by the BSAC but such appointments were subject to the approval of the British Secretary of State.[60] The first judge was appointed in 1894, followed by a second in 1896. The Southern Rhodesia High Court bench continued to have two judges until 1933, when a third was appointed. By 1964 the number of judges sitting in the High Court had risen to nine.[61] The first few judges were hired from outside Southern Rhodesia but over time the majority came to be selected from within the colony's legal fraternity. There were three main paths of entry onto the Southern Rhodesian bench for local legal professionals.[62] Most of those who were appointed to the bench had held the position of Minister of Justice. Alternatively, judges were selected from those who had served as Attorney-Generals. The last path was selection from amongst the members of the local bar. By the 1960s, four of Southern Rhodesia's previous Chief Justices had served as Minister of Justice. This tradition of selecting judges from amongst people who had held political office or served as senior members in the executive introduced a systemic bias within the judiciary which would become especially clear when the overtly political cases of the 1960s came before the courts.

Another feature of the colonial legal system which brought to the fore the embedded nature of ideas about racial difference within it was the jury system. Jury trials in Southern Rhodesia were initiated by the passage of the 1899 Juries Ordinance which stipulated that all

[60] *Ibid*, p. 5.
[61] *Ibid*.
[62] Palley, *The Constitutional History, p. 549.*

criminal trials in the High Court were to be tried before a jury of nine European men.[63] Between 1899 and 1908 there were 'several scandalous verdicts' involving 'unjustified acquittals of Europeans charged with offences against Africans and some baseless convictions of Africans charged with offences against European women.'[64] This led to the passage of the Special Juries Ordinance of 1912 which provided for the appointment of a special jury of five men chosen by the Governor and approved by the Legislative Assembly to serve as jurors in cases 'where the accused is charged with the crime of murder, culpable homicide, rape or robbery (or an attempt to commit any of those crimes) or any assault with any special intent and where such crime is committed by a European against a native or by a native against a European.'[65] Despite the passage of this new law, the jurors 'tended to be swayed by white public opinion in their appraisal of cases that inflamed feelings against Africans.'[66]

The jury system would later be changed largely due to reasons that were again grounded in ideas of racial difference. As part of their attempts to establish themselves as the sole 'experts' on all matters relating to Africans, Native Affairs Department (NAD) officials maintained that jury trials were not suited to cases involving Africans because 'European jurors had little or no knowledge of African custom or way of life'. In addition, 'few had any conception of the working of the African mind.'[67] The result was the Criminal Trials (High Court) Act of 1927 which abolished jury trials for Africans and stipulated that they instead be tried by a judge assisted by two assessors, whose key qualifications consisted of having served in the NAD for a long period. The 1927 Act also gave non-Africans the choice of

[63] Courts of Inquiry Commission, p. 31.
[64] *Ibid*.
[65] *Ibid*, p. 32. Palley, *The Constitutional History, p. 524.*
[66] M. C. Steele, 'The Foundations of a "Native" Policy: Southern Rhodesia, 1923-1933', (PhD Thesis, Simon Fraser University, 1972), p. 129.
[67] Courts of Inquiry Commission, p. 32.

whether to be tried by a jury or a judge and two assessors.[68] Appeals from the Southern Rhodesian High Court were heard in the Cape Supreme Court in South Africa, which was subsequently reconstituted as the Appellate Division of the Union of South Africa.[69] The Judicial Committee of the Privy Council in Britain remained the ultimate court of appeal for Southern Rhodesia until 1965 when the Rhodesian settler government unilaterally declared independence from Britain.[70]

A key feature of the Southern Rhodesian legal system was the tensions between the officials from the NAD and the Law Department. Native Commissioners (NCs), who came under the NAD, were primarily administrative officers. However, they were also granted judicial powers over all inhabitants of Southern Rhodesia in 1899.[71] The fact that they had executive and judicial powers, combined with their patronizing and racist views about Africans, contributed to their tendency to cultivate personalised forms of authority in their districts.[72] The Law Department officials tended to frown on the practices of NCs and saw it as their duty to ensure that there was strict adherence to due process in the administration of the law.[73] As Allison Shutt notes:

> Noticeable tensions existed between the British imperial authorities, the Native Department, and the Law Department. The British and Law Department upheld the liberal rule of law as the path to justice in Southern Rhodesia, while native

[68] *Ibid*, p. 33.
[69] This practice was abolished in 1955 when the Federal Supreme Court was set up to serve as the appellate court for cases originating from within the Federation of Rhodesia and Nyasaland. See Palley, *The Constitutional History*, pp. 541-547.
[70] Courts of Inquiry Commission, p. 9.
[71] *Ibid*, p. 20. This practice was abolished in 1962.
[72] A. Shutt, '"The Natives are getting out of hand": Legislating Manners, Insolence and Contemptuous Behaviour in Southern Rhodesia, c. 1910-1963', *Journal of Southern African Studies*, 33 (2007).
[73] For a discussion of similar tensions in Kenya and South Africa see B. L. Shadle, 'Changing Traditions to Meet Current Altering Conditions': Customary Law, African Courts and the Rejection of Codification in Kenya, 1930-1960,' *Journal of African History*, 40 (1999) and I. Evans, *Bureaucracy and Race: Native Administration in South Africa* (Los Angeles, 1997).

commissioners (NCs) argued that Africans required more discipline than existing Regulations and Acts allowed.[74]

It should be pointed out that Law Department officials were committed to a minimalist idea of the rule of law which had two key features: the idea that the exercise of power had to be governed by law and that the law was supposed to be administered according to set rules and procedures. As will be clear in the rest of the thesis, Law Department officials were much more flexible when it came to other aspects of a more elaborate idea of the rule of law such as the independence of the judiciary, the equal application of laws regardless of race or the need for law to be just in the substantive sense of the word.[75]

Given these differences, Law Department officials welcomed the decision in 1910 which limited NCs' judicial authority to Africans while magistrates continued to have judicial authority over all inhabitants of Southern Rhodesia. The Law Department also retained oversight of NCs with respect to reviewing their court rulings and adjudicating over cases brought by Africans against NCs. Much to the ire of the NCs, on a number of occasions decisions were made against NCs in cases brought forward by Africans.[76] NCs therefore pressed for 'unquestioned authority' over Africans and considered the passage of the 1927 Native Affairs Act as a victory. Like the 1910 Native Regulations, the Act regulated Africans' movement, employment and access to land. Significantly, it gave NCs 'exclusive criminal jurisdiction over proceedings for the contraventions of the Native Affairs Act'.[77] This victory on the part of the NAD was, however, diluted by the Law Department's

[74] Shutt, 'Legislating Manners', pp. 656-657.
[75] D. H. Cole, '"An Unqualified Human Good": E. P. Thompson and the Rule of Law', *Journal of Law and Society* 28 (2001), p. 185.
[76] Steele, 'The Foundations of a "Native" Policy', pp. 123-124.
[77] Shutt, 'Legislating Manners', p. 657.

insistence on strict adherence to procedural safeguards and its tendency to quash NCs' rulings on technical grounds.[78]

Linked to the NCs' courts was the Court of Appeal for African Civil Cases, which was established in 1928. The court was presided over by a retired judge or advocate who was assisted by two assessors who had served in the NAD. The court proved to be unpopular with African litigants and between 1928 and 1936, only 38 cases were reported to it. Nevertheless, the court's significance lay in the fact that it published its rulings on the cases it heard and this was the closest the colony got to codification of local customs. However, the anthropologist J. F. Holleman dismissed these rulings as often being 'vague and contradictory'.[79]

Soon after the occupation of Southern Rhodesia, a legal profession began to develop in order to provide services to the growing mining, agriculture and commercial sectors in the colony. The legal fraternity was made up of a significant number of lawyers who had migrated from South Africa. As with the broader legal system, the legal profession took on many of the features of the South African profession. This was particularly evident in its structure, its commitment to formalism, and its efforts to restrict entry on the grounds of gender and race.[80] In 1908 a Law Society was established and over time a profession which was divided into advocates and attorneys emerged.[81] While attorneys could appear in the lower courts and be

[78] Steele, 'The Foundations of a "Native" Policy', p. 52.
[79] Cited in Steele, 'The Foundations of a "Native" Policy', p. 137.
[80] See M. Chanock, 'The Lawyer's Self: Sketches on Establishing a Professional Identity in South Africa 1900-1925', *Law in Context Special Issue*, 16 (1999). I am using formalism here to refer to the approach to the law among legal professionals that holds that 'the rule of the law must be maintained as a purely legal standard devoid of an ideological content'. G. Feltoe 'Law, Ideology and Coercion in Southern Rhodesia' (University of Kent M. Phil Thesis, 1978), p. 81.
[81] Advocates and attorneys are similar to barristers and solicitors respectively.

approached by clients directly, advocates could not receive clients directly and had to be briefed by an attorney. However, advocates could appear in the High Court as well as the lower courts. There was little justification for such specialisation in the profession even as late as 1965, hence Claire Palley's observation that: 'A remarkable feature in Southern Rhodesia is that although only a small proportion of the population can afford to patronize lawyers, the country has persisted in having a divided profession.'[82]

This 'division of juridical labour' was in large part an effort by lawyers to control the supply of legal services in the colony. Another means by which the members of the profession sought to achieve this was by closely controlling entry into the profession. The process of becoming an attorney involved a period of attachment to a law firm as an often poorly paid 'articled clerk'.[83] The length of the attachment varied depending on whether one had a law degree or prior legal experience as an advocate. The period of clerkship was followed by a three-part Attorney's Admission Exam and those lawyers who wanted to work as notary publics or conveyancers had to sit for additional exams. In order to be admitted to the Southern Rhodesian Bar as an advocate one had to have qualified as a barrister in Britain or South Africa, or have attained a law degree in either country. Advocates also had to pass exams in local statute law, as well as Roman-Dutch law in the case of those who had studied law in Britain.

Initially colonial officials envisioned a very limited role for Africans in the administration of the law. For the most part Africans played minor roles such as interpretation or carrying out various clerical duties. Two key barriers to entry into the legal profession for the vast

[82] Palley, *The Constitutional History*, p. 558.
[83] M. E. Currie, *The History of Gill, Godlonton and Gerrans, 1912-1980* (Harare, 1982), p. 39.

majority of Africans were the educational qualifications and the financial requirements for doing a degree in law. The few Africans who did possess the necessary educational qualifications had to contend with the discriminatory nature of the profession which was such that they were unlikely to secure a place for attachment. The obstacles to gaining access to the legal profession automatically eliminated the likelihood of any African becoming a judge, not that this would have been accepted. Africans were also excluded from serving as jurors in the High Court. In 1927 legal provision was made for the High Court Judge to appoint assessors and at times Africans could be called upon. As I show below, chiefs and headmen would be formally granted judicial powers in the late 1930s.

A central aspect in the operation of the colony's legal system was the culture of 'legalism' that came to characterize the Southern Rhodesian state.[84] As alluded to above, this was partly due to Law Department officials' commitment to a set of ideas about appropriate rule-bound conduct on the part of state officials. It was also about the role of law as a mode of rule for the state. Legalism, as Martin Chanock has shown in the case of the South African settler state, was not about constraining state action but rather enabling it. It was a means of 'creating powers' and 'endowing officials with regulated ways of acting'.[85] In practice, legalism in Southern Rhodesia meant the implementation of an autocratic form of rule that was underpinned by law and the deployment of legal language. Legalism also served the secondary purpose of legitimising state actions in the eyes of the local settler population and the metropolitan government. The foundation for legalism was laid during the period of Company Government. However, it was carried much further after 1923 when a settler

[84] I am using legalism here to refer to the reliance on law as a mode of rule by state officials. This is contrasted to formalism, which I use to describe legal professionals' attitude to the law.
[85] Chanock, *The Making of South African Legal Culture, 1902-1936, Fear, Favour, Prejudice* (Cambridge, 2001), p. 22.

government led by Charles Coghlan took over under the Responsible Government Constitution.

An important consequence of the achievement of Responsible Government status was that effective power now lay in Salisbury. The government could therefore make and implement policy without having to defer to the Colonial Office as much as other colonies like Nyasaland and Northern Rhodesia. While there was a reservation clause in the Responsible Government Constitution which gave the British government the right to revoke any laws that negatively affected Africans, this power was rarely exercised. Unlike the Company Government, which was primarily focused on making profits, the new government was more responsive to settler needs. It actively pursued the goal of promoting permanent European settlement and made extensive use of the law in order to achieve this. This was clearest in the area of agricultural policy. Soon after attaining Responsible Government, a much better financed Land and Agricultural Bank was set up in 1924 and in 1925 the Morris Carter Land Commission was appointed to look into the question of land distribution in the colony. Speaking to the Legislative Assembly in 1927, Coghlan declared '…this is essentially a country where the white man has come and desires to stay, and he can only be certain of doing so if he has certain portions of the country made his exclusively.'[86] These moves culminated in the Land Apportionment Act of 1930 which allocated 49 million acres of land in the country's best agro-ecological zones to the settlers who numbered approximately 50 000 and most of whom lived in urban areas. The Act also allocated 29 million acres of land in the poorer agro-ecological zones to the African population who were about 1 081 000.[87]

[86] Cited in V. E. M. Machingaidze, 'Agrarian Change from Above: The Southern Rhodesia Native Land Husbandry Act and the African Response', *The International Journal of African Historical Studies*, 24 (1991), pp. 558-559.
[87] *Ibid*, p. 558.

Dealing with Indigenous Legal Systems

The establishment of the colonial legal system also raised the question as to how the imposed system and the indigenous one would relate. In Southern Rhodesia, state officials initially hoped that the indigenous legal systems would gradually give way as Africans abandoned their own institutions and increasingly patronised the colonial legal system. Behind this hope was a belief in the superiority of the British legal system and a corresponding derision for indigenous legal systems. However, these early hopes gradually shifted as state officials came up against the limitations of the administration's capacity and the resilience of African legal systems. The Southern Rhodesian experience, with respect to colonial officials' efforts to deal with the indigenous legal systems, suggests that a more appropriate approach in thinking about developments in the legal arena is that of legal pluralism.

From the outset the company government had instructions to give 'regard' to local laws. Article 14 of the Royal Charter carried the following stipulation:

> In the administration of justice to the said peoples or inhabitants careful regard shall always be had to the customs and laws of the class or tribe or nation to which the parties respectively belong, especially with regard to the holding, possession, transfer and disposition of lands and goods, and the testate or intestate succession thereto, and marriage, divorce, legitimacy, and other rights of property and personal rights, but subject to any British laws which may be in force in any of the territories aforesaid and applicable to the peoples or inhabitants thereof.[88]

A similar provision was made in Section 4 of the May 1891 Order in Council as well as Section 9 of the High Commissioner's Proclamation of June 1891. Under the 1894 Order in Council, the position was slightly revised to include the provision that indigenous law would

[88] Cited in H. F. Child, *The History and Extent of Recognition of Tribal Law in Rhodesia*, (Ministry of Internal Affairs, Salisbury, 1973), p. i.

apply in civil cases as long as the law in question was not 'repugnant to natural justice or morality.'[89] However, during the first few decades of colonial occupation, officials in Southern Rhodesia were opposed to according indigenous legal systems a place within the colonial legal sphere. As Diana Jeater notes, early colonial officials felt that: 'It was both the duty of and the justification for white occupation of the territory to ensure that African "barbarism" gave way to white "civilisation". The administrator's fear was that a codification of existing African civil law would ossify barbaric practices, and stand in the way of the progress of civilisation.'[90]

These views were based on colonial officials' interpretation of the differences between the local and the western legal systems. One important difference between the legal systems was the fact that, while the colonial system was based on fixed written laws, the local systems operated on the basis of oral and more flexible 'rules'.[91] In addition, colonial courts were based on a retributive approach to justice, while local courts operated on the basis of a restorative approach with a focus on reparations and the maintenance of social harmony in the community. Furthermore, indigenous legal systems did not divide offences into civil and criminal as was the case with the colonial legal system. Differences also extended to court procedures and rules of evidence. Whereas colonial courts had narrow criteria with respect to acceptable evidence and strict rules limiting public participation, local courts had a more flexible approach in both regards. Holleman noted three main stages in the procedure of chiefs' courts among the Shona-speaking communities he studied. The first stage involved the testimonies of the litigants. This was followed by the audience's participation in order 'to

[89] Palley, *The Constitutional History*, p. 505.
[90] D. Jeater, '"Their idea of Justice is so peculiar", Southern Rhodesia 1890-1920', in P. Coss (ed), *The Moral World of the Law* (Cambridge, 2000), p. 180.
[91] *Ibid*.

interrogate, to volunteer information, voice opinions based on intimate knowledge of local relations and specific circumstances, and generally contribute to a searching inquiry into the case of the dispute before them.'[92] Once the matter had been discussed exhaustively, the chief and his advisors handed down a ruling.

NCs' early resistance to the exercise of judicial powers by chiefs was based on their understanding of African legal systems as 'uncivilised' and was reinforced by a suspicion of chiefs given their role in supporting the 1896/7 rebellions. As a result, the administration was wary of any policies that might shore up the power of the chiefs and initially limited their role in the administration of the colony. In the 1898 Order in Council chiefs were given an official but limited role in the administration of the colony. They were to act as 'constables' in their areas and were paid a salary by the government. Their duties included notifying the NC of 'all crimes or offences, deaths and suspicious disappearances, prevailing diseases and epidemics' within their areas.[93] As 'Indirect Rule' came to be applied in British colonies, local officials in Southern Rhodesia remained opposed to giving chiefs a greater role in the administration of the colony. 'The Colonial Office doctrine of Indirect Rule, as applied to certain dependencies in Africa like Tanganyika', Steele notes, 'found considerable disfavour in governmental circles and with the European public at large. A retired N.C. warned that its introduction would turn the Colony into "a second Basutoland", pre-empting its development as a white man's country.'[94] Chiefs' responsibilities were marginally increased with the passage of the Native Affairs Act of 1927 which added the tasks of apprehending offenders and reporting subversive rumours to their responsibilities. The amendment of the Native

[92] J. F. Holleman, 'Law and Anthropology: A Necessary Partnership for the Study of Legal Change in Plural Systems', *Journal of African Law*, 23 (1979), p. 119.
[93] Child, *The History and Extent of Recognition of Tribal Law in Rhodesia*, p. 12.
[94] Steele, 'The Foundations of a "Native" Policy', p. 75.

Affairs Act in 1931 saw the murder of twins and 'deaths imputed to witchcraft' added to the cases that chiefs had to report.

While chiefs had limited official duties, unofficially they continued to exercise significant judicial authority in their areas and, in a number of cases, this was with the tacit support of NCs. NC's support for chiefs exercising judicial authority was partly due to their realisation that they were not able to try all of the cases arising in their areas, in addition to carrying out all of their other duties. They also recognized the fact that they did not have the capacity to stop chiefs from hearing cases, even if they had wanted to. As a result in the course of the 1920s many NC's had reconciled themselves to this state of affairs and by the late 1920s there were growing calls from NAD officials to formally grant chiefs limited civil jurisdiction. The fact that Northern Rhodesia had passed the 1930 Native Authorities Ordinance which gave chiefs greater powers, also influenced their thinking. However, these calls did not amount to a desire for 'Indirect Rule'. The outcome was a proposal for chiefs to be granted limited judicial powers, which was submitted to the NAD Advisory Committee in 1931. Speaking in support of this proposal the influential NC, E. G. Howman, remarked in 1931: 'If you get the right kind of chief he settles cases very much better than I can. He has the inside knowledge which I have not got very often… No matter how proficient a European may become in settling native cases, I do not think he ever gets to the bottom of things.'[95]

The NAD's calls were resisted by the Law Department. A legal opinion produced by the department in 1931 was categorical on the subject: 'Chiefs', it argued, 'are of course completely ignorant of rules of procedure and law. To confer statutory jurisdiction in judicial

[95] Cited in Steele, 'The Foundations of "Native" Policy', p. 85.

matters on unqualified persons is wrong.'[96] However, by the mid-1930s senior government officials were becoming more receptive to the idea. This was partly due to fears of law and order problems in the colony as a result of the weakening of the authority of traditional officials. The proposal also found favour with the Prime Minister, Godfrey Huggins, as it sat well with his policy of greater racial segregation. Consequently, in 1937 the Native Law and Courts Act which was based on the 1931 proposals, was passed.

The move to recognise chiefs' judicial powers was not accompanied by any attempt to codify indigenous laws. Under the Act, the Governor was empowered to award warrants to chiefs' or headmen's courts which authorized them to exercise civil jurisdiction. In reality the Act was not providing any new powers but simply giving formal recognition to what was taking place on the ground. Importantly, the Act represented an acknowledgement that despite its relatively considerable capacity, almost five decades after occupation the Southern Rhodesian colonial state could not claim to possess a monopoly of judicial authority. From 1937 the government sought to draw 'traditional' leaders' courts into the service of the state, albeit in a limited way. One result of this was the gradual incorporation of features of the colonial legal system into the chiefs' courts. Under the legislation, warranted headmen's and chiefs' courts became courts of record and therefore had to keep a civil record book in which details about the cases they heard, the litigants, and the judgments handed down were recorded. Other more enterprising chiefs sought to appropriate more features of the colonial courts.[97] However, this process of change occurred at different rates and to different extents in the courts around the colony.

[96] Cited in *Southern Rhodesia Parliamentary Debates*, 28 January 1969, col. 620.
[97] Holleman, 'Law and Anthropology', p. 120.

Maintaining Law and (the Social) Order

The legal system that was established after colonial occupation was enlisted in the maintenance of 'order' in two senses. Firstly, the legal system was deeply implicated in the creation and maintenance of a colonial social and political order that was primarily founded on racial difference. In Southern Rhodesia, as in other colonial contexts, law was used to create the colonial society envisioned by the settler administration. Law, as Bourdieu reminds us, is an active discourse that not only names, but seeks to create the things it names.[98] It was therefore used in creating and authorising categories of persons, apportioning them with rights and duties, and allocating them a position in the colonial social hierarchy. This process was not simply about the deployment of the symbolic power of the law. The coercive and symbolic dimensions of the law were both marshalled, often simultaneously, to achieve this end.

The legal efforts to police racial difference in Southern Rhodesia were most clearly dramatized in the trials and legislation that were related to the imagined threat of 'black peril'.[99] Settler anxieties about the perceived sexual threats against European women by African men led to laws like the Criminal Law Amendment Ordinance of 1903 which provided for the death sentence for Africans convicted of attempted rape of European women. In the same year the Immorality and Indecency Suppression Act was passed which criminalised sexual relations between African men and European women outside of marriage.[100] Importantly, these laws also contained the element of gender bias, as sexual relations between European men and African women were not subject to similar regulation.

[98] P. Bourdieu, 'The Force of Law: Towards a Sociology of the Juridical Field', *Hastings Law Journal*, 38 (1987), pp. 838-839.
[99] See J. McCulloch, *Black Peril, White Virtue: Sexual Crime in Southern Rhodesia, 1902-1935* (Bloomington, 2000) and Steele, 'The Foundations of a "Native" Policy', pp. 124-130.
[100] The intention of this law was to clamp down on instances of European prostitutes providing their services to African men.

As Diana Jeater demonstrates, African patriarchal ideas as well as Victorian ideas about gender which the settlers brought with them found expression in the laws that were passed in the early colonial period and sought to enforce a particular racial and gendered hierarchy.[101]

Besides these dramatic and emotive cases involving inter-racial sexual relations, the laws relating to everyday activities also played a role in reproducing the colonial social and economic order. As John Comaroff points out, 'it was by means of legal instruments…that economic rights, entitlements, and proprieties were established, that labor relations and contracts were promulgated and policed, that interests were negotiated.'[102] Laws which enabled the transfer of economic resources through land dispossession, taxation and forced labour were passed. The draconian Master and Servants Ordinance of 1901, which made workplace 'infractions' crimes against the state, was at one level meant to provide a regulatory framework which enabled European employers to 'control' their African employees. At another level, it reinforced the colonial racial hierarchy which was backed up by the coercive might of the colonial state. Similarly, the Native Pass and the Native Urban Locations Ordinances were as much about labour and crime control as they were about policing racial difference and reserving the urban areas for the settler population.[103]

The efforts to ensure sufficient cheap labour for the mines and the farms also extended to educational policy. As Dickson Mungazi's study of colonial educational policy shows, the Education Ordinance of 1899 and the laws that succeeded it enabled the government to create

[101] D. Jeater, *Marriage, Power and Perversion: The Construction of a Moral Discourse in Southern Rhodesia 1894-1930* (Oxford, 1993).
[102] J. Comaroff, 'Colonialism, Culture and the Law: A Foreword', *Law and Social Inquiry*, 26 (2001), p. 309.
[103] McCulloch, *Black Peril, White Virtue*, p. 52. See also T. Yoshikuni, *African Urban Experiences in Colonial Zimbabwe: A Social History of Harare before 1925* (Harare, 2007), p. 41.

an education system for Africans that would prepare them to take up the role of manual labourers in the colonial economy.[104] This thinking was clearly expressed by the Chief Native Commissioner (CNC) for Mashonaland in his annual report for 1905 in which he observed: 'It is cheap labour that we need in this country, and it has yet to be proved that the Native who can read and write turns out [to be] a good labourer. As far as we can determine, the native who can read and write will not work on farms and in mines. The official policy is to develop the native on lines least likely to lead to any risk of clashing with Europeans.'[105] Even seemingly minor aspects of colonial social relations such as racial etiquette were subject to legislation as NCs tried to ensure that they had the power to deal with any behaviour they viewed as insolence. As Shutt shows, the regulation of etiquette was a means by which 'difference and domination were defined and refined'.[106]

The legal system also played an important role in maintaining order in the sense of preventing unrest and ensuring the safety of members of the settler population and their property. This was achieved, firstly, through the persistent day to day efforts by NCs to prosecute and punish Africans charged with 'crimes' related to pass laws, taxes and other regulations. 'Sentences imposed on blacks, (often for minor offences) were harsh,' Chanock observes, 'if one views them as being only punishment for the offence, or deterrence. But punishment and deterrence were also closely involved with the protection of white power. What had to be deterred was not simply crime, but defiance and rebelliousness.'[107] In addition, colonial officials were constantly on the watch for 'subversive' African organisations. However, a key difficulty the settler government faced during the interwar

[104] D. Mungazi, *Colonial Education for Africans: George Stark's Policy in Zimbabwe* (New York, 1991).
[105] Cited in Mungazi, *Colonial Education for Africans*, p. 8.
[106] Shutt, 'Legislating Manners', p. 653. See also Saada, 'The Empire of Law'.
[107] Chanock, *The Making of South African Legal Culture*, p. 129.

period was resistance from a number of groups within the settler population to repressive legislation that dealt with political dissent. These groups included the press, missionaries and settler opposition parties. Owing to the fact that the reservation clauses in the Responsible Government prevented the government from passing legislation that specifically targeted Africans, any legislation dealing with political dissent effectively applied to all residents of the colony, regardless of race. This made opposition political parties and the press wary that such laws would be used to target them. The Southern Rhodesian government therefore needed to demonstrate the existence of a threat from the African population that was significant enough to convince these groups to put aside their misgivings.

An example of the government's efforts to deal with potential threats from Africans was its response to the moves to re-establish the Ndebele paramountcy. One of the results of the 1896-7 uprisings, which violently shattered the sense of security within the settler community, was that colonial officials became wary of efforts to re-establish the paramountcy.[108] Consequently, the attempts in the 1920s by two of Lobengula's grandchildren, Rhodes Lobengula and Albert Lobengula, to do so aroused concerns amongst NAD officials. From 1929 the Matabele Home Society began making calls for the restoration of the paramountcy. At the same time rumours began spreading in the colony that the paramountcy would soon be restored. This provided a suitable opportunity for Rhodes Lobengula, who began collecting 'royal' cattle in order to make a claim for the paramountcy.[109] The NAD responded by bringing charges against him for extortion in January 1932. Despite the fact that Lobengula was convicted, the trial did not achieve the desired result for the NAD as his fifteen month sentence was wholly suspended. The

[108] Steele, 'The Foundations of a "Native" Policy', pp. 182-83.
[109] T. Ranger, *Voices from the Rocks: Nature, Culture and History in the Matopos Hills of Zimbabwe* (Oxford, 1999), p. 114.

government ultimately managed to get Lobengula to leave the colony in 1933 by acquiring a farm for him in the Cape.[110]

Another source of anxiety for the government during the 1920s was the Industrial and Commercial Workers Union (ICU). The ICU was originally established in Cape Town in 1919 by Clements Kadalie, an African migrant worker from Nyasaland. The Southern Rhodesia branch of the ICU was established in 1927 and became one of the more radical African organisations of the interwar period.[111] By 1928 the government had come to see it as a subversive group and the CNC drafted the Unrest Bill in order to provide state officials with more powers to deal with it. The Bill was modelled on the Hostility Clause contained in South Africa's Native Administration Act of 1927, and it proposed a maximum penalty of 'five years' imprisonment or a £500 fine, or both, against any person who incited "natives" to commit unlawful or seditious acts, or who promoted "feelings of hostility between different races in the Colony".'[112] However, the Bill never made it into law owing to European opposition:

> At the request of the Secretary of State, Moffat replaced the word 'natives' with the phrase 'any person or body of persons', a non-racial form that exposed the Bill to severe criticism from the press and Labour interests, who feared it might be used to curtail the European's freedom of speech. The protest induced Moffat to withdraw it from the list of Bills scheduled for the 1928 Session, and the Bill was abandoned early in 1929.[113]

However, for two and a half years ICU meetings were attended by European CID detectives who took notes on the speeches they deemed to be 'provocative'. One result of this surveillance was the conviction of Masotsha Ndlovu on charges of criminal slander for

[110] Steele, 'The Foundations of a "Native" Policy', p. 187.
[111] I. Phimister and C van Onselen, 'The Labour Movement in Zimbabwe:1900-1945', in B. Raftopoulos and I Phimister (eds), *Keep on Knocking: A History of the Labour Movement in Zimbabwe* (Harare, 1997), pp. 17-18
[112] Steele, 'The Foundations of a "Native" Policy', p. 171.
[113] *Ibid.*

calling the Chief Native Commissioner, C. L. Carbutt, 'a bad man and an oppressor of natives'.[114]

The ICU's failure to pose a significant political threat ultimately led to the subsidence of calls for more vigorous legislation to deal with dissent amongst Africans in the late 1920s. However, the depression of the early 1930s and the attendant agitation among Africans prompted the ICU to make efforts to recruit in the rural areas. This led to renewed efforts to pass stronger legislation to deal with 'agitators' in the form of the 1932 Prevention of Racial Discord Bill which was based on the 1928 Unrest Bill. The Bill was later withdrawn partly because the parliamentary session was shortened to allow for the Prime Minister to travel abroad. More importantly, government officials could not demonstrate a sufficient threat to convince the different sections of the settler populations such as the press, labour, and missionaries that such repressive legislation was necessary.

In the end it was the activities of the Independent African churches, in particular the Watchtower movement, which tipped the scale in the government's favour. From the 1910s independent African churches came to be seen as a problem as they often encouraged their members to defy the colonial authorities and disseminated 'prophecies' that foretold the end of colonial rule. The Watchtower was one such religious movement that provoked significant anxiety of the part of the NAD and the police. It had been introduced in Southern Rhodesia prior to World War One by migrants from Nyasaland. Over the following decades the movement was kept under surveillance by the administration, especially following the 1915 Chilembwe uprising in Nyasaland, which was led by Watchtower adherents.[115] From the

[114] *Ibid*, p. 175.
[115] Phimister and van Onselen, 'The Labour Movement', p. 11. For an account of the Watchtower Movement's activities in Nyasaland and Northern Rhodesia see Fields, *Revival and Rebellion in Colonial Central Africa (Princeton*, 1985).

early 1920s there were abortive efforts by successive CNCs to have legislation enacted to suppress the Watchtower Movement. However, these efforts were renewed as the Watchtower took on an anti-European stance from 1933. They were given further momentum by the 1935 riots on the Copperbelt in Northern Rhodesia, which were associated with the Watchtower, as well as the rise of local independent churches whose preachers could not be deported. A Native Preachers Bill was drafted in 1936 but was later withdrawn. However, the powers required to deal with African preachers who were considered to be subversive were incorporated into the Sedition Bill which was enacted the same year.[116]

The challenge in the 1920s and early 1930s had been to demonstrate a threat from the African population that was sufficient to cause members of the settler population to agree to increasing state powers. The Watchtower movement had reached this threshold and, notwithstanding the voices raised against it in the House, the Sedition Act reflected this. The passage of the law also foreshadowed what was to come in the post-World War Two period. The increasing political militancy of the period occasioned further debates within the Southern Rhodesian Parliament and determined efforts to criminalise African politics on the part of government officials.

African Interactions with the Colonial Legal System

With all of the legal changes that were underway, an important question is how did Africans interact with the new legal system? Studies of early African interactions with the legal system in Southern Rhodesia have advanced two main positions. Scholars such as Elizabeth Schmidt and Tapiwa Zimudzi have maintained that Africans made use of colonial laws from early on. Schmidt, for example, argues that African women took advantage of new laws

[116] *Southern Rhodesia Parliamentary Debates*, 23 April 1936, col. 1027-1032.

which prohibited practices such as forced marriages, child pledging and polygamy in order to rebel against patriarchal power.[117] At the same time men took advantage of the laws to gain 'control' over their wives. She notes that:

> Between October 1899 and February 1905, the native commissioner heard 345 civil cases. Of this total, 95 cases pertained to girls who refused to marry men who had paid bridewealth for them, while 65 concerned wives who had actually run away. Thus nearly half the civil cases heard by the state during this period involved men attempting to obtain the return of recalcitrant wives.[118]

Schmidt, however, argues that African women's new found freedom was short lived due to moves by the government to shore-up the authority of chiefs from the 1920s and 1930s.

Like Schmidt, Zimudzi also sees a significant degree of African agency within colonial courts. His study focuses on African women who were tried in the High Court for serious offences such as spousal murder and infanticide between 1900 and 1952. For Zimudzi, the accused women's agency took a number of forms. Many sought to exploit judges' gender stereotypes by portraying themselves as weak-minded and having been influenced by their lovers to murder their spouses. Zimudzi notes that 'many female offenders on spousal murder cases were recommended to mercy largely on the grounds that they were intellectual simpletons whose "dullness of intellect" made it impossible for them to appreciate the gravity of the nature and consequences of their offences.'[119] In cases of infanticide, accused women initially pleaded ignorance as a mitigating factor. When this strategy became ineffective in attracting the sympathy of judges they:

> ...sought to project to colonial judges the image of 'tutored natives' who had been coerced by 'raw natives' into killing their twins. These female offenders emphasised how their efforts or suggestions to take the newborn twins to mission

[117] E. Schmidt, 'Negotiated Spaces and Contested Terrain: Men, Women, and the Law in Colonial Zimbabwe, 1890-1939', *Journal of Southern African Studies*, 16 (1990), p. 625.
[118] *Ibid*, p. 640.
[119] T. Zimudzi, 'African Women, Violent Crime and the Criminal Law in Colonial Zimbabwe, 1900-1952', *Journal of Southern African Studies*, 30 (2004), p. 506.

> stations, which by then had become well-established sanctuaries for such infants, had been overcome by the determination of the 'raw natives' to kill the twins.[120]

Some accused women tried to portray themselves as motherly in order to earn judges' pity while others resorted to intimidating witnesses who were called to give evidence against them.

In contrast, Jeater has argued that the early courtroom interactions between Africans and Europeans were characterised by miscommunication due to the fundamentally different legal systems they were coming from. Owing to this miscommunication, judges delivered rulings that did not conform to African litigants' conceptions of justice, and as a result Africans reverted to their own legal forums. Jeater argues that:

> We all now recognize that 'what colonial officials treated as immutable customary law was itself the product of historical struggles unfolding during the colonial period.' However, what struck me, from looking at the record from Melsetter district in the 1890s and 1900s, is how little this was recognized by the participants themselves. People who trekked scores of miles to take a case to the NC did so, it seems, not because they could exploit European forms of justice but because they did not accept that it differed significantly from their own systems of justice. What the NC or the magistrate thought he had heard and understood and what the litigants had heard and understood seem to have been two separate things. There may, in fact have been far less hybridity and far more conservatism in African responses to white courts than we have generally realized.[121]

With regard to Melsetter District, she observes that 'it is remarkable how rarely local Africans used the text-based legal systems of the white courts in their struggles with each other'.[122] Extending this argument to Southern Rhodesia as a whole, Jeater argues, '…as well as maintaining their own systems of jurisprudence, Africans across the territory also maintained their own judicial procedures, which remained remarkably resilient against attempts to displace them.'[123]

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[120] *Ibid*, p. 514.
[121] D. Jeater, *Law, Language and Science: The Invention of the "Native Mind" in Southern Rhodesia, 1890-1930* (Portsmouth, 2007), pp. 77-78.
[122] *Ibid.*
[123] *Ibid*, p. 207.

These studies raise a number of important issues with respect to African engagement with colonial legal systems in the early colonial period, the first being the extent to which Africans utilised the new courts. The divergence in the findings of the studies may have something to do with the different case studies that they draw on. Jeater's study focuses on Melsetter District where the Mount Silinda Mission had been active from the early colonial period. She therefore suggests that 'the influence of the mission on both young and old, combined with the prevalence of waged labour, meant that there was little relative advantage to be gained from drawing on text or from claims to modernity.'[124] What is unclear, however, is the extent to which these findings are generalizable to the rest of the colony. A second factor may be the different approaches that the studies adopt in examining the question. Whereas Jeater looks at African society more generally, Zimudzi and Schmidt take the path of greater disaggregation and examine the ways different social groups engaged with the colonial courts in specific circumstances. Zimudzi, for example, focuses on criminal cases where the African women brought before them had no option but to engage with the colonial legal system as failure to do so was costly. Schmidt also deals with groups that had vested interests in making use of the colonial legal system. These groups may well have found colonial courts to be uncomfortably foreign and much was likely to have been 'lost in translation' during courtroom exchanges. Nevertheless, the actual outcomes were probably more important in shaping their decisions to use colonial courts. This is a point that Jeater acknowledges for the 1920s but perhaps not sufficiently for the earlier decades.[125]

Notwithstanding the above points, Jeater is likely to be correct regarding the occurrence of miscommunication in the early period of colonial rule and makes an important contribution to the way we think about these early legal interactions. It is worth pointing out, however, that

[124] *Ibid*.
[125] *Ibid*, p. 208.

overemphasizing the idea of miscommunication might stand in the way of a better understanding of the interaction between legal systems in colonial contexts. In addition, over-emphasizing the differences between textual and oral legal systems risks missing moments when African agency bridged the two either through the performance of text based archetypes or the selective borrowing of concepts.[126] Lastly, the resilience of African legal systems and ideas of jurisprudence and the instrumentalisation of colonial courts need not be seen as mutually exclusive processes.

An alternative way of approaching indigenous legal systems which incorporates both resilience and innovation is Sally Falk Moore's idea of the 'semi-autonomous social field'. For Moore the semi-autonomous social field 'can generate rules and customs and symbols internally' and has 'the means to induce or coerce compliance; but it is simultaneously set in a larger social matrix which can, and does affect and invade it, sometimes at the invitation of persons inside it, sometimes at its own instance.'[127] An important question with respect to African engagement with colonial law is therefore how do we account for the development of African legal consciousness? Zimudzi suggests that:

> By the time the High Court of Southern Rhodesia was established, African women had already had eight years of court experience in colonial civil and criminal courts. Throughout the half-century considered here, they displayed increasing boldness and agency in the High Court. The legal consciousness of African women charged with spousal murder manifested itself in numerous ways, often showing their awareness of those openings in the colonial legal system that could work in their favour.[128]

He is perhaps overstating the point in arguing that between 1890 and 1898 Africans had developed sufficient legal consciousness to make use of colonial courts. This is particularly so when one considers the fact that the Magistrate's courts were only granted jurisdiction

[126] See for example D. R. Peterson, 'Morality Plays: Marriage, Church and Colonial Agency in Central Tanganyika, ca. 1876-1928', *American Historical Review*, 111 (2006).
[127] S. Falk Moore, 'Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study', *Law and Society Review*, 4 (1973), p. 720.
[128] Zimudzi, 'African Women, Violent Crime and the Criminal Law', p. 508.

over Africans in 1894. However, Zimudzi's broader point remains valid: the increased use of colonial courts led to greater awareness of their procedures, the underlying jurisprudence as well as the opportunities for Africans to make use of them. This increased experience with colonial courts worked in conjunction with the exchange of information within social networks as well as the role of African intermediaries such as court clerks and interpreters.[129]

The second key issue the debate on early African interactions with the colonial legal system raises has to do with why Africans made use of these courts. For the most part scholars have emphasized calculation or opportunism. This, for example, is implicit in the study by Schmidt. Similarly, Holleman underscores the opportunities that the contrasts between the colonial and indigenous legal systems offered for 'forum shopping'. After conducting fieldwork in four different areas in Mashonaland during the 1940s, he observed disapprovingly:

> I saw the kind of situations in which there was sufficient difference between various jurisdictions to make it worthwhile for litigants to shop around for the kind of law that would be profitable to them. Tanner and others have called this "the selective use of legal systems" but this kind of competition does not enhance the certainty of law and is unlikely to promote the cause of justice.[130]

An additional result he noted was the undermining of chiefs' courts which manifested itself in '…the sorry spectacle of a chief and litigant threatening one another to call in the strong arm of District Administration to see that justice be done, while the public watched with a mixture of amusement, bewilderment and scorn.' Holleman adds that: 'Such scenes were not a rarity in the later 'forties and early 'fifties, but one of the symptoms of the growing tension between

[129] See B. N. Lawrence, *et al* (eds), *Intermediaries, Interpreters, and Clerks: African Employees in the Making of Colonial Africa* (Madison, 2006).
[130] Holleman, 'Law and Anthropology', p. 120.

tradition and innovation on the intersections of disparate legal cultures and competitive legal jurisdictions.'[131]

Notwithstanding these observations about the opportunities that jurisdictional competition availed for the instrumentalisation of the law, there was something else of importance that was under way. The colonial period had unleashed a number of processes that led to new conceptions of goods, persons, and relationships amongst Africans.[132] The increasing levels of education and the spread of Christianity fostered new ways of thinking about the self, both in relation to others and to the state. In addition, rural to urban migration brought Africans into contact with new ideas and into new spaces which allowed for 'self-fashioning'. The courts also mediated the process of social change by introducing and enforcing new social and economic ideas related to debt, gender relations and marriage.[133] Much as they had wanted to, colonial officials were not able to control the formation of African subjectivities.

These new subjectivities were increasingly evident in the African associations of diverse descriptions which organised around different issues, formulated critiques of colonial policies and made demands on the colonial government. The elitist associations of the 1920s such as the Rhodesian Bantu Voters Association, for example, made claims for the right to vote and invoked arguments about British justice and 'equal rights for all civilized men'.[134] Labour organisations like the ICU demanded better working and living conditions for African workers and offered fairly radical critiques of the unequal distribution of wealth in the colony

[131] *Ibid*, p. 121.
[132] S. E. Merry, 'Law and Colonialism', *Law and Society Review* 25 (1991), p. 892.
[133] See, for example, R. Smith, '"Money Breaks Blood Ties": Chiefs' Courts and the Transition from Lineage Debt to Commercial Debt in Sipolilo District,' *Journal of Southern African Studies*, 24 (1998).
[134] M. West, *The Rise of the African Middle Class: Colonial Zimbabwe* (Indianapolis, 2002), p. 127.

and deplored the constant harassment of workers by the authorities.[135] Under the leadership of Charles Mzingeli, the Reformed Industrial and Commercial Workers Union (RICU) took up the fight for the rights of access to the city for Africans and made claims for an 'imperial working class citizenship' for African workers from the 1940s.[136] The appeals to the law by Africans and their mobilisation of legal discourse especially in cases involving the state were thus about more than just opportunism. They were reflections of shifting ideas of personhood, emergent political imaginaries and alternative visions of the colony's social order.

Conclusion

From the occupation of Southern Rhodesia in 1890, law was central not just to the constitution of state power but to the constitution of the colonial state itself. The establishment of legal institutions was a central aspect of state construction, as were the efforts to establish colonial courts as the final arbiters of justice. In addition, legal institutions were also part of the effort to project state authority across space. However, the process was not a smooth one and tensions soon emerged within the state over the administration of law in the colony. While NAD officials wanted to exercise a form of personal rule in their districts, Law Department officials insisted on rule-bound conduct. In the initial years of colonial rule, state officials took the position that Africans would have no substantial role in the administration of the colonial legal system. Theirs was to be the role of grateful recipients of the gift of 'civilised' law. Equally, their legal systems were to have no formal place in the colonial legal sphere. However, as African legal systems remained resilient and NAD officials realised the limits of their capacity, the colonial government was forced to acknowledge that it had failed to establish a monopoly of judicial power in

[135] *Ibid*, pp. 134-140.
[136] T. Scarnecchia, *The Urban Roots of Democracy and Political Violence in Zimbabwe: Harare and Highfield, 1940-1964* (Rochester, 2008).

Southern Rhodesia. This resulted in the passage of legislation that granted chiefs and headmen formal jurisdiction of civil cases amongst Africans in 1937. An important development in the legal sphere during this period was the growing use of colonial laws and courts by different social groups within African society in order to pursue their respective interests. At one level, these uses of the law were calculated and opportunistic. As we have seen, men and women made use of the courts as a resource in domestic struggles. However, at another level, they were a reflection of underlying ideas about personhood, political imaginaries and alternative visions of the Southern Rhodesian social order.

In the subsequent chapters I examine the role played by the law in struggles between Africans and the state and amongst themselves between 1950 and 1990. I will explore a number of strands in this story which include the attempts to draw on chiefs' courts and 'customary' legal authority in order to legitimize the state, the efforts to employ the symbolic and the coercive capacities of the law to deal with the rise of African nationalism, African efforts to instrumentalise the law and mobilize it discursively in struggles with the government, and the transformation and continuities in the legal sphere in the first decade after independence.

CHAPTER II

Customising Justice and Constructing Subjects: State, 'Customary Law' and Chiefs' Courts, 1950-1980

Introduction

In contrast to other British colonies in Africa which adopted 'Indirect Rule' in the 1920s and 1930s, Southern Rhodesian authorities largely resisted the drive to grant chiefs a significant amount of power in the day-to-day administration of Africans. However, in the early 1960s the option of drawing chiefs and chief's courts more firmly into the service of the state began to receive serious consideration. In March 1961 the Robinson Commission recommended that urgent attention be given to the task of 'giving the people the justice they feel meets the norms of their society'.[137] Following the Robinson Commission's report, Working Party 'C' was appointed to look into ways of augmenting the powers of chiefs' courts. The working party's recommendations formed the basis for the African Law and Tribal Courts Act of 1969 which gave chiefs limited criminal jurisdiction. This was followed by vigorous efforts by the Ministry of Internal Affairs (MIA) to ensure chiefs' courts around the country began exercising these new powers.

This chapter examines this belated turn to 'custom' by Rhodesian authorities. I argue that it was part of an explicitly political project that was aimed at dealing with the crisis of

[137] NAZ S2827/1/19, Report of the Working Party 'C' Chiefs Courts (Arising out of the Robinson Commission Report), Salisbury, 13 March 1962, paragraph 7.

legitimacy that had been triggered by the implementation of the Native Land Husbandry Act (NLHA) of 1951 and the political threat posed by the rise of African nationalism. The move was not concerned with elaborating or codifying African 'customary law'. Its key aim was to assign chiefs sufficient powers to enforce unpopular government policies. Ironically, these were the rigid and fixed regulations rooted in the 'technical development' framework of the 1950s and had little to do with African custom. The move also exhibited an ambition on the part of the settler government to constitute a particular type of colonial subject. In a clear departure from the 'high modernist' language of the NLHA and the efforts to transform Africans into proletariats and farmers, from the 1960s the government sought to discursively construct them as custom-bound ethnic subjects who were undeserving of the full rights of citizenship in the colonial polity.[138]

This approach to the administration of justice was founded on an evolutionary paradigm to which many NAD officials subscribed. The paradigm sought to connect law, justice and punishment on the one hand, to race and stages of 'civilisation', on the other. Africans, this view maintained, were not as far along the 'civilisation' continuum as Europeans. Therefore, more severe forms of punishment were appropriate in dealing with them rather than 'rehabilitative' forms of justice. The chapter is organized into three sections. In the first section I examine the official debates about the judicial powers of chiefs in the 1950s. In the second section I turn to the state's efforts to assign new powers to chiefs' courts and the intellectual labour that was devoted to justifying these efforts. The last section focuses on the implementation of the 1969 African Law and Tribal Courts Act and African responses to these efforts.

[138] J. Comaroff, 'Governmentality, Materiality, Legality, Modernity: On the Colonial State in Africa', in J. Deutsch, H. Schmidt and P. Probst (eds), *African Modernities: Entangled Meanings in Current Debate* (Oxford, 2002).

The State and Chiefs' Courts in the 1950s

As shown in Chapter One, the question of whether to grant chiefs greater judicial powers had long been a contentious one within the Southern Rhodesian state. To recap, on the one hand, the Law Department had long maintained that chiefs did not have the expertise to exercise such power. The NAD, on the other hand, felt that granting chiefs limited criminal jurisdiction would free its officials - who faced increasingly onerous demands - to focus on other aspects of administering the African areas. The decision to grant official recognition to chiefs' arbitration of civil cases in 1937 was a reluctant compromise for Law Department officials whose acceptance of this measure had more to do with the fact that it removed judicial powers from NAD officials.[139] For NAD officials, however, this was seen as a first step towards giving chiefs criminal jurisdiction. Up to the 1950s these branches of government remained at odds over the question of granting chiefs greater judicial powers. However, officials in the Ministry of Justice retained the final say in such matters, and the status of chiefs' courts remained that of arbitration forums for civil disputes among Africans.

The debates over chiefs' powers in the 1950s were set against the backdrop of important economic, social and political changes in Southern Rhodesia and in the region. Locally, a key concern was the growing influence of a body of political ideas about rights-bearing citizenship, national self-determination and majority rule among Africans. These ideas came to dominate nationalist political discourse and fuelled increasing African political

[139] D. Jeater, *Law, Language and Science: The invention of the "Native Mind" in Southern Rhodesia, 1890-1930* (Portsmouth, 2007), p. 207.

militancy.[140] The Southern Rhodesia African National Congress statement of principles, policy and programme produced in 1957, for example, professed to recognize '…the rights of all who are citizens of the country, whether African, European, Coloured or Asian, to retain permanently the fullest of citizenship.'[141] From the early 1950s organisations such as the Benjamin Burombo-led British African Workers' Voice Association had started to take their message to the rural areas and were actively trying to recruit chiefs to their cause.[142] Such initiatives made NAD officials uneasy, especially given the significant unrest that the NLHA was causing in rural Southern Rhodesia.

Drafted in the context of the post-World War Two manufacturing boom, the Native Land Husbandry Act was in part a response to the industrial demand for 'stabilized' labour.[143] The state therefore sought to put an end to the migrant labour system and transform Africans into either proletariats or farmers. The Act also sought to undertake an ambitious restructuring of African agriculture that was founded on a belief in technical planning. The Southern Rhodesian state disregarded the role of land expropriation in causing the land pressure in African reserves and the resultant land degradation and falling productivity. Instead, it took the position that the problems in African agriculture were the result of laziness and destructive agricultural methods. Consequently, state intervention based on technical planning was deemed necessary.[144] Technical experts made several prescriptions that were

[140] This language was regularly employed by *Zimbabwe News* and *Zimbabwe Review* in the 1960s and 1970s. These were nationalist newsletters that were published by the two main parties the Zimbabwe African Nationalist Union (ZANU) and Zimbabwe African People's Union (ZAPU).
[141] Southern Rhodesia African National Congress: Statement of Principles, Policy and Programme, Salisbury, 1957 in C. Nyangoni and G. Nyandoro (eds), *Zimbabwe Independence Movements: Select Documents* (London, 1979), p. 3.
[142] S2796/2/1 Assemblies of Chiefs General, Minutes of the First Assembly of Chiefs held in Gwelo, 28 October 1951. See also A. K. H. Weinrich, *Chiefs and Councils in Rhodesia: Transition from Patriarchal to Bureaucratic Power* (Columbia, 1971).
[143] J. Alexander, *The Unsettled Land: State-making and the Politics of Land in Zimbabwe, 1893-2003* (Oxford, 2006), pp. 44-62.
[144] Alexander, *The Unsettled Land*, p. 44.

supposed to improve African agriculture. These related to field size, limits on household livestock holdings, reordering of settlement patterns and labour intensive soil conservation measures.

In theory, these prescriptions were supposed to lead to greater agricultural productivity. However, in reality the NLHA was a dismal failure and moves to enforce policies such as destocking or the labour intensive contour ridging were met with violent resistance. Rural discontent was further stoked by the fact that there was insufficient arable land to give to all those who wanted it, and significant numbers of unemployed migrant labourers and young men generally lost their farming rights. This led to a serious crisis of legitimacy for the state and fuelled a rise in nationalist politics in the rural areas.[145] Southern Rhodesian officials' concerns about rural unrest were exacerbated by the increasing challenges to colonial rule in the region. Not only did they fear that the more vocal African nationalist groups in Northern Rhodesia and Nyasaland might 'incite' the local population, but the spectre of Mau Mau loomed large in their minds. At the same time the independence of other African countries such as the Belgian Congo was a source of concern.

For many NAD officials, chiefs were an important part of the answer to these problems. In an attempt to outflank African political organisations that were articulating African grievances, the NAD sought to present chiefs as the 'authentic' representatives of Africans and instituted Provincial Chiefs' Assemblies. Opening the first Chiefs' Assembly in Midlands Province, the CNC L. Powys-Jones, remarked:

[145] *Ibid.*

> Now some of these [African political] organisations say they represent and know the opinion of all the people, but it is not always right that they do. Some just talk for themselves and know nothing about other people and that is why we started these Assemblies of Chiefs in each province and they are going to meet twice a year. It is the chiefs who are the eyes and ears of the Native Commissioners and the Government. If people have any troubles they should go to their Chief, not to any Association in a town – that is why I think these meetings are important.... At these Meetings of Chiefs, we will also take the opportunity of explaining any new laws which have come into force.[146]

The irony in the CNC's words was that, while he was trying to present chief's as the true representatives of Africans, in the same breath he was calling them 'eyes and the ears' of the NC. The assemblies were meant to be forums where the government consulted with the chiefs and informed them about government policy. However, in a caveat that reflected the government's level of commitment to a consultative approach to African administration, Powys-Jones gave the chiefs the following reminder: 'Now you must remember that the Government is there to govern, not to consult the People. It is obviously a good thing to consult them and I am going to do that in future.'[147]

In the assemblies, the attitude of NAD officials towards chiefs was often patronising and remarks such as those by the Provincial Native Commissioner (PNC) for Midlands during his address to the chiefs present at the 1954 Midlands Chiefs' Assembly were not uncommon. He observed:

> Now I am not here on a political party platform to answer questions, nor to lecture you but as chairman to help and guide your thought and discussion, so that they can be put down on paper in proper form and sent to the Chief Native Commissioner. It will help the Government to know your problems connected with the Land Husbandry Act, and Soil Conservation. Secondly I think as chiefs, the Government expects you to become more enlightened everyday so you can use your own intelligence and brains for the better of your Reserves.[148]

[146] NAZ S2796/2/1, Assemblies of Chiefs General, Minutes of the Midlands Chiefs' Assembly, 28 October 1951.
[147] *Ibid*.
[148] *Ibid*, Minutes of the Midlands Chiefs' Assembly, 28 June 1954.

Despite the patronising tone taken by state officials, the assemblies did provide a forum for chiefs to deliberate and voice their concerns about state policies such as destocking under the NLHA and the limit on *roora* (bride wealth) imposed by the 1950 Native Marriage Act. Often these concerns were dismissed by NAD officials. However, where chiefs' interests coincided with those of NAD officials, such matters were taken up with their superiors in Salisbury.

One such instance was the call made by Matabeleland chiefs for more judicial powers and for work colonies. This demand for greater powers was frequently made in chiefs' assemblies around the country. However, the Matabeleland chiefs were more assertive than their counterparts in other provinces and they made proposals about the methods of punishment that should be practised. This assertiveness was partly due to the fact that historically Ndebele *izinduna* - who later became known as chiefs - had generally exercised more power over their subjects in comparison with chiefs in the Shona-speaking areas. While the *izinduna* had been part of a centralised Ndebele state in pre-colonial times, they had enjoyed a degree of autonomy and were leaders of 'mini-states'.[149] The fact that succession in Matabeleland followed the system of primogeniture as opposed to the system of collateral succession that was practised in the Shona-speaking areas also meant that chieftaincy in Matabeleland was far more stable and was not periodically rocked by succession disputes and the chiefs were younger, at least when they were appointed.

A sore point for the chiefs in Matabeleland was the issue of stock theft. This was brought up as the first item of discussion during the 1952 assembly. The outcome of the deliberations

[149] Alexander, *The Unsettled Land*, p. 18.

was a resolution, proposed by Chief Sitauze of Beitbridge, which tried to fuse the idea of restorative justice to the colonial state's retributive approach to punishment. The resolution, which was supported by all the 37 chiefs present, made the following request:

> That government introduce immediate legislation on the following lines:-
>
> (a) The provision of work colonies or like institutions where prisoners convicted of stock theft or other kinds of theft causing loss or damage to the owner of the property should be put to work after serving the term of imprisonment imposed.
> (b) The earnings of persons thus committed should, by suitable arrangement, be paid to the injured party until his claim is satisfied.
> (c) The persons sentenced to perform labour on the basis suggested, should remain as prisoners and be subject to all the penalties applicable to prisoners undergoing ordinary prison sentences.[150]

The second resolution was proposed by Chief Kayisa Ndiweni, who would later chair the Council of Chiefs and become a prominent 'sell-out' in the 1960s and 1970s. He requested that, '…the powers of chiefs be restored; that their duties and powers be clearly and precisely defined; that they be given limited criminal jurisdiction; and that all these matters should be contained in written form and every Chief supplied with a copy.'[151]

While he supported both resolutions, the PNC for Matabeleland was particularly keen on the one relating to the punishment of theft and he took this up with his superiors in Salisbury. Writing to the Secretary of Native Affairs, he opined:

> This to my mind is the sanest resolution yet submitted. The Natives can learn nothing from us about the treatment suitable for criminals – particularly thieves. I should, for example, like to see Native Tribunals dealing with the Housebreakers and those who specialise in thefts from cars. I wager there would pretty soon be an end to a sorry business. Quite candidly, hardened thieves simply laugh at our punishments. I hope this resolution will receive early and careful consideration.[152]

[150] NAZ S2796/2/4, Assemblies of Chiefs Matabeleland 1951 June- 1958 December, Minutes of the Matabeleland Assembly of Chiefs, 29 August 1952.
[151] *Ibid*.
[152] NAZ S2796/2/4, Provincial Native Commissioner (PNC), Matabeleland, to Secretary for Native Affairs, 9 December 1952.

Implicit in the PNC's letter was the view that Africans required more severe methods of punishment than incarceration. As David Killingray and Stephen Pierce show, this view was not unique to Southern Rhodesia.[153] The PNC's letter was forwarded to the Secretary for Justice who was not convinced by the idea that more severe punishments would be more effective. In light of the history of disagreements between the Ministry of Justice and NAD officials, the ensuing exchange between the officials from the two departments is not surprising.[154]

In response to the views from the NAD officials in Matabeleland, the Secretary for Justice expanded on the history of thinking about the question of punishment. 'The subject raised is an interesting one', he observed:

> …which has not escaped the serious attention of this department…Without offering a dissertation on the subject, I would remark that in England in the 1860s it was laid down in plain terms that the sole object of punishment was punitive deterrence with the emphasis on the punitive. For a generation they had the most strictly deterrent penal system ever devised. The belief in the efficiency of severe punishments is always cropping up and without the devastating failure of this experiment we might never have known better. The failure was so complete that a departure to fresh principles became essential. Fear of imprisonment does not much deter many native thieves from repeated thefts.[155]

For him, this experience pointed to the need for rehabilitative measures, not more retributive ones suggested by NAD officials, or the restorative measures suggested by chiefs. He went on:

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[153] See D. Killingray, 'The "Rod of Empire": The Debate over Corporal Punishment in the British African Forces, 1888-1946', *Journal of African History*, 35 (1994), pp. 201-216 and S. Pierce, 'Punishment and the Political Body: Flogging and Colonialism in Northern Nigeria', *Interventions* 3 (2001), pp. 206-221. See also F. Bernault, 'The Shadow of Rule: Colonial Power and Modern Punishment in Africa, in F. Dikotter (ed), *Cultures of Confinement: A History of the Prison in Africa, Asia and Latin America* (New York, 2007), p. 74

[154] See A. Shutt, '"The Natives are getting out of hand": Legislating Manners, Insolence and Contemptuous Behaviour in Southern Rhodesia, c. 1910-1963', *Journal of Southern African Studies*, 33 (2007), pp. 656-658 and Jeater, *Law, Language and Science*, pp. 205-213.

[155] NAZ S2796/2/4, Secretary for Justice to Secretary of Native Affairs, 8 January 1953.

> It is for this reason that most civilised communities realise that the punishment of the offender is not enough, but that combined rehabilitative and reformative methods must be used. In an endeavour to implement this idea I submitted a draft work colonies Bill for consideration by Cabinet in 1949. The scheme was rejected. I have not asked for reconsideration because, for financial reasons, the time is not propitious… I agree with the Matabeleland Chiefs to this extent that some additional measures should be introduced, but I am opposed to the suggestion of the Provincial Native Commissioner that the administration of justice should be handed over to Native Tribunals.[156]

The NAD officials remained unconvinced by the Secretary for Justice's arguments and maintained that more severe punishments were the appropriate approach to administering Africans. The Native Commissioner (NC) for Filabusi, for example, felt that 'a more concrete reply' was necessary and wrote to the PNC for Matabeleland South: 'If I may be allowed to draw swords with the Secretary of Justice, can the pious hopes and abstract principles expressed be appreciated by the native in this country or can his phychology [sic] be compared with that of the English. It is notorious that sentences in England today and under the Colonial system are far more savage than they are in Southern Rhodesia. I feel the chiefs are justified in being alarmed at our weak sentences.'[157] The PNC added: 'The British have been somewhat arrogant in their assumption that their legal system becessarily [sic] meets the needs of other races. We imposed on the inhabitants of this colony a body of law but we seem never to have questioned its suitability in practice.'[158]

Further representations by NAD officials did not succeed in changing the Secretary of Justice's mind. NCs resorted to making a request that corporal punishment be approved as a sentence for cattle theft. In their 1953 conference, Matabeleland NCs resolved that:

> Bearing in mind that the constructive proposals of the Chiefs' assembly for a labour camp for stock thieves has not met with success, and having regard to the seriousness of this crime today owing to the enhanced value of stock, and to the

[156] *Ibid*.
[157] NAZ S2796/2/4, Native Commissioner (NC), Filabusi, to PNC, Matabeleland South, 29th January 1953.
[158] *Ibid*, PNC, Matabeleland South, to Secretary for Native Affairs, 3 February 1953.

> increase in the incidence of this crime, this conference is of the opinion that the present punishment for stock theft no longer fits the crime.
>
> In [sic] the reluctance of reviewing judges to confirm corporal punishment for this offence legal cannot this aspect be tested [sic]?
>
> Further, the inauguration of Federation makes it incumbent upon the Government to appreciate that judicial officers in this territory, the senior partner, become inferior to their colleagues in the other two territories, where even a native chief has four times the normal jurisdiction of a judicial official in this territory.[159]

This request did not receive favourable consideration and two years later, following the fifth Assembly of Chiefs in Matabeleland, the PNC noted: 'There is evidence of very considerable frustration that despite resolutions at previous Assemblies the Chiefs are still as they were. They attach the utmost importance to this as the minutes amply demonstrate. I do hope some tangible results will be produced soon, otherwise I fear the Assemblies will fail….'[160]

For their part, chiefs around the country continued to voice their demands for increased powers and added to their list of concerns the fact that the system of appeals allowed people to disregard their rulings. In the Midlands Assembly of 1951, Chief Chivese complained that '[c]hiefs have certain judicial powers, but they are in many cases ignored by the People, who go direct to the Native Commissioner. They despise the Chiefs because they can ignore their judgements.'[161] This view was supported by Chief Sogwala who also complained that many judgments handed down by chiefs were being reversed by Native Commissioners. At the 1952 Midlands Assembly Chief Neshano similarly pointed out that 'When people come to chiefs with their complaints and chiefs give a judgement they are invariably disgraced in front of these people by the Native Commissioner who gives a different judgement.'[162] Other chiefs expressed concerns about 'the impertinence of the rising generation'. However, no

[159] *Ibid*, Secretary for Native Affairs to the Secretary, Law Department, 26 November 1953.
[160] *Ibid*, PNC Matabeleland to Secretary for Native Affairs, 10 May 1955.
[161] NAZ S2796/2/1, Assemblies of Chiefs General, Minutes of the Midlands Assembly of Chiefs, 28 October 1951.
[162] *Ibid*, Minutes of the Midlands Assembly of Chiefs, 27-28 September 1952.

resolutions were made on this matter. For Chief Ngungumbane the answer to the problem of 'troublemakers' who defied the NLHA lay in chiefs being granted the powers to remove these 'unwanted elements' from their areas. This met with the support of the chiefs resulting in the resolution that 'whenever anyone is troublesome or incorrigible he should be sent away from the kraal and it is his business to find other accommodation….'[163]

The picture that emerges from the deliberations in the Chiefs' Assemblies of the 1950s is not one of an institution of chieftaincy that had a stable base of authority. Rather, chiefs were fully aware of the progressive erosion of their authority and prestige during the colonial period, as well as their inability to enforce their rulings. They therefore looked to the government for a wider range of coercive power couched as custom. Chiefs also expressed a desire to appropriate the symbols and forms of the colonial legal system in order to shore up their own legal authority. At the 1952 Midlands Assembly, for example, Chief Ndanga made the following request: 'I would like to have a courtroom at the kraal, for on rainy days it is impossible to hold court and this causes inconvenience; we also need a gaol for detaining people; a clerk is also necessary…I suggest that law books be translated into our own language to enable us to try cases properly.'[164] At the 1954 Chiefs' Assembly in Matabeleland, Chief Nqoya proposed that the Native Law and Courts Act be amended to enable them to execute their judgements by collecting any money or property due.[165]

By the end of the 1950s NAD calls for assigning more powers to chiefs had acquired a greater urgency given the social and political unrest being experienced in Southern Rhodesia.

[163] *Ibid.*
[164] *Ibid.*
[165] NAZ S2796/2/4, Minutes of the Matabeleland Assembly of Chiefs, 26 May 1954.

NAD officials thus engaged in heated debates with justice officials and mobilised an evolutionary paradigm to support their claims. At the same time chiefs were also making claims for greater powers. An important aspect of their claims was a desire to appropriate the forms and symbols of state law in order to augment their own authority. Despite this pressure, up to the end of the 1950s the Justice Ministry remained unwilling to budge. However, in the 1960s the NAD would gain the upper hand in this debate.

Constructing the Ethnicised, Custom-bound Subject

In the early 1960s, the position of the NAD was strengthened by the findings of a series of commissions. This culminated in the 1969 African Law and Tribal Courts Act which provided for limited criminal jurisdiction for chiefs who bore the necessary warrants. This Act was part of the broader shift in the state's approach to African administration from the early 1960s which Jocelyn Alexander has shown was a response to the disastrous effects of the NLHA on state authority in the rural areas.[166] It was in the context of this rural crisis, the spread of nationalism and regional developments that the aforementioned commissions were appointed. Commissions, as Ann Stoler has shown, were technologies of rule which did much to produce the realities they claimed to only record.[167] 'By the time most commissions had run their course (or spawned their follow-up generation),' she notes, 'they could be credited with having defined "turning points," justifications for intervention, and, not least, expert knowledge.'[168] The first commission to be appointed in Southern Rhodesia was the Mangwende Commission, which was appointed on the 27th of October 1960.[169] It was tasked with investigating the unrest in the Mangwende chieftaincy that was related to the clashes

[166] Alexander, *The Unsettled Land*, pp. 63-82.
[167] A. L. Stoler, 'Colonial Archives and the Arts of Governance', *Archival Science*, 2 (2002), pp. 103-107.
[168] *Ibid*, p. 104.
[169] G. C. Passmore, *The National Policy of Community Development in Rhodesia: With Special Reference to Local Government in the African Rural Areas* (Salisbury, 1972), p. 75.

between Chief Mangwende and the NC and opposition to the NLHA. Among other things, the Commission recommended that the implementation of the NLHA be immediately suspended in the Mangwende reserve and that more land be provided for grazing and arable purposes. A key conclusion reached by the Commission was that there was a need for a 'restructuring of the Administrative approach' in African areas.[170]

The Robinson Commission, which followed the Mangwende Commission, was charged with inquiring into the administrative and judicial functions of the Native Affairs and District Court departments.[171] It made recommendations for far reaching changes in the structure of local government in Southern Rhodesia. With regard to the exercise of judicial powers it recommended that these powers be taken away from Native Commissioners and be assigned to the District Courts Department. In relation to chiefs' courts, it stressed that '[t]he important thing is to give the people the justice they feel meets the norms of their society'.[172] The Working Party 'C' was in turn tasked with investigating how this could be done and with giving recommendations as to how chiefs' status could be enhanced.[173] In her assessment of the failure of technical development and the subsequent shift to community development, Alexander has shown that this 'required that Africans be reconceptualised once again as communal, bound by irrational beliefs and so incapable of modernisation.'[174] A similar process of 'othering' was at work in the Working party 'C's efforts to elevate chiefs' courts.

[170] *Ibid*, p. 79.
[171] *Ibid*.
[172] NAZ S2827/1/19 Report of the Working Party 'C' Chiefs Courts (Arising out of the Robinson Commission Report) Salisbury 13 March 1962, paragraph 7.
[173] Working Party 'C' was one of four working parties set up under the Robinson Commission.
[174] Alexander, *The Unsettled Land*, p. 63.

The Working Party was led by H. R. G. Howman, who was an Undersecretary in the NAD. He had served in the NAD for a long period and came from a family that had long been involved in the NAD. He was therefore considered an expert in African administration. In all, four of the seven members of the Working Party were NAD officials, the others being the PNC for Gwelo N. L. Boast, the NC for Bulawayo N. L. Dacomb and the NC for Sinoia N. J. Brendon. The Justice Ministry was represented by the Attorney General E. W. G. Jarvis and an Undersecretary, A. M. Bruce-Brand. The last member of the Working Party was B. J. M. Foggin, who served as the secretary. As with most colonial enquiries on matters of custom, chiefs were the main group who were consulted by Working Party 'C'. Unlike the provincial Chiefs' assemblies, the Working Party 'C' officials showed more respect for the views of chiefs. However, it was clear that Howman, who led many of the meetings, was trying to steer the chiefs in a particular direction on a number of issues. The chiefs raised many of the concerns they had in the 1950s. Invariably, the version of custom they gave was one which affirmed their demands for more judicial powers.

Chiefs were particularly opposed to Howman's proposal regarding the 'right of election' or the idea that African litigants could choose the court where they wanted to take their cases and the proposal that their rulings could be appealed against in higher courts. During the consultation meeting with the Council of Chiefs, Chief Myinga of Nkai argued that during pre-colonial times: 'The chief was a personality in his own right and nobody had the right to query the chief's right to do things. The only person who could take a complaint direct to the

king would be the chief. It was the chief's duty to settle these matters and then make a report to the king.'[175] Chief Shumba of Fort Victoria was far more strident in his views:

> I want this word 'choosing' to be obliterated because I want people to be united because they are all African. All these people are under my control and I would want to try all matters arising because if I as chief fail then they can appeal to that court of appeal which we are going to form, and that is final. I even want to try criminal cases. Even though the man may be convicted I still want to try him when he comes out of jail and I would make him pay.

Chief Sigola similarly felt that the 'right of election' was not consistent with African customs and asked Howman, who was chairing the meeting: 'Why do you say that we can adjudicate according to our own native custom when you give to us with one hand and take away with the other[?] When you suggest that a complainant has right of election that is not according to our custom.'[176]

Howman's efforts to change chiefs' minds by pointing out that commercial disputes between businessmen might involve intricate matters of law touched a raw nerve with some chiefs who objected to the idea that wealthy business people could ignore the chief. The exchange between Howman and the chiefs over this and other issues highlighted the fact that what was happening was not a search for African legal ideas and practices but a negotiation between government officials and chiefs over the extent and nature of authority they could exercise. Chief Myinga was amongst those who were opposed to Howman's suggestion. He supported his objections by recounting an incident in his area involving a commercial dispute between two businessmen:

> …in my area I gave two Africans permission to start a grinding mill and a store and they got into difficulties about this. I was told that one had loaded up the grinding mill and taken it in to Bulawayo. That case has never been reported to

[175] NAZ S2824/11, Minutes of the Working Party 'C' consultation meeting with the Council of Chiefs, 12 October 1961.
[176] *Ibid*.

> me. Because he is a businessman he thinks he can do as he likes. That man who removed this grinding mill is depending on his solicitors.[177]

Chief Kayisa's contribution to the debate went to the core of chiefs' concerns with the idea of the 'right of election' and the exclusion of particular social groups from their jurisdiction *viz* the impact this had on chiefs' prestige. He explained: 'What increases a chief's prestige is that even the business people with troubles take them to the chief. And if the case is too difficult for the chief it is up to the chief to give permission to take it to another court. Even a European situated in the chief's area should also report in the first place to the chief when he has any difficulty.'[178]

The final report that was compiled by Working Party 'C' took little note of the basis for chiefs' objections. Instead, it was couched in a language of cultural difference. It prefaced its recommendations with a section entitled 'Indigenous law and the community' which presented Africans as essentially communal and resistant to change. 'Life in a tribe', it began:

> …has certain features which throw a light on the operations of a tribal customary system and it must be stressed that whatever legal enactments and structures may be superimposed, tribal life – where law is a definition of norms, normal behaviour, customs and social relationships undertaken by local talent as an almost daily experience with great resources of public opinion to back it – has a remarkable way of persisting and even flouting the external system imposed by the ordinary law of the State.[179]

It went on to highlight the 'communal' nature of African society pointing out that 'In a normal communally minded society a number of individuals who feel themselves united, normally by kinship bond, participate in disputes as a single unit. They are benefitted or

[177] *Ibid.*
[178] *Ibid.*
[179] NAZ S2827/1/19, Report of the Working Party 'C', p. 2.

injured together.'[180] On these grounds the Working Party 'C' concurred with the Robinson Commission and argued that it was necessary to give Africans 'the justice that meets the norms of their society'. Ironically, these 'norms' were to be defined by state appointed 'experts' not chiefs or the 'Africans' themselves.

Drawing on the work of anthropologists such as J. F. Holleman and Max Gluckman, the report went on to describe the process of dispute resolution in chiefs' courts in idealised terms. It made the following observation:

> The chief is the tribal community in action, the headman the ward community in action, and neither acts alone. It is the assessors or counsellors ("abatonisi" or "wachinda") of the chief or the headman who conduct the proceedings, they digest the evidence, probe witnesses, measure behaviour against the recognised code of behaviour and finally, as Holleman puts it, "the solution emerges as the common product of many minds and the chief's decision is as undramatic and uneventful as a full stop after a long paragraph." He, the chief, may not even be present, or be there for only part of the time, but the formality of the "cutting of the case" is always done in his name.[181]

At least two things are worth noting in the Working Party's statement. The first is the contrast it bore with what had actually come out of the consultation with chiefs. Far from describing this romanticised state of affairs, the chiefs had highlighted the increasing disregard for their decisions and the tensions between them and other social groups such as the youth and wealthy businessmen.

Secondly, the 1950s tradition of anthropological writings by Gluckman and Holleman which the Working Party decided to draw on was a curious choice. In justifying the creation of homelands, the South African authorities had preferred to draw on an older anthropological

[180] *Ibid*.
[181] *Ibid*, p. 11.

tradition, the 1920s writings of Bronislaw Malinowski that took as granted the existence of separate homogenous 'tribal' societies.[182] The work of Gluckman and others, however, challenged colonial stereotypes that presented African societies as irrational, primitive and homogenous. Gluckman's work on the Barotse, for example, argued that African legal systems, like European systems, met the Weberian standards of rationality.[183] The Rhodesian authorities' appropriation of this anthropological writing was strategic in that it enabled them to support the proposal to elevate chiefs' courts with academic arguments. At the same time these writings did not unsettle the notions of cultural difference which undergirded the state's new approach to African administration. State officials could thus argue that African legal practices were 'rational', but they were not 'modern'. As such Africans remained cultural 'others' who were to be treated as such.

In the government's designs, chiefs' courts were to play a role in the effort to 'distance the state from its coercive role and to legitimise authority over people and land in customary guise'. [184] The Working Party explained how this was to be achieved in the following terms:

> That many chiefs do mete out punishment in the form of damages for wrongs against the community interest is well known but it is done covertly. Offenders who endanger huts by fire, who cut down fruit trees, who soil the public drinking place, who upset the spirits by incest, provoke a reaction from the community which is the traditional duty of a chief, as head of the community, to enforce powerful sanctions of ostracism, banishment, ridicule and damages in the form of meat (a beast, a goat, a fowl according to the enormity of the offence) which are partly a token of regret or apology and partly a sign of rapprochement when all partake of the meat.[185]

It went on:

[182] B. Oomen, *Chiefs in South Africa: Law, Power and Culture in the Post-Apartheid Era* (Oxford, 2005).
[183] M. Gluckman, *The Judicial Process among the Barotse of Northern Rhodesia* (Manchester, 1955).
[184] Alexander, *The Unsettled Land*, p. 63.
[185] NAZ S2827/1/19 Report of the Working Party 'C', p. 10.

> We believe that these traditionally recognised offences against the communal welfare could be expanded to cover such injurious actions as digging mice out of a dam wall or contour ridge, grazing stock in a prohibited paddock or cutting fences, if African courts could be empowered to try such cases as civil matters and impose damages. We consider that this 'injury to the community' aspect could, at the wish of the people, be extended to many violations of by-laws made by Native Councils and Tribal Land Authorities without at the same time precluding recourse to prosecution in the criminal courts in a proper case.[186]

By trying to pass off deeply unpopular state policies that were rooted in the NLHA as 'wrongs against the communal welfare' to be enforced by chiefs, the state hoped to become, to paraphrase Karen Fields, a consumer of legitimacy generated in the customary sphere.[187]

All in all, Working Party 'C' made a total of 25 recommendations on augmenting the powers of chiefs and elevating the role of their courts which formed the basis of the African Law and Tribal Courts Bill, introduced in Parliament in 1969. The Bill was introduced by the Minister of Internal Affairs under whose ministry the re-organised NAD fell. He went to great lengths to counter the long-held stereotypes about African 'customary' law within the settler population. Much like Working Party 'C', the Minister made extensive use of academic arguments that appeared to validate African customary law. At the same time, this rhetoric attempted to mask the underlying process of constructing Africans as ethnic subjects and establishing institutions that would treat them as such. He argued that the negative stereotypes about African custom were influenced by early travellers who chose to report 'the newsy, sensational episodes of life'. He observed:

> What was not apparent to these early travellers and writers, or what was insufficiently sensational probably, to make it worthwhile repeating or recording was the unseen, uncomprehended, normal day-to-day operations of a system of law. This, in its search for the truth, in its weighing of evidence, in its judgements of conduct, in its decisions as to who was acting as he ought to act in a reasonable manner, in its concern to keep order in the community - in all these

[186] *Ibid*, p. 11.
[187] K. Fields, *Revival and Rebellion in Colonial Central Africa (Princeton*, 1985), p. 31.

> basic problems a system of law, more notable for its fundamental similarity with the Western legal system than in contradiction, was and still is in operation.[188]

Drawing on Eugen Ehrlich's classic work on the sociology of law, the Minister declared that:

> This bill is not therefore innovating so much as it is recognising something that exists – living law applied to the facts of daily life for the preservation of social order. It is not conferring jurisdiction on 'completely unqualified' persons ignorant of this and that. It is recognizing a very long-established institution – normal African customary law and rules of procedure administered by functionaries who are legitimate and qualified in the eyes of litigants and the public – and an institution which has survived non-recognition, discouragement, neglect and even prohibition in some aspects.[189]

Much of the Minister's speech adopted this glowing language and marshalled history and academic arguments that contradicted what had been the policy of successive settler governments.

While some African Members of Parliament (MPs) welcomed the legislation, seeing it as according chiefs their rightful status, a number realised the negative implications of these moves. These MPs often spoke on behalf of the African middle class and not in defence of the interests of the majority of 'ordinary' Africans in the rural areas. Nevertheless their contributions reveal two main points. Firstly, that some Africans imagined themselves as rights-bearing citizens and consciously opposed the state's attempt to treat them as custom-bound subjects. Secondly, their statements bore testimony to the role of education and interaction with colonial courts in shaping African legal consciousness and ideas of personhood. Chigogo, the MP for Gokwe, was amongst those who had concerns about the implications of the Act for the educated elite. He opined:

> Today you have the University here where you produce African doctors, where you produce African lawyers and all sorts of graduates, not speaking about the numerous secondary schools we have the whole country wide.[sic] I wonder if

[188] *Rhodesia Parliamentary Debates*, 28 January 1969, col. 618.
[189] *Ibid*, col. 622. See E. Ehrlich, 'The Sociology of Law' *Harvard Law Review*, 36 (1922).

> you will agree with me to say that such an African, having left the University of Rhodesia, having acquired knowledge of the legal systems, although this man is an African he goes into the Tribal Trust Land and here this individual is taken before the chief's court or chief's *dare*, or whatever the name may be, and he is going to be flatly told because the Minister has formulated such type of a legislation that the man has no right of appeal, I look very far, far from the District Commissioner's office or from the provincial commissioner's office to the highest courts we have in this country which we have become acquainted with for the last 70 years since the Europeans came into this country.[190]

Speaking on a personal note he declared:

> I would find it very difficult myself, personally, if I went before the chiefs *dare* and I was charged in the tribal court. Maybe I will be out of this Parliament, having known the system…, how the rights of men are contained in this House and dished to the rulers of this country. Surely I will conflict with the chiefs and his *Indunas* at this *dare* because I will claim to know my rights. But because I happen to be an African, because the Minister's department has chosen to frame the law in such a way that I must be muzzled, I must not open my mouth; I must have no rights so I have to go to be punished like a sheep.[191]

As I show in the next section, it was not just members of the educated elite who refused to be 'muzzled' or to go to their punishment like 'sheep'.

For all his rhetoric about the virtues of African legal systems and the government's efforts to recognise these, the Minister was in fact proposing an authoritarian piece of legislation that had little to do with African legal ideas and practices. This comes out clearly in the provision that dealt with corporal punishment. Corporal punishment for Africans had been provided for under Southern Rhodesian law since the establishment of Magistrates' Courts in 1891. From 1894, when a High Court was set up in Matabeleland, all cases in which a sentence of corporal punishment was handed down were subject to automatic review by a High Court judge. In the case of juveniles there was no statutory requirement for automatic review. However, the record was sent for 'perusal' by a High Court judge in keeping with an

[190] *Rhodesia Parliamentary Debates*, 31 January 1969, col. 843.
[191] *Ibid*, col. 844.

undertaking made to the Secretary of State in 1899 which remained in force.[192] Under the 1969 legislation, the Minister sought to widen the use of bodily punishment by having chiefs administer it. In addition, it was to be administered in public and free from judicial or medical supervision. In effect, the state was responding to rising political agitation amongst African youth by resorting to corporeal technologies. What is more, the administration of this bodily punishment would take the form of a public spectacle, making it both a means of control and a performance of power.[193]

The provision on corporal punishment sparked objections from African MPs who feared that such powers could be abused. The Minister's response was to downplay such concerns, declaring:

> I have never heard of a case where a whipping has been properly administered of a juvenile suffering any serious or permanent injury though he may be a little uncomfortable for a time. When I was at school this happened to me very, very frequently – [An honourable member: Shame] – However, nobody worried as to whether my physical condition could or could not stand it. All I remember was that I was very proud in the bathroom later in the evening to display the signs of my manhood across my rear…indicating that I had stood up to a little bit of punishment which had been meted out to me. I do not believe I suffered one bit. – [Mr Chigogo: We want it properly administered.][194]

Besides revealing his ideas about masculinity, the Minister's reference to his own experience of whipping sought to push into the background the aspect of racial difference which was central to the decision to use corporal punishment on Africans. Administrative officials had used arguments about racial difference since the 1950s to back the view that whipping was

[192] Report of the Courts of Inquiry Commission 1971, Government of Rhodesia (Salisbury, 1971), p. 21.
[193] See M. Foucault, *Discipline and Punish: The Birth of the Modern Prison* (London, 1977), chapter 2.
[194] *Rhodesia Parliamentary Debates*, 31 January 1969, col. 872.

the appropriate form of punishment for Africans. Placing the administration of whipping in the hands of African chiefs reinforced the underlying rationale of racial difference. [195]

Despite the Minister's attempt to make light of the provision, MPs like Chigogo found no comfort in the minister's assurances and they demanded more 'civilised' approaches to punishment. Chigogo observed: 'We have since heard that these cases will not be tried *in camera* but will be done in public and after the trial they will be caned in public but this is not done under English law.'[196] He went on, 'I feel this clause should be re-examined. I feel a civilised way should be found to punish our youngsters who are coming from school and at the same time their birth certificates should be produced to show the age of that particular child.'[197] Mr Samuriwo was concerned by the fact that the whipping would be done without medical supervision and he noted that: 'When other children in towns are beaten, a doctor has to be there to see how the beating and the rubbing of medicine is done. In the Tribal Trust areas we think our own people need that treatment as well. But the beating will be done without the treatment and where there are wounds from the beating no treatment will be given.'[198]

The legislation tabled by the Minister was not aimed at the elaboration or codification of African 'customary law'. Its objective was to enable the government to draw on the legitimacy of 'traditional' leaders' legal authority and exploit its authoritarian potential.[199]

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[195] See A. Rao and S. Pierce, 'Discipline and the Other Body: Correction, Corporeality, and Colonial Rule,' *Interventions*, 3 (2001), p. 161.
[196] *Rhodesia Parliamentary Debates*, 4 February 1969, col. 933.
[197] *Ibid*.
[198] *Ibid*, col. 934.
[199] For a discussion of the way colonial states sought to 'marshal the authoritarian possibilities' of African culture see M. Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton, 1996).

As a result, the African Law and Tribal Courts Act passed in 1969 went very far in augmenting the powers of chiefs, if only on paper. Section 13 of the Act granted Chiefs the power to 'impose a moderate correction of whipping, not exceeding 8 strokes' on young men who 'ha[d] not attained the apparent age of nineteen years' who were convicted for criminal offences.[200] In civil cases, appeal from their courts was limited to the provincial Tribal Appeal Courts made up of three chiefs. In criminal cases the Act allowed for convicted individuals to take their appeals to the magistrate's court though, in reality, every effort was made to frustrate such steps. Section 19 (1) gave chiefs the powers to evict 'problem makers' from their areas. However, in practice this provision proved difficult to implement as it was difficult to find a place to settle the evictees.

Chiefs' courts were also protected by a strict contempt provision which defined contempt in very wide terms and provided for a maximum sentence of £50 or 6 months in prison. District Commissioners' intervention in the operation of chiefs' courts was limited to administrative matters and lawyers were barred from appearing in chiefs' courts.[201] Chiefs' courts were also empowered to try offences under a wide range of laws which revealed the extent to which it was hoped that chiefs would do the heavy lifting in terms of enforcing state policies in the rural areas. These Acts included the African Affairs Act, African Beer Act, African Councils Act, Tribal Trust Lands Act, Natural Resources Act, African Cattle Marketing Act, Tribal Trust Land Forest Produce Act and the African Land Husbandry Act. The irony underlying all these measures lay in the fact that very little of what chiefs were supposed to enforce was in any sense based on African custom, real or imagined. Many of these were statutes and regulations rooted in 1950's technical development.

[200] Act No 24, African Law and Tribal Courts Act, *Statute Law of Rhodesia 1969* (Salisbury, 1970).
[201] In 1962 Native Commissioners' title was changed to District Commissioner. A review of the laws in the same year also removed the word 'native' from all legislation and replaced it with 'African'.

Implementing the African Law and Tribal Courts Act

From 1970, when the Act became operational, the Ministry of Internal Affairs (MIA) set about issuing chiefs with warrants that authorised them to exercise civil and/or criminal jurisdiction. However, the state faced a number of obstacles which included reluctance by chiefs to exercise these powers as well as resistance by individuals resident in the rural areas. An increasingly important factor in the 1970s was the pressure being exerted on chiefs by the guerrilla armies that had begun waging a war against the Rhodesian state in the mid-1960s. These were the Zimbabwe People's Revolutionary Army (ZIPRA) and the Zimbabwe African National Liberation Army (ZANLA) which were the military wings of the Zimbabwe African People's Union (ZAPU) and the Zimbabwe African National Union (ZANU) respectively. While the late 1960s had witnessed a lull in the military clashes, the early 1970s saw intensified fighting and increased aggression towards chiefs and others who were perceived to be 'sell outs'. In many areas chiefs were caught between a government that demanded their loyalty and sought to use them to enforce unpopular policies, and guerrillas who threatened them with violence should they do so. In this context, the MIA placed a great deal of pressure on Provincial and District Commissioners (PCs and DCs) to make sure as many chiefs as possible were warranted. A typical letter from the MIA headquarters to PCs read as follows:

> From records here it seems that none of the chiefs from Bulalima-Mangwe, Matobo, Filabusi and Beitbridge districts have had jurisdiction conferred upon them. In Gwanda only Masuku has jurisdiction. The power to enforce the Tribal Land Authority by-laws and to compel payment of Council rates must improve the standing of the Tribal Authority. You will be aware that it is policy to do what we can to improve the power and status of chiefs. Could you please point out to the District Commissioners that they may be overlooking a useful

> administrative tool and urge them to seek criminal jurisdiction for their chiefs wherever possible, please.[202]

Despite this pressure, after five years MIA records showed that out of 252 chiefs only 117 had warranted courts.[203] As will be shown below, many of those chiefs that did receive warrants were hesitant to exercise their increased judicial powers.

A by-product of the moves to draw chiefs' courts into the service of the state was that the chief's courts gradually began to take on many of the features of state courts, especially where procedure and the generation of paperwork was concerned. This was partly the result of pressure by the Justice Ministry officials for close supervision of chiefs' courts. At the same time MIA officials feared that decisions by chiefs' court might be quashed on procedural grounds thereby undoing the government's plans. It was this concern that lay behind the Secretary for Internal Affairs (SIA), R. J. Powell's circular to all DCs and PCs in January of 1975 in which he explained that:

> It is perfectly possible for customary procedure, however different from European legal ideas, to deal with cases without any failure of justice. To assist tribal courts in doing this without the risk of their judgements being upset on procedural grounds a set of checklists has been compiled, by which court-clerks can demonstrate in their case records that the procedure followed has satisfied the requirements of justice. Suitable notes should of course be made in the case record. The purpose of the checklist is not to replace the note in the record, but to remind the clerk of court to take the steps mentioned in the checklists.[204]

Owing to these concerns, the court clerks had an important function in the eyes of the government. They ensured that all procedures were observed and that the necessary forms and reports were completed. Learning about these checklists, forms and the writing of reports was a key component of the training given to clerks for chiefs' courts. In some cases,

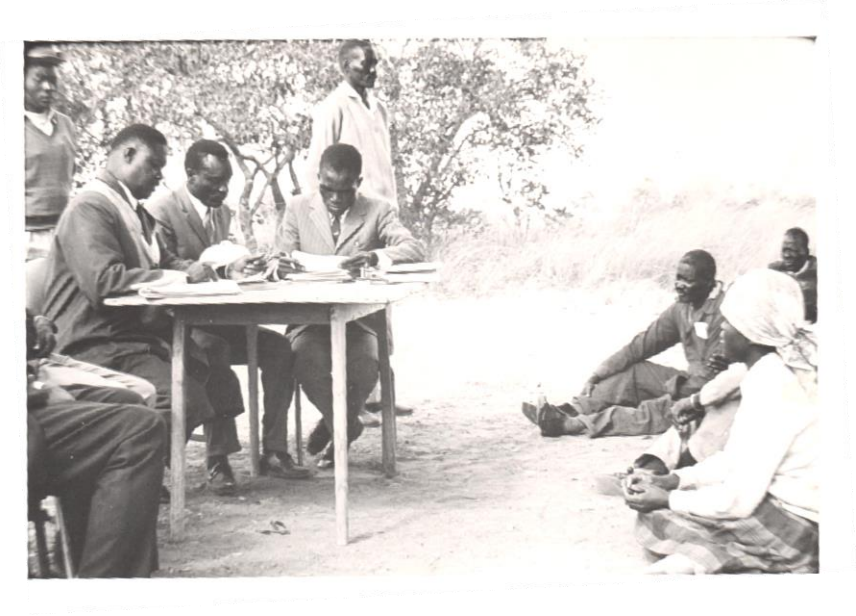
[202] NAZ S3700/103/1, African Law and Tribal Courts Act, N. A. Hunt, for Secretary for Internal Affairs (SIA) to PC, Matabeleland South, 20 March 1975.
[203] NAZ S2930, Vol. 1 African Law and Tribal Courts, Tribal Courts of Chiefs Mid-March 1975, 19 March 1975.

[204] NAZ S3700/103/1, SIA R. J. Powell to All PCs and DCs, 20 January 1975.

however, the state's insistence on the observance of procedures was a source of tension between the chief and his assessors on the one hand, and the clerk on the other. Such was the case in Chief Chibi's court where the chief and his assessors were angered by the fact that the clerk, to them a mere child, insisted on giving them instructions on how to run the court.[205]

In other areas the adoption of the forms and symbols of state courts was welcomed. Reuben Ndanga, the son of Chief Ndanga and one of the first clerks to be trained in 1969, recalled with a sense of pride the various forms they used and recited excerpts of the African Law and Tribal Courts Act. He informed me that he had excelled in his training and had been requested to assist with the training of court clerks in other parts of Rhodesia before the war scuttled those plans.[206] His account of his long history working with the chiefs' court served a purpose in the contemporary struggles over the chieftaincy since his father died in 2008. However, what was evident was that, for him, this symbolic appropriation was a sign of progress and endowed the chiefs' courts with great prestige and authority. Importantly, this indicated that a two way symbolic appropriation was at play. While the state sought to borrow the authority of 'traditional' courts, chief's sought to appropriate the symbols of state law in order to bolster their legitimacy.

[205] NAZ S3700/103/2, Tribal Courts: Court Clerks, Training: Allowances, DC Chibi to PC Victoria, 24 October 1972.
[206] Interview with Reuben Ndanga, Ndanga Township, 18 April 2011.



Picture 1: Chief's Court 1973 [Source – National Archives of Zimbabwe (NAZ)]

Picture 2: Tribal Appeal Court 1974 [Source - NAZ]

In practice, the fortunes of chiefs' courts varied widely over time and space. Some chiefs, like Dakamela of Nkai district, were able to assert their power through their courts up to the mid-1970s. While Dakamela was reluctant to implement conservation policies, he had no qualms about exercising his judicial powers, where the enforcement of council rate payment

was concerned.[207] In the second half of 1973 Dakamela's court heard 17 civil cases and handed down judgements that amounted to R$440 and 25 cattle.[208] During the same period his court had also heard 102 criminal cases, all of which dealt with African Council rate defaulters. All of the accused in the cases were ordered to pay the outstanding rate of R$2-00 as well as court fees. The transcript of a group of 102 rate defaulters tried by Chief Dakamela in April 1975 gives an insight into the operations of Dakamela's court. During the trial the court had refused to accept the absence of the actual defaulters as an acceptable excuse and instead placed the guardians, parents and wives of the defaulters on trial. The plea recorded in the transcript was: 'We do accept the $2 rate and cost incurred by the said Council.' Three individuals who attempted to register their objections to the process were charged with contempt and one of the three appeared before the court in handcuffs. Part of the court transcripts read as follows:

> **(102) Rate defaulters xx [cross examined] by court**
>
> **Q**: Do your relatives the rate defaulters have the right to own and till land?
>
> **A**: Unanimous answer was 'yes'
>
> **Q**: Do they have or deserve to be called residents of the Dakamela Tribal Area where the Dakamela Council holds jurisdiction?
>
> **A**: They do.
>
> **Q**: Do you appreciate the fact that your relatives or sons or husbands have contravened the African Council Act (Chapter 95), because they have neglected paying the $2 rate?
>
> **A**: We do.
>
> **Q**: Do you accept the idea of paying on their behalf?
>
> **A**: We do, because they are our dependents and husbands.
>
> **Q**: Do the rate defaulters have any moveable property?

[207] For an account of Chief Dakamela's relations with the government see J. Alexander, J. McGregor and T. Ranger, *Violence and Memory: One Hundred Years in the 'Dark Forests' of Matabeleland* (Oxford, 2000), pp. 129–131.
[208] S3700/103/4/2, District Commissioners' Court Rules, Report: Chief Dakamela's Tribal Court for the Period 1st July 1973 to 31st December 1973, Nkai District.

A: They do.

Actual rate defaulters XX [cross-examined] by Court

Q: Will you give reasons for neglecting to pay rate? [sic]

A: We did not neglect paying, but our problem is money.

Q: Do you deserve the right of being residents of the Dakamela Tribal area?

A: We do.

JUDGEMENT

The $2 rate, and $3 order as to costs to be paid by each and every rate defaulter for the following reasons:

a) The court ordered compensation for the Dakamela African Council because all rate defaulters have right to own and till land; and
b) Because they are residents of the Dakamela Tribal area; and
c) Because they contravened the African Councils Act (Chapter 95); and
d) Guardians were also ordered to pay compensation for their dependants;
e) The $20-00 fine or 3 months jail sentence was not imposed.
f) And the following fines were summarily imposed as contempt $10-00, $10-00, and $2 upon Njiyi Tshuma, Myengwa Ncube and Yisaya Tshabalala respectively.[209]

It is unclear from the available evidence how successful the court was in enforcing the judgement. However, a 1971 comment by the DC for Nkai that Dakamela enjoyed 'terrific respect in the district, albeit as a dictator' suggests that his court may well have been able to enforce its rulings. In addition, in 1975 'he was granted Emergency Powers as a District Authority "to counter terrorist activities". He could arrest without a warrant, and deal with anyone on the spot who caused "feelings of hostility toward yourself…"'[210] It should be added that Dakamela's actions ultimately incurred the wrath of ZIPRA guerrillas in the late 1970s and he was forced to flee his home and live in the Dakamela sub-office under the protection of government paramilitary forces.[211]

[209] NAZ-Bulawayo, Box 28926, Location 29/6/3R, Local Government District Nkai, Chief Dakamela's Court, Criminal Case No. 6/73.
[210] Alexander *et al*, *Violence and Memory*, p. 130.
[211] *Ibid*, p. 150.

In other areas several factors militated against the operation of chiefs' courts in the way that the state had intended. Among the Tonga, for example, chiefs had not exercised the degree of authority required to make the state's policy work. In particular, they had never exercised authority over land. Consequently, Tribal Land Authorities (TLAs) proved difficult to set up, and without TLA by-laws chiefs' courts could not enforce land use policies. The DC for Binga, B. D. Hornby, made this clear to his superior in remarking: 'I will endeavour to get Chiefs interested in Tribal Land Authorities but I see no real prospect of getting any effective by-laws.' 'Tonga chiefs', he explained, 'have no traditional tribal land authority and never had any control over the allocation of land. While some chiefs see the advantages to them of exercising such authority they are not strong enough to change established custom. At this stage any by-laws would be ineffective.'[212] In other areas chiefs were reluctant to exercise the powers accorded to them in the new legislation, realising the risks this posed to their own legitimacy. This reluctance was noted by the DC of Melsetter who observed that:

> In Manicaland, particularly in the areas of Ndau influence, tribal leaders have always and will continue to play to the whims and feelings of their people. Events across the border [in Mozambique] have highlighted the so called 'oppressive' conservation measures and other restrictions placed on land use in Rhodesia. Many or should I say the majority of tribal leaders have absolutely no intention of introducing further restrictive measures which could be in any way misconstrued by their people.[213]

This led him to the conclusion that: 'Until we can establish effective TLAs who can and will use their powers to make orders relating to better land usage, these regulations will be seen only as a waste of paper.'

[212] NAZ S3700/40 Tribal Land Authorities, DC Binga to PC Matabeleland North, 23 April 1975.
[213] *Ibid*, DC Melsetter, J. R. Peters, to PC Manicaland, 21 November 1974.

MIA official D. M. Connolly, made a similar observation regarding chiefs' powers to evict people from their areas. In a note to the SIA he pointed out that, 'It will probably be difficult, in practice, for chiefs to exercise this power, and I have no doubt that most will not bother with it. However, it is a useful regulation to have for those who wish to make use of it.'[214] As Alexander notes, reliance on chiefs was further hindered by the fact that state officials often found themselves entangled in disputes between different leading houses vying for the chieftaincy.[215] In addition, chiefs often had their own agendas that were distinct from those of the government. Consequently, it was not uncommon for chiefs who had once been in alliance with district officials to transfer their loyalties to the nationalists. In addition, the war also meant that chiefs' judicial powers were progressively eroded by both state and non-state judicial forums. Norma Kriger's study of the experiences of the guerrilla war in Mutoko shows, for example, how chiefs' judicial powers were eroded by the imposition of martial law on the one hand, and the existence of ZANU-related people's committees which began to take over the task of adjudicating disputes and enforcing law and order, on the other.[216]

In trying to rely on chiefs and their courts, the Rhodesian state failed or refused to recognize the inherent limitations of this strategy. In the first instance, Fields aptly notes that: 'Not all commands may be legitimately issued even by a legitimate ruler.'[217] Working Party 'C' had been overly optimistic in thinking that unpopular state policies could be made acceptable by giving chiefs the task of enforcing them. In addition, as Thomas Spear's points out, there were inherent limits to the strategy of inventing tradition. Not only did the legitimacy of 'traditional' leaders have to be maintained, but the policies implemented had to resonate with

[214] NAZ S3700/43 Tribal Trust Land Disputes, D. M. Connolly to SIA.
[215] Alexander, *The Unsettled Land*, pp. 83-99.
[216] N. J. Kriger, *Zimbabwe's Guerrilla War: Peasant Voices* (Cambridge, 1992), p. 199.
[217] Fields, *Revival and Rebellion*, p. 64.

people's values. The Rhodesian government largely disregarded these limitations and sought, in overt ways, to manipulate the institution of chieftaincy and use chiefs to implement deeply unpopular policies. Consequently, it was not only unsuccessful in legitimising itself through the chiefs, but it also delegitimized those chiefs who tried to do its bidding and made them targets for guerrilla attacks as the war intensified.

The war forced many chiefs to try to walk the fine line between staying in good books with the MIA and not incurring the wrath of the guerrillas. Chief Ndanga was among those faced with this predicament. From his appointment in 1958, he had managed to cultivate a fairly comfortable working relationship with the government. During the early 1960s he was elected to the Council of Chiefs and, along with 29 other chiefs, he went on the 1964 overseas tour organised by the Rhodesian Front government. In 1969 his court was chosen to be part of the pilot group of courts to be warranted under the African Law and Tribal Courts Act and his son Reuben Ndanga was sent for training as a court clerk.[218] In October 1975 Chief Ndanga, like Dakamela, was appointed a District Authority. However, as the war intensified in the late 1970s and guerrillas began operating in Ndanga and the neighbouring Bikita district, he and other 'traditional' leaders found themselves in a difficult position. This comes out clearly in the minutes of the DC's monthly meetings with headmen and chiefs. Over time many headmen and chiefs became reluctant to be associated with government policies or to make any reports about the operation of guerrillas. The minutes of the October 1977 meeting noted that: 'The tribal leaders had many excuses why it was difficult to report even finding out where terrorists are operating. The Member I/C pointed out that he was very busy fighting the war without much help from the Tribal leaders… It was quite evident that

[218] Interview with R. Ndanga, 18 April.

all the Tribal leaders are frightened of the result of terrorism and they found it easier to sit on the fence. It is highly recommended that these meetings be discontinued.'[219]

The fear on the part of chiefs and headmen was not unfounded as is attested to by the experience of Headman Muroyiwa. After a two month absence from the meetings, Headman Muroyiwa explained his ordeal at the hands of the guerrillas at the February 1978 meeting. The minutes for the meeting record that:

> On the 12th December, 1977 he was abducted by a group of terrorists and taken to Hozwi Plateau where another group of terrorists set about beating him with a log. The reason they gave was that he was too progressive and that he always had too much to say in the past at TLA meetings, also that he was the District Commissioner's stooge. He was beaten 30 times until he fainted and collapsed. The women at this unknown kraal poured buckets of water over him shouting 'you are going to kill our headman'. He was then told if he reported this incident to the District Commissioner that they would kill him and leave him to rot in his yard and that no funeral services would be permitted.[220]

Headman Muroyiwa's misfortunes did not end with his encounter with the guerrillas. He was later arrested by the BSAP and detained under Martial Law regulations on suspicion of assisting guerrillas and being involved in stock theft.[221] Muroyiwa was not the only one to have a negative encounter with the guerrillas. Of the four chiefs in Ndanga district, two, Nyakunuwa and Bota, were killed by the guerrillas for allegedly reporting their movements to the authorities.

Chief Ndanga appears to have tried to tone down his cooperation with the administration and, for example, ceased his involvement in the District Show. This decision is likely to have

[219] NAZ-Masvingo, Local Government District Administration Chiefs and Headmen: CHK & HM 14 1975-1982, Minutes of Minutes of DC Ndanga's meeting with Chiefs and Headmen, October 1977.
[220] *Ibid*, Minutes of DC Ndanga's meeting with Chiefs and Headmen, 3 February 1978.
[221] *Ibid*, DC Ndanga, N. B. Lawton to PC Victoria, 13 December 1979.

been influenced more by the instinct of self-preservation than by political conviction. After being visited at his homestead by guerrillas, Chief Ndanga chose to build rapport with them and would, on occasion, kill a beast for them.[222] As a result of his cooperation with the guerrillas he was able to continue running his court, despite the presence of ZANU committees in his area. However, the guerrillas did appoint two people, Runochinya Chikato and Simon Musuka, to sit on the court and guerrillas would sometimes turn up to witness hearings in the court.[223] Chief Ndanga's relations with the guerrillas brought him under the government's suspicion and as a result he was arrested and detained for six months. Through the assistance of Dr Simon Mazorodze, who had worked at Ndanga hospital, he was able to secure legal representation from an African lawyer, Wilson Sandura. Chief Ndanga was ultimately released and after his release he was unwilling to attract the suspicion of the Rhodesian security forces and even forbade late night church meetings of the Zion Christian Church in his household. However, where his court was concerned, it was the guerrillas who managed to exert influence.

The Rhodesian government's intention to make use of chiefs' courts was also frustrated by the resistance that came from 'ordinary' Africans in rural Rhodesia. As highlighted above, the new strategy involved legally inscribing the status of ethnic subjects bound by custom on Africans and setting up institutions, such as chiefs' courts, that would treat them as such. On the ground, however, ordinary Africans resisted being treated in this way. Instead of simply complying with orders given by 'traditional' rulers or administrative officials, Africans behaved as rights-bearing citizens and sought legal counsel. By resisting subject status and the associated institutions the government sought to impose on them, Africans disrupted the

[222] Interview with R. Ndanga, 18 April 2011.
[223] *Ibid*.

foundation on which the new strategy of African administration lay. That Africans should respond in this way is explained by a number of factors. As alluded to by MP Chigogo in his speech in Parliament, due to the long period of engagement with the settler legal system, law gradually began to shape African ideas about personhood. Processes unleashed by colonisation such as rural to urban migration also had an important impact. Urban areas were spaces for self-fashioning and the adoption of new ideas and notions about personhood which included rights-bearing citizenship.[224] This process was further reinforced by the body of political ideas highlighted above that was gaining currency in the post-World War Two period in Southern Rhodesia. The overall impact of these processes was to reshape the way Africans saw themselves both in relation to the state and to 'traditional' leaders.

Consequently, local authorities, such as the DC, chiefs and headmen, came up against 'ordinary' Africans who refused to simply 'obey and comply' with their orders. On a number of occasions this resistance found its way into the legal arena as Africans who had been found guilty by the chief's court took to the higher courts and successfully appealed the rulings. It is difficult to quantify the extent to which such struggles between state officials and Africans found their way into the legal arena. This is partly due to the lack of the 1960s and 1970s records for the courts where such appeals could have been lodged such as the Court of Appeal for African Civil Cases and Magistrates courts. However, as I show in chapters four and five, as the war intensified the numbers of Africans who sought legal assistance in locating and/or defending their relatives and in making claims against security forces for

[224] D. Jeater, *Marriage, Power and Perversion: The Construction of a Moral Discourse in Southern Rhodesia 1894-1930* (Oxford, 1993).

assaults and destruction of their property swelled significantly.[225] Secondly, pursuing disputes in the legal arena required resources which Africans in the rural areas did not always have. This makes the cases of those who successfully took matters up with lawyers all the more interesting as this involved a significant commitment in time and resources. Thirdly, unless the matter went to court, and many did not, the dispute would leave very few traces in the archival record. Finally, DCs were greatly offended when lawyers intervened and did their best to frustrate Africans who sought legal recourse and to ensure that such legal action was unsuccessful. The importance of these cases lies not in their success, but in the way they provide a window into the legal consciousness of 'ordinary' Africans and the imaginaries that energised them to seek recourse in the law.

When faced with legal resistance, the response of state officials was often to try to close up any avenues available for Africans to challenge it by means of the law. For example, after a successful appeal by Beaven Manyuchi against a ruling by a chief who had no warrant, the SIA was concerned about the broader impact this would have if nothing was done. He thus wrote, with a note of urgency, to the PC of Manicaland to say:

> You have no doubt seen this judgement in the Court of Appeal for African Civil Cases. The Appeal Court, in paragraph 3 of the judgement, has pointed out that the Chief's court had no jurisdiction under the African Law and Tribal Courts Act. My JUD/20/1 of the 20th March 1975 drew attention to Maranke's case, among others. The situation it was sought to prevent has in fact arisen. May all District Commissioners please be urged to establish Courts with all convenient speed to avoid otherwise valid judgement being upset for lack of the necessary warrant.[226]

[225] The International Defence and Aid Fund files document hundreds of cases in which Africans sought legal recourse in disputes with the Rhodesian government. See NAZ MS587/4, Untitled, and NAZ MS591/2/4, Legal Sheridan.

[226] NAZ S3700/103/1, African Law and Tribal Courts Act: Policy Procedure, N. A. Hunt for SIA to PC Manicaland, 19 June 1975.

In other cases, Africans sought the assistance of lawyers as they attempted to contest the actions of state officials. In his long struggle with Gokwe authorities who were trying to evict him, Mqibelo Dube sought the assistance of the Bulawayo law firm Ben Baron and Partners and was awarded $1 500 in settlement for assault and destruction of his property by the Tribal Land Authority.[227]

Similarly in Mrewa, a man named Driver consulted the Salisbury law firm Stumbles and Rowe in his attempt to resist efforts by Chief Nyajena to evict him from his area.[228] Driver refused to recognise the authority of the chief and chose instead to defend his rights to reside, cultivate and graze his livestock in the area. Unsurprisingly the MIA was not on his side. This was evident in the DC of Mrewa's letter to the PC for Mashonaland South in which he wrote: 'The tribal authority have [sic] withdrawn the above-named's cultivation and grazing rights and have no intention of returning them, furthermore they are not obliged to give the Attorneys any reasons.'[229] He went on: 'With reference to his rights to reside, these have not as yet been withdrawn but as soon as Head Office warrants Chief Njajina's Court he intends serving a removal order on Driver, however please simply advise the Attorneys that the DC Mrewa states that his rights to reside have not been withdrawn. The removal order will come as an unpleasant surprise to them and will put an end to this trouble maker.'

In Ndanga District, Kwangwari and 47 village heads enlisted the help of the Fort Victoria-based law firm Winterton, Holmes and Hill in their efforts to resist the government's decision

[227] See G. H. Karekwaivanane, '"It shall be the duty of every African to obey and comply promptly": Negotiating State Authority in the Legal Arena 1965-1980', *Journal of Southern African Studies*, 37 (2011), pp. 333-349.
[228] NAZ S3700/43, Stumbles and Rowe to PC Mashonaland South, 17 January 1973.
[229] *Ibid*, DC Mrewa to PC Mashonaland South, 4 June 1973.

to place them under Chief Mabika.[230] In Inyanga, the efforts by the state to remove the Tangwena people from their ancestral lands also provoked a legal response. Wonesayi responded to the government's harassment - which included physical violence, the destruction of their homes, confiscation of their cattle and the taking away of their children - by suing the Ministers of Justice, Law and Order and of Internal Affairs. Wonesayi was successful in his suit and an appeal by the ministers was dismissed.[231] After unsuccessfully pursuing the goal of staying on their land through the courts, Chief Tangwena resorted to publicising the plight of his people and critiquing the repressive nature of the law in Rhodesia. In a letter to Queen Elizabeth II he wrote: 'I am informing you what is happening in this country of Chief Tangwena, people are suffering terribly they are having their huts destroyed by your children of this country, the government of Rhodesia which is destroying the richness of Chief Tangwena, Is that the law? To rob someone's richness without a reason?...When you will have read this you must put this in papers so that everybody reads and know whether this is law which is being done by this Rhodesian government.'[232]

[230] Karekwaivanane, 'It shall be the Duty of Every African', pp. 343-348.
[231] 'Notes on Cases: Smith N. O. and Lardner Burke N. O. vs. Wonesayi', *Rhodesian Law Journal*, 12 (1972), p. 150.
[232] British National Archives (hereafter BNA) FCO36/741, Tangwena Dispute, Chief Rekayi Tangwena to Queen Elizabeth, 18 February 1972.

Picture 3: Eviction of the Tangwena people, September 1969 [Source – NAZ]

Africans were not always successful in their legal encounters with the state as the two disputes recounted below show. Both disputes had to do with efforts to enforce the unpopular policy of digging contour ridges and were handled by A. J. A. Peck, a Salisbury-based lawyer. Neither of them went before the courts. The records survived largely because the lawyer involved protested in writing to the Ministry of Internal Affairs about the way he and his clients had been treated by the DC and the Police in Mrewa. The dispute, which involved two village heads, M. Munwa and N. Chimbangu, arose out of the headman's attempt to punish the two for not having completed digging their contour ridges.[233] While both men had dug some of the required contour ridges, they had not completed all of them partly due to the heavy work involved. The headman, who had not completed digging his own contour ridges, imposed a fine of R$3 which they refused to pay. As a result of their defiance they were arrested and detained in Mrewa from the 4th to the 13th of May 1972.

[233] NAZ S3700/43, TTL Authorities: Disputes 1973 May-1976 April, A. J. A. Peck to Minister of Internal Affairs, 26 May 1972.

After their release the two men did not pay the fine. Instead they travelled to Salisbury to seek legal advice from Peck. Due to the fact that he had been given a hostile reception by the DC and the police in Mrewa while handling a previous case, Peck decided to take the matter up with the Minister of Internal Affairs himself. In a lengthy letter to the Minister, which he copied to the Secretary of the Law Society and the Commissioner of Police, Peck detailed the ill-treatment that he and his clients had been subjected to at the hands of the officials in Mrewa.[234]

In the previous case Peck had been consulted by a group of residents of Pfungwe Tribal Trust Land in Mrewa who included Munyarara, Ndowa, Chidzimura, Dzika, Matambura and Mukango. The group had three concerns about the way the policy of digging contour ridges was being enforced in their area about which they sought legal advice. Firstly, they had been instructed to pay for the pegging of their land while other areas had not been asked to pay anything. Secondly, they felt that the time allocated for the digging of contour ridges was too short. Thirdly, they had been told that those who had not completed the contouring of their land would not be allowed to plough it. Peck telephoned the DC, D. W. Walters, to raise these concerns and had a less than amicable conversation owing to the fact that Walters felt that the involvement of a lawyer was an affront to his authority. He therefore criticised Peck's clients for 'running off to Salisbury to see an attorney.'[235]

Following his conversation with the DC, Peck wrote a letter summing up the conversation and sent one copy to the DC and another to his clients addressed to Munyarara. On finding out that the letter for Munyarara had arrived, the DC sent a policeman to Munyarara's home

[234] *Ibid.*
[235] *Ibid.*

on 14 September 1971 where he forced him to come to the postal agency, claim his letter and read it aloud. After doing so the letter was confiscated and Munyarara was instructed to remain at his homestead awaiting arrest. Instead of doing so, Munyarara travelled to Salisbury to inform Peck about the incident. Peck secured an appointment with the SIA on the 18th of September and registered his complaints about the conduct of the Mrewa DC. However, while he was in Mrewa the next day on other business he found five of his clients under arrest "for going to see an attorney". Peck's account of the events that followed gives a clear sense of the attitude of local administrative officials to Africans who sought legal recourse:

> A meeting was held that afternoon at which the District Officer (Mr Nicolle) and the Member in Charge (Mr Walters) indeed "apologised" to my clients, but this did not stop -
>
> a) The Member in Charge declaring "I am sorry, but I must over-rule you, Mr Peck", and interrogated them.
> b) The Member in Charge telling my clients that they should always go to see "the proper authorities", which I regarded as gross impertinence, and I as much as said so.
> c) My clients being lectured as though they were naughty children. (My letter was returned to me in the course of the meeting.)
>
> Quite frankly, words fail me. No wonder there is so often trouble in Mrewa! Here a group of tribesmen behaves in the most reasonable and responsible way they could behave, by consulting an attorney to put forward enquiries on their behalf in a sane and reasonable fashion. I will reserve my comments as to how the attorney himself was treated, but they themselves were treated like common criminals. If this is how they (and their attorney) are treated, little wonder they hesitate to make enquiries from the "proper authorities"![236]

Walters' response to Peck's letter was unapologetic and made it clear that he considered himself, and not the law, to be the final authority in Mrewa. Regarding the dispute involving Munyarara and others he explained:

[236] NAZ S3700/43, Peck to Minister of Internal Affairs, 26 May 1972. (Emphasis in original)

> All went well until Rhodes & Founders [holiday] in July when many of the town workers returned for that week end. Hereafter, a group of tribesmen consulted Mr Peck and raised queries which he has listed under (a) (b) & (c) on page 2 of his letter. When I spoke to Mr Peck on the telephone on 19th July 1971 I told him that I had already answered those queries directly to the kraal heads at the meeting in June 1971. I said that if tribesmen wished further explanations they should come to see me instead of "running off to Salisbury to see an Attorney" and I wish to stress here that I stand by this comment. I am the Administrator responsible for the Mrewa district and I am always prepared to give tribesmen a hearing if they wish to raise complaints or ask for explanations of policy.[237]

Walters' statement was reminiscent of the opposition that had been expressed by chiefs to appeals against their rulings and indicated the personalised way in which he sought to construct his authority. Dismissing Peck's objections, Walters concluded his letter by asserting: 'Finally I wish to say that I intend to continue administering this district as I have done in the past and I have no doubt that Mr Peck or others of his ilk will always have complaints such as this or try to discredit our administration. My only annoyance over this business is that I have had to spend the whole morning of Sunday 11th May 1972, writing this report when I could have been enjoying 18 holes of golf.'[238] In this he had the support of his superior A. D. B. Yardley, the PC for Mashonaland South, who remarked, 'I too resent the tone of this letter [Peck's letter] and also take strong exception to the remarks made about the work of a dedicated District Commissioner on my team who has been under considerable pressure in recent months.'[239]

The DC's comment that 'Mr Peck or others of his ilk will always have complaints such as this or try to discredit our Administration' was misleading. Peck had graduated from Oxford with a degree in Politics, Philosophy and Economics before taking up a legal career in Southern Rhodesia. In the 1960s he had ventured into politics and stood for a seat in

[237] *Ibid*, DC Mrewa to PC Mashonaland South, 13 June 1972.
[238] *Ibid*.
[239] *Ibid*, PC Mashonaland South to SIA, June 1972.

Parliament as an independent candidate. In the course of the 1960s he had also written a series of books commenting on the dispute between Britain and Rhodesia regarding the Unilateral Declaration of Independence of 1965. One of the books which was published in 1966 was entitled *Rhodesia Accuses,* taking its inspiration from Emile Zola's letter *J'accuse.* The book celebrated Cecil John Rhodes' 'vision' for Africa and accused Britain of betraying it and yielding to communism by calling for majority rule in Rhodesia.[240] While Peck was not a Rhodesian Front supporter, he was neither a nationalist lawyer like Leo Baron nor a 'liberal' one like Hardwicke Holderness. The last words of his letter to the Minister suggest his possible motives. He wrote:

> May I request, Sir, that the present matter receive reasonable, careful and prompt consideration, and that I may be advised of developments in this matter? You will appreciate that I have acted with restraint, have in fact done nothing at all for nine months, and have refrained from adopting any of the courses open to me. It is simply that I have been consulted again in virtually the same matter. This is not the first time I have been treated in this somewhat high-handed fashion at Mrewa. I regret that I owe a duty to my clients and to my profession to ensure that it does not continue.[241]

What drove Peck was an ideal of how the law was supposed to be administered and therein lay the source of his outrage at the practices of the DC of Mrewa. Like the Justice Ministry officials who had long criticised the practices of administrative officials, his was a commitment to due process. It should be added that his next letter was more temperate, beginning as it did with the words: 'On my perusing my own letter again, it does strike me that my letter may be misunderstood in one or two points….'[242]

[240] A. J. A. Peck, *Rhodesia Accuses* (Salisbury, 1966).
[241] NAZ S3700/43, Peck to Minister of Internal Affairs, 26 May 1972.
[242] NAZ S3700/43, Peck to the Minister of Internal Affairs, 19 June 1972.

Conclusion

When the Robinson Commission recommended that Africans be provided with 'a justice that met the norms of their society', it was in fact talking about a 'justice' that met the needs of the settler government which was faced with a deep crisis of legitimacy and rising African political militancy. This was a 'justice' that was founded on notions of racial and cultural difference, which sought to treat Africans as ethnic subjects bound by custom as opposed to rights-bearing citizens. As this chapter has shown, these efforts were unsuccessful for a number of reasons. State officials had overestimated the ability of the institution of chieftaincy to lend legitimacy to unpopular land use policies. In addition, chiefs proved to be less pliable than had been hoped for. Not only did they have their own agendas which did not necessarily coincide with those of the government, they were also keenly aware of the threat to their lives, let alone their legitimacy, should they try to implement unpopular land use policies. Consequently, it was the guerrillas and not the state that exerted influence on chiefs' courts. Another reason for the failure of the strategy was the resistance from 'ordinary' individuals in the rural areas who refused to comply with the directives of local authorities. Notwithstanding harassment by state officials and the expense involved, they sought legal advice as to how they might check the state's intrusions in their lives. In part, this response signified the instrumentalisation of the law by Africans in their conflicts with the local government officials. At another level these actions signified their efforts to assert themselves as rights-bearing citizens.

CHAPTER III

Legislating Against Dissent: Law, Politics and Race, 1950-1964

Introduction

In the previous chapter I explored one of the significant developments in the legal sphere: the elevation of chiefs' courts, their role in government designs and African responses to these efforts. In this chapter I turn to the sphere of politics, which was another important source of legal disputes between Africans and the state in the last decades of settler rule. A key development of the post-World War Two era, which had a far reaching impact on Southern Rhodesia's future and the content and administration of law, was the rise in African nationalism. A key part of the government's response was the enactment of a series of repressive laws that were aimed at quelling African political dissent. Much of the academic literature that focuses on legal developments between 1950 and 1964 has tended to treat the passing of the Law and Order (Maintenance) Act in 1960 as the key starting point.[243] This has not been without justification. Nevertheless, it has had the effect of occluding a decade of legislation prior to 1960 during which state officials and legislators struggled to come to terms with the rise in African nationalism and debated amongst themselves what actions they could legitimately take without betraying British legal traditions. Such debates are important in as far as they allow us to track shifts in settler opinions about the relationship between law and the legitimate exercise of state power, and how these in turn shaped state practice. In addition, they shed light on how the law and ideas about racial difference were enlisted by the

[243] See G. Feltoe 'Law, Ideology and Coercion in Southern Rhodesia' (M. Phil Thesis, University of Kent, 1978) and C. Palley, 'Law and the Unequal Society: Discriminatory Legislation in Rhodesia under the Rhodesian Front from 1963 to 1969, Part 1,' *Race and Class*, 12 (1970).

state in the effort to deal with African nationalism. In this chapter I therefore examine the legal response by the colonial state to African nationalism between 1950 and 1964, paying particular attention to the debates about the relationship between the law and the legitimate exercise of state power.

Legislating against African political dissent was not the end of the story. It invariably led to arrests and prosecutions, which in turn provoked responses from Africans. I therefore explore how African nationalists engaged with the government in the legal arena and how they made use of the law instrumentally and discursively in these legal encounters. Examining these questions sheds light on the place of law within the Zimbabwean nationalist movement. The chapter is divided into four sections. I begin with a brief discussion of the rise of nationalist politics in Southern Rhodesia and the factors that propelled it. In the second section I use Parliamentary Debates on political legislation to explore how law and notions of racial difference were enlisted by the colonial state in its efforts to interpret and respond to the surge in African nationalism. The third section provides an examination of the courtroom encounters between nationalists and the Southern Rhodesian state, while the last section explores the consequences of these encounters with respect to state practice.

The Rise of Nationalist Politics

From 1945 Southern Rhodesia witnessed a surge in political militancy among Africans. This was marked by workers' strikes, riots, the destruction of government property and a general

increase in confrontations between Africans and colonial authorities.[244] This militancy was fuelled by, among other things, a body of political ideas which gained currency during this period. These ideas about national self-determination, universal human rights, majority rule and rights-bearing citizenship formed the basis for growing critiques of colonial rule. Africans from different backgrounds made claims for full citizenship and challenged the colonial government to give substance to its rhetoric about 'civilisation' and 'British justice'. The Second World War was particularly important in exposing the double standards of empire in that African soldiers had fought to defend the rights of Europeans to self-determination in the face of Fascism and Nazism.[245] However, they were denied those same rights when they returned home. In 1944 Lance Corporal Masiye, who had fought in the Second World War, wrote a letter to the *Bantu Mirror* which read in part:

> It must be a shameless sort of ruler who exploits people under his thraldom at ease and yet he never dreams of their release nor allows them to have privileges to race for comparative human rights. The African has served his rulers with admirable devotedness. What is he to receive for this? A continual exclusion from human rights? If so, our rulers must be quite shameless to blame the enemy for his brutality and assumed racial superiority.[246]

This strategy of challenging the government on the basis of its own claims was also used by labour and political leaders in their engagements with officials.

These ideas also inspired the formation of several organisations that sought to improve the living conditions of Africans in the urban areas. During the early 1950s the Reformed Industrial and Commercial Workers Union (RICU), under the leadership of Charles Mzingeli,

[244] For a detailed account of the rise in mass nationalism see M. West, *The Rise of the African Middle Class: Colonial Zimbabwe* (Indianapolis, 2002) and T. Scarnecchia, *The Urban Roots of Democracy and Political Violence in Zimbabwe: Harare and Highfield, 1940-1964* (Rochester, 2008).
[245] A. S. Mlambo, 'From the Second World War to UDI, 1940-1965' in B. Raftopoulos and A. S. Mlambo (eds), *Becoming Zimbabwe: A History from the Pre-colonial Period to 2008* (Harare, 2009), pp. 78-80. See also C. Banana (ed), *Turmoil and Tenacity: Zimbabwe, 1890-1990*, (Harare, 1989).
[246] Cited in Mlambo, 'From the Second World War to UDI', p. 79.

was at the forefront of attempting to address the grievances of Africans living in the urban areas. As Timothy Scarnecchia shows, Mzingeli's energies were devoted to fighting for 'the rights of access of township residents to the city'. At the same time he urged them 'to gain more education in order to obtain greater respect so that they could in turn make greater claims to an imperial working-class citizenship.'[247] RICU was also involved in campaigning against the harassment associated with the implementation of the Native (Urban Areas) Accommodation and Registration Act of 1946, and in making calls for the government to address the rising cost of living.[248] However, by the mid-1950s RICU's dominance in township politics was being challenged by a number of organisations.[249] One such organisation, which would go on to play a key role in the rise of mass nationalism in Southern Rhodesia, was the Salisbury City Youth League (CYL).

The CYL was formed in August 1955 by young men who felt excluded from the opportunities being availed to African elites during the 1950s under the banner of 'racial partnership'.[250] Its leaders included James Chikerema, Edson Sithole, George Nyandoro and Maurice Nyagumbo. The CYL was opposed to the elitism that underpinned the policy of 'racial partnership' and it adopted a more confrontational approach than RICU in engaging the government. With respect to the differences between RICU and CYL, Nathan Shamuyarira put it thus: 'Mzingeli had complained about night raids on lodgers, poor township lighting, ungraded roads, the pass system and other regulations; he had championed the cause of homeless people. But the CYL leaders challenged the fundamental laws which

[247] Scarnecchia, *The Urban Roots of Democracy*, pp. 12-13. Scarnecchia uses the term 'imperial working class citizenship' to distinguish African workers claims to citizenship from 'the more elitist view of "Imperial citizenship" that was marked by attaining European attributes of civility and wealth.' *The Urban Roots of Democracy*, p. 169, footnote 1.
[248] *Ibid*, p. 52.
[249] B. Raftopoulos, 'Nationalism and Labour in Salisbury 1953-1965', *Journal of Southern African Studies*, 21 (1995), p. 88.
[250] West, *The Rise of an African Middle Class*, p. 204.

created the officials and the parliament, to whom Mzingeli had been content to complain.'[251] The CYL got involved in opposition to the Native Land Husbandry Act (NLHA) of 1951 and helped villagers to institute legal suits against DCs who overstepped their authority in enforcing the NLHA for example by destroying their crops. As Shamuyarira notes: 'In the Weya case they took it to the point of summoning Sir Edgar Whitehead, who had become premier by then, to appear in court on a charge of destroying tribesmen's crops.'[252]

A key moment in the CYL's life was the September 1956 Bus Boycott against rising bus fares and the general increase in the cost of living. The success of the boycott was tarnished by violent attacks against the young women of Carter Hostel who were accused of defying the boycott. These events marked 'a turning point in both nationalist politics and also in the role of women in politics.'[253] Whereas Mzingeli's brand of township politics had been focused on defending community interests and had recognized the important role of women in this endeavour, the new politics initiated by the CYL was characterised by violence and intolerance, and reversed the progress towards greater gender equality in township politics. In 1957 the CYL was transformed into the Southern Rhodesian African National Congress (SRANC) thereby ushering in the era of mass nationalism in Southern Rhodesia.[254]

Nationalism was also developing in the rural areas of Southern Rhodesia and this was not simply the result of its importation from the urban areas. Different communities gradually began to understand the source of their problems as a colonial state that needed to be

[251] N. Shamuyarira, *Crisis in Rhodesia* (New York, 1966), p. 41.
[252] *Ibid*, p. 42.
[253] Scarnecchia, *The Urban Roots of Democracy*, p. 85.
[254] *Ibid*, p. 207.

overhauled and not just particular pieces of legislation.[255] This gave rise to what Alexander, McGregor and Ranger have referred to as 'local nationalism' which was fuelled by local grievances, had a local social base and drew on local sources of legitimation.[256] As shown in chapter two, a key source of rural grievances was the NLHA which led to a serious crisis of authority for the state and a rise in nationalist membership. An area where African resistance to the Act was particularly strong, and which became a nationalist stronghold, was Sipolilo. In 1958, 30 Sipolilo residents, assisted by the SRANC and Herbert Chitepo (the first African lawyer in Southern Rhodesia), successfully challenged their conviction for refusing to appear at the Native Commissioner's office to receive grazing permits that limited the number of cattle they were allowed to possess.[257]

Members of the African middle class were late to come to the nationalist table largely because many of them had either bought into the 1950's project of 'racial partnership' or sought to take advantage of the opportunities it availed for their personal advancement. The idea of 'racial partnership' had been promoted by the Huggins administration as a way of allaying African concerns about the plans to form the Federation of Rhodesia and Nyasaland, which came into being in 1953. From the outset Huggins assured the European electorate that the kind of partnership he was talking about was that between 'a horse and its rider'. The second and more important goal behind 'racial partnership' was to co-opt the African middle class through inter-racial organisations and use them as a buffer against the 'masses'. Multi-racialism was taken up enthusiastically by the 'liberal' wing of the settler population. The Southern Rhodesian 'liberals' were a 'a small minority, [of] mainly post-war white collar

[255] J. Alexander, J. McGregor and T Ranger, *Violence and Memory: One Hundred Years in the 'Dark Forests' of Matabeleland* (Oxford, 2000), *pp. 83-87.*
[256] *Ibid*, p.87.
[257] NAZ S3642/2 Sipolilo Magistrate's court: Cases appealed by Africans 81/58 -111/58. See also the discussion about the SRANC in Sipolilo in the *Southern Rhodesia Parliamentary Debates*, 23 July 1958, col. 405-407.

immigrants from Britain, [who] had an alternate vision of racial partnership in which the African elite would be gradually incorporated into the white-dominated civil society.'[258] As Michael West points out, the 'liberals' shared a number of traits with the hard-liners on the right of settler society. Both groups aimed to preserve settler privilege in Southern Rhodesia, were ethnocentric in their assumptions about the superiority of western civilisation and were paternalistic in their attitude towards Africans.

Their key point of difference lay in how they felt the preservation of this privilege should be achieved. While the hard-liners' position was that no effort should be spared in clamping down on African politics, the liberals felt that increased repression would most likely lead to a severe backlash thereby imperilling the future of all settlers in Southern Rhodesia. Instead, they advocated that educated Africans be accepted into the ranks of the 'civilized' so that they could act as a bulwark against political pressure from the rest of the African population. 'Liberal' organisations such as the Inter-Racial Association (IRA) and the Capricorn Africa Society (CAS) thrived during the 1950s as African elites seized the opportunity for advancement. However, by the late 1950s it had become clear to many of the African elite that 'racial partnership' had delivered few tangible benefits. The final straw for many of them was the removal of Garfield Todd from office by his cabinet on the grounds that he was too liberal. This charge exaggerated the liberal credentials of Todd's administration. West is closer to the truth in observing that: 'Although liberal in his use of the stick, Todd, in contrast to the white ultra-diehards, also saw the need for the carrot. In essence, his policy was to apply the one to the African working class (as evidenced by his response to the strikes over

[258] West, *The Rise of the African Middle Class*, pp. 192-93.

which he presided), while offering the other to the black elite (as seen in his proposal to enfranchise teachers and nurses).'[259]

Upon taking up office Edgar Whitehead, the new Prime Minister, was faced with increasing unrest from an agitated African population whose demands had shifted from calling for reforms to colonial policies to demanding a transfer of power into the hands of Africans. From 1959 the pace of political events picked up significantly. In February a month-long state of emergency was declared resulting in the banning of the SRANC and the detention of hundreds of its leaders. Many of these leaders were detained alongside the nationalists arrested during Nyasaland's own state of emergency.[260] Detainees who were deemed to be less of a threat were later released. However, those who were considered to be a serious threat, such as Nyagumbo and Chikerema, remained incarcerated for the next 4 years. The state of emergency was renewed in March and a series of laws designed to quell African political militancy were passed.

Despite these moves, political agitation continued to intensify in both the rural and urban areas and in January 1960 a new political party, the National Democratic Party (NDP), was formed under the leadership of Michael Mawema, Moton Malianga, Enos Nkala and Sketchley Samkange, among others.[261] The continued unrest led to the arrest of Mawema, Samkange and Leopold Takawira, who was chairman of the NDP's Harari branch. These arrests provoked further unrest in Salisbury and during the rest of the year urban unrest

[259] *Ibid*, p. 213.
[260] J. McCracken, 'In the Shadow of Mau Mau: Detainees and Detention Camps during Nyasaland's State of Emergency', *Journal of Southern African Studies*, 37 (2011), p. 538.
[261] T. Ranger, *Are we not also Men? The Samkange Family and African Politics in Zimbabwe, 1920-1964* (London, 1995).

spread to Gwelo and Bulawayo. In Bulawayo, the unrest manifested itself in the Zhii riots of 24 and 25 July which saw 11 Africans shot dead by the police.[262] In 1961 the NDP was banned as was the Zimbabwe African People's Union (ZAPU) which succeeded it, as well as the Zimbabwe African Nationalists Union (ZANU) which broke off from ZAPU in 1963. Notwithstanding these attempts to suppress nationalism, the early 1960s were marked by increasingly violent confrontations between Africans and state officials in both rural and urban areas.[263]

Law, Politics and Race

A central aspect of the Southern Rhodesian government's response to the rise in African political militancy was legal. At the beginning of 1950 the main piece of legislation that dealt with political dissent in Southern Rhodesia was the Sedition Act of 1936. However, by 1960 no less than six pieces of legislation had been passed by the Southern Rhodesian Parliament. These were the Subversive Activities Act of 1950, the Public Order Act of 1955, the Unlawful Organisations and the Preventive Detention Acts of 1959, and lastly the Law and Order (Maintenance) Act and the Emergency Powers Act both passed in 1960. This process of legislating against African political dissent would continue throughout the 1960s and 1970s. As shown in chapter two, the concerns of the settler community were compounded by political developments in the region. The independence of the Belgian Congo in 1960, for example, was marked by an NDP meeting which ended with clashes between NDP supporters and government forces. In their efforts to come to terms with the rise of nationalism and devise a response to it, settlers drew liberally on a range of colonial tropes about Africans. These were used to justify the increasingly repressive turn in the

[262] *Ibid*, pp. 186-189.
[263] This violence was also turned inwards especially after the formation of ZANU.

legislation and the continued refusal to grant Africans full citizenship and the right of self-determination.

The first piece of legislation that dealt with politics in the 1950s was the Subversive Activities Act of 1950. The Act arose out of the recommendation by the Hudson Commission of Enquiry into the 1948 general strike. In its final report, the Commission highlighted the fact that Southern Rhodesia had no legislation in place to deal with riots and advised that steps be taken to rectify this. An additional factor that weighed on the minds of the drafters of the legislation was the Cold War and the fear of communist agents infiltrating the colony and causing unrest. The resultant legislation was modelled on South Africa's Riotous Assemblies Act of 1914. However, its scope was widened to cover subversive acts in general. In presenting the Bill to Parliament, Julius Greenfield, the Minister of Justice and Internal Affairs, played up the threat of communist agents who, he argued 'employ insidious methods of propaganda which has a certain appeal to ignorant minds, and it is unnecessary for me to stress what volatile material we have in this country which might fall prey to propaganda of this sort. It is propaganda which is particularly dangerous with ignorant uneducated people.'[264] By constructing the African population in this way the Minister sought to counter the suggestion that the solution to the political problems lay in improving the living conditions of the African population. For such a population, he maintained, it was 'not sufficient merely to improve living conditions without at the same time protecting them from subversive doctrines of this description.'[265] Among other things, the law provided for the control of the movement of people spreading 'subversive propaganda' and 'subversive materials'.

[264] *Southern Rhodesia Parliamentary Debates*, 2 June 1950, col. 1905.
[265] *Ibid*, col. 1907.

Support for the Bill was not unanimous within the settler-dominated Parliament. Opposition stemmed in part from a fear that the legislation, while initially directed at Africans, would be used against European opposition political parties. Two of the Bill's most vocal opponents were Laurence Keller and William Eastwood, the MPs for Raylton and Bulawayo District respectively. Both men were members of the Rhodesia Labour Party and feared that the legislation would be used to clamp down on opposition parties like theirs. Keller therefore condemned the legislation in very strong terms: 'Let me say immediately we deprecate tyranny or brutality or fear. We do not stand for that sort of thing, but this Bill itself is going to endeavour to maintain control over the people of this country through fear of punishment, fear of the penalties contained in this Bill.'[266] He added, 'It places too much power in the hands of Government and in the hands of the hon. the Minister who is not always entirely responsible. You cannot legislate against doctrines, creeds and ideas.'[267]

For Eastwood, another serious problem with the legislation was that it went against British legal traditions. He observed sarcastically:

> I appreciate the Minister's difficulty because being well versed in law, I presume he must know about the Magna Carta and the Petition of Rights and about *Habeus Corpus* and about the combination Acts. He must be so well versed in all the instruments which have finally been put on the Statute Book of Great Britain and for which men have fought and given their lives over a period of centuries. I cannot believe that with that background he can feel very sincere and earnest about a Bill of this nature.[268]

By invoking the notion of British legal traditions, Eastwood and other opponents of the Bill were not making a case for the extension of equal rights to Africans. Rather, they were

[266] *Southern Rhodesia Parliamentary Debates*, 13 June 1950, col. 2011.
[267] *Ibid*, col. 2019.
[268] *Ibid*, col. 2034-35.

expressing a concern akin to that of the 19th century 'moralizing imperialists' who saw British legal traditions as the hallmark of its civilisation.[269] They therefore maintained that the empire had to be run according to these standards and that violating them delegitimized it. At the heart of the debate in Parliament was the question of the relationship between law and the legitimate exercise of state power. Eastwood's rhetorical strategy of invoking British legal traditions had a long history in the British empire. However, it was not always a persuasive argument among settlers. For one thing, there was no single interpretation as to what exactly the core of that heritage was and what adherence to it meant in practical terms. In his study of interracial murders in the British empire, Martin Wiener shows how contested the idea of 'rule of law' was in colonial contexts. On the one hand, members of the 'colonized' took it to mean 'the same law for all British subjects'. On the other, settlers interpreted it as '"the Englishman's Birthright" of rights against Government, including trial by a jury of his peers'.[270]

In Southern Rhodesia a similar tension existed within the settler community over what respect for British legal traditions meant in practical terms. The proponents of the Bill framed it as an attempt to protect Southern Rhodesian settler society from the threat posed to it by communist *agents provocateurs* and their African followers. One such proponent, Neville Barret, the MP for Marandellas, refuted the claims that British legal traditions had been violated, arguing instead that critics of the Bill needed to understand the 'exceptional' circumstances of Southern Rhodesia *viz* the presence of a large African population. The proposed legislation, he argued:

[269] R. W. Kostal, *A Jurisprudence of Power - Victorian Empire and the Rule of Law* (Oxford, 2005), p. 474.
[270] M. Wiener, *An Empire on Trial: Race, Murder, and Justice under British Rule, 1870-1935* (Cambridge, 2009) pp. 230-231.

> …has been threshed out and gone into from all angles and has been altered and as a result we have arrived at something which to my mind is entirely reasonable and compatible with our British observations of justice. When one is considering this question in a country where there is an entirely European population, there might be a different approach. There might be other methods which would suit the situation and probably meet the case in time. But what we have to remember in this country is that we are in the midst of central Africa and we are surrounded by a very large native population, uneducated and easily influenced, and that is a point I think the public should remember when criticisms are levelled at this Bill.[271]

George Munro, the MP for Gatooma, took the argument further in arguing that the legislation was not just compatible with British legal traditions but it in fact defended them. The Bill, he argued, would '…prevent a certain class of people who are taking advantage of our liberties and our privileges from depriving the people of those privileges and liberties and therefore subjecting them to absolute slavery and degradation. This Bill is really a shield to our present liberties and our freedom.'[272] While Munro argued the Bill was about defending liberties, the subtext of his statement revealed that it was in fact about excluding Africans from enjoying the same liberties enjoyed by settlers.

Several African organisations such as RICU, the African National Congress and the Federation of Bulawayo Trade Unions realised this and mocked the state's democratic pretensions.[273] Their efforts to oppose the Bill were nevertheless in vain and the legislation was used to ban several publications such as the book *Nehru on Africa* and all publications from the World Federation of Trade Unions (WFTU) and the Pan African Trade Union Congress. In 1953 Joshua Nkomo, a trade unionist who would later lead ZAPU, was arrested

[271] *Southern Rhodesia Parliamentary Debates*, 13 June 1950, col. 2027.
[272] *Ibid*, col. 2031. (Emphasis added)
[273] West, *The Rise of the African Middle Class*, pp. 178-179.

and charged under the Act and the following year it was used by the Todd administration to quell the strike at the Wankie Colliery.[274]

The debate over the 1955 Public Order Bill again revealed the centrality of race in the way African political militancy was understood and how responses to it were rationalized. The key opponents of the Bill in this instance were not latter-day 'moralizing imperialists' but 'liberals'. The legislation had been drafted in the wake of the Mau Mau revolt in Kenya as well as the 1953 Cholo disturbances in Malawi. It communicated an anxiety on the part of state officials to avoid a similar occurrence in Southern Rhodesia. This, it was hoped, would be achieved by criminalizing an even longer list of political acts than that of 1950. These acts included marching in formation without permission, carrying a flag or wearing a uniform associated with a political party and being in the leadership of an organisation 'prepared to use force to achieve political aims'. Other acts such as 'suggesting that it was desirable for someone to die', possessing a weapon at a public gathering or threatening to injure a person were also added to the list. In an apparent reference to events in Kenya, consenting to take an oath, administering one or being present at an oath-taking ceremony were also made illegal. Much to the ire of Rhodesian journalists, publishing a false rumour was also made a criminal offence. The Bill also gave state functionaries greater powers to control riots and all gatherings deemed unlawful by the government.

As he introduced the Bill to the House, the Minister of Justice and Internal Affairs, Albert Stumbles, was conscious of the public outcry the proposed legislation had already caused. His speech was therefore carefully crafted to pre-empt any objections. 'The provisions which

[274] J. Nkomo, *Nkomo: The Story of My Life* (London, 1984), pp. 57-61.

it is decided to introduce in this Bill', he argued, 'are English in the main, from the United Kingdom, and very, very old, many of them. They have stood the test of time and they have remained on the Statute Book.'[275] Drawing on the ideas of the English philosopher Edmund Burke he reminded the Parliament that 'it was Burke, that famous politician, that famous statesman, who once said that the only liberty which is valuable is a liberty connected with order. – [HON MEMBERS: Hear, hear.] – And we must not confuse liberty with licence. Take away our laws, take away our order, and where is our liberty, Mr Speaker? It is gone; completely gone.'[276]

In making his case for the legislation, the Minister went on to invoked the spectre of Mau Mau:

> …I think we must be realists in our legislation, realists of our geographical position. I would like to read out to the House extracts of a letter written by a man who lived in Kenya for seven years. He has now settled in Southern Rhodesia and he has written a letter dealing with this particular legislation. This is what he says: "Before coming to Salisbury in 1953 I was for seven years in Kenya, and it is my considered opinion that if the then Government had brought in such a Bill as this when it was first warned about Mau Mau in 1947, the emergency would probably not have arisen. The Kikuyu would have known the penalties and the Government would have been able to deal firmly with those sporadic cases which were coming up prior to the outbreak. As it was, prosecutions were not undertaken. If they were, the culprits usually got off on some technicality and a contempt for British law and order began and increased up to the present." That I think epitomizes our approach to the whole problem.[277]

Implicit in Stumbles' words was the thinking that a strict adherence to due process encouraged contempt rather than respect for the law amongst Africans, hence the need for a different approach. This view ran counter to the argument that was made in 1905 by Winston Churchill who was then the Under Secretary for the Colonies during a visit to Kenya. In a conversation with a District Commissioner, Churchill argued that a strict adherence to

[275] *Southern Rhodesia Parliamentary Debates*, 29 July 1955, col. 1427.
[276] *Ibid*, col. 1426.
[277] *Ibid*, col. 1430.

judicial procedure reinforced colonial authority on the grounds that: 'the tribesmen see that their ruler – to them all-powerful… - is himself obedient to some remote external force, and they wonder what that mysterious force can be and marvel dimly at its greatness.'[278] However, for Stumbles and many colonial officials, Africans were impervious to ideas about law and justice and only responded to force. It thus followed that legislation had to empower officials to use force in dealing with Africans.

The Minister's scaremongering was not enough to allay the concerns of European journalists who feared that the provisions on publishing false rumours would be used to target them. The *Rhodesia Herald* pointed out that, 'Even if some curtailment is necessary to prevent freedom degenerating into licence it does not seem to us that this Bill gives sufficient protection to innocent and responsible persons acting in what they are convinced is in the public interest.'[279] Criticism of the Bill also came from the 'liberals' who felt that the legislation was not just a betrayal of British legal traditions; it was also a counter-productive step in trying to preserve settler privilege in Southern Rhodesia. The Inter-Racial Association dismissed the Bill in its entirety arguing that the proposed legislation was undemocratic and that it attacked the freedom of the press.[280] It also highlighted the point that the existing legislation already provided for sufficient powers for the Minister to deal with unrest.

Hardwicke Holderness, a Salisbury lawyer and a leading 'liberal' politician, was particularly opposed to the Bill. 'Reading through the Bill, Mr Speaker', he observed:

[278] R. Waller, 'Witchcraft and Colonial Law in Kenya', *Past and Present*, 180 (2003), p. 243. See also J. Lonsdale, 'Kenyatta's Trials: Breaking and Making an African nationalist', in P. Coss (ed), *The Moral World of Law* (Cambridge, 2000), pp. 196-200.
[279] *Rhodesia Herald*, 18 July 1955.
[280] *Southern Rhodesia Parliamentary Debates*, 29 July 1955, col. 1449-50.

> …you can get only one impression, and that is that it has been composed as a sort of cocktail of the emergency legislation which has been found to be necessary at various places and at various times in history, shoved together to make a thoroughly comprehensive security measure, with a few of our own inventions thrown in for luck. We have legislation which originates with the Black Shirt troubles in England, we have got legislation which, whether it originates there or not, is obviously connected to the Mau Mau troubles in Kenya. There is even legislation which came on the Statute Book of England during the emergencies after the French Revolution, and it even goes back as far as the 14th century. Mr Speaker, it is not surprising that people looking to this government for a strong and positive liberal lead, faced suddenly and without warning with a measure of this kind, must be shocked.[281]

Holderness also questioned the rationale behind the state's approach to political unrest which held that 'as long as you turn into crimes a whole lot of things that the sort of people do who might stir up racialist trouble, then you have solved the problem.'[282] For him the nationalist movement was an inevitable reality. As such, the best course of action was to try to channel it in a different direction. He therefore argued that: 'We must accept [nationalism] as a dynamic force, but we must not make the mistake of assuming that everybody who has a nationalist feeling necessarily has an anti-European feeling, or an anti-British feeling.'[283] He went on:

> It is not a question of putting ideas in people's heads, because, with the development of our country and the uprooting of the African people you have a whole section of people who are politically conscious, and, as I once said before are, for lack of a better phrase, knocking at the door of Western civilisation. That being the position, we must accept it, and we must try to take positive measures, we must find ways and means of integrating these people into Western civilisation, and we must in fact find an inter-racial nationalism. That positive sort of approach is the only way of tackling the real problem. Furthermore, it is not a question of going too fast, because every day the problem gets more urgent.[284]

For a while these ideas had attracted the African elite. However, there were few takers amongst the audience Holderness was addressing in the Southern Rhodesian Parliament.

[281] *Ibid*, 2 August 1955, col. 1491.
[282] *Ibid*, col. 1496.
[283] *Ibid*, col. 1498.
[284] *Ibid*.

Holderness' contribution drew fire from the hard-liners in Parliament. For Harry Reedman, the MP for Braeside, it was not a question of Europeans ushering Africans into 'western civilization' but one of them instilling discipline in Africans as a parent would do to impatient children. He observed:

> I would say Mr Speaker, that there is a slow emergence from primitive life to civilized behaviour with the white or any race. At some stage there is a clamouring for self-expression, and a reluctance to complete the apprenticeship. By that, Mr Speaker, I mean that it is not uncommon to consider the adolescence of a person, or the adolescence of a nation, when one is full of inspiration and wanting to jump fences, as being that time that discipline, that parental discipline, is so very necessary. And we need not, even in this analogy, consider the matter of racialism. It is so very necessary for all of us.[285]

For emphasis, he added: 'And I make the point again, Mr Speaker, if we have a race which we are helping on at the present moment to maturity, let us continue our guidance if we are in order in giving that guidance, to see that it does not jump its fences.'[286] Despite their disagreement, both Reedman and Holderness' arguments were founded on an evolutionary paradigm in which Africans figured as less 'civilized' and in need of European custodianship.

A notable contribution to the debate was Minister of Native Affairs, Patrick Fletcher's brief unguarded speech that went to the heart of the matter in terms of explaining the necessity of the legislation before the House. He dispensed with appeals to lofty ideas and plainly pointed out that such legislation was central to maintaining the social and political status quo in Southern Rhodesia:

> Without belittling the importance of this measure, a thought has gone through my mind. What a wonderful opportunity this Bill would offer to a fifth form scholar in debate, attacking it on the academic and unrealistic basis of repugnancy; repugnant to our ideas of freedom and democracy; repugnant to our way of life – of course it is repugnant. Just as repugnant as are whippings, prisons and gallows, but those devices are essential supports of our social order. What a

[285] *Southern Rhodesia Parliamentary Debates*, 2 August 1955, col. 1520.
[286] *Ibid*, col. 1521.

> wonderful climax a fifth form scholar could reach in attacking this Bill on an academic plane. He could launch out in accusations of Hitlerism, totalitarianism and heroics of this kind. It is so easy for a measure of this kind to be attacked by people with their feet off the ground. We hear fatuous argument that although the United Kingdom has powers of this kind they are relics of the past and no Government of the United Kingdom of Great Britain would dare to attempt to take powers like these. That no Government in the United Kingdom of Great Britain would attempt to use such powers. The fact remains that Governments have come and Governments have gone in the United Kingdom of Great Britain and still these powers remain.[287]

Fletcher's views were very much in keeping with the thinking of Native Affairs Department (NAD) of which he was head. As we have already seen NAD officials were self-pronounced experts on dealing with Africans and had long clashed with Ministry of Justice officials who insisted on maintaining certain procedural standards.

The trend towards more repressive legislation persisted and in March 1959 the new Minister of Justice and Internal Affairs, Reginald Knight, introduced in Parliament two new pieces of legislation that sought to deal with African political militancy: the Preventive Detention and the Unlawful Organisations Bills. Amongst other things, the two Bills sought to empower the state to issue detention orders as well as proscribe organisations without having to rely on the declaration of a state of emergency. In October of 1960, amidst more urban unrest, the Minister of Justice was again before Parliament with a new Bill. He expressed the hope that 'through its more comprehensive provisions, through the more severe penalties provided, it will enable the Government more effectively and firmly to discharge its responsibilities for the maintenance of law and order in the colony.'[288] The Bill was the Law and Order (Maintenance) Act, which the sitting Federal Chief Justice, Robert Tredgold, described as an 'anthology of horrors' and threatened to resign rather than enforce it.[289] His threat was not

[287] *Ibid*, col. 1535-36.
[288] *Southern Rhodesia Parliamentary Debates*, 27 October 1960, col. 2517.
[289] R. Tredgold, *The Rhodesia that was my Life* (London, 1968), p. 229.

heeded and in 1960 the state's most senior judge resigned in protest. The same year saw the passing into law of the Emergency Powers Act. Put together these two laws provided the state with overriding powers to deal with its political opponents. In the years that followed these powers were used to proscribe African political parties and prosecute and/or detain their leaders and supporters on a huge scale.

The actions of the Southern Rhodesian government were taken in response to both local and regional events. In the passing of the 1955 Public Order Act, for example, the actions were taken in conjunction with the other members of the Federation of Rhodesia and Nyasaland. In addition, the state of emergency declared in 1959 was applied across the Federation. Nevertheless there were differences in its approach in dealing with political dissent as compared with that of other colonies such as Nyasaland and Kenya.[290] A key difference related to how political militancy was constructed by the colonial state and how this informed its response. In Kenya, African political militancy was viewed through a 'medical' lens and officials took the view that it stemmed from a psychological disorder. As David Anderson shows, Kenyan officials 'diagnosed' Mau Mau as a 'mind destroying disease' arising from the Kikuyu's inability to cope with civilisation.[291] In so doing the grievances of the Kikuyu were denied validity and the colonial state exonerated itself from any blame in the war. This understanding of Mau Mau fed directly into the solutions that Kenyan officials proposed. If Mau Mau was an illness it therefore followed that the Kikuyu had to be cured. Consequently, tens of thousands of detainees were put through the 'pipeline', a multi-stage process of

[290] J. Alexander, 'Nationalism and Self-government in Rhodesian Detention: Gonakudzingwa, 1964-1974', *Journal of Southern African Studies*, 37 (2011), p. 553.
[291] D. Anderson, *Histories of the Hanged: The Dirty War in Kenya and the End of Empire* (London, 2005), p. 280.

'rehabilitation', and release from detention was only granted once one had confessed and recanted the Mau Mau oath.

The situation in Nyasaland bore some similarities to that in Kenya though there was a marked difference in terms of scale. Nyasaland's colonial authorities secured the services of John Pinney, a District Officer previously based in Kenya, to assist in dealing with the political disturbances.[292] John McCracken notes: 'As in Kenya, [Pinney] started with the assumption that political militancy was a disease that could be cured only through a combination of confession and hard work: "a desire for release must be inculcated in the detainee and this can be best achieved by subjecting him to strict discipline and getting him to work."'[293]

In Southern Rhodesia the 'disease theory' did not take root as a way of interpreting African political militancy. During much of the 1950s settler rhetoric constructed Africans involved in political unrest as children or simpletons who were being misled by communist *agents provocateurs* into disrupting law and order in the colony. This view enabled the state to deny the validity of African grievances and gave credence to its chosen response of criminalizing political dissent and imposing more and more severe sentences as a deterrent. The early treatment of detainees in Southern Rhodesia was particularly distinct from that in Kenya and Nyasaland. Jocelyn Alexander notes that during the late 1950s and early 1960s 'detainees were legally recognised as distinct from criminals by right of the fact that they had not been convicted of an offence….' What is more the 'state accepted that it had obligations to the

[292] McCracken, 'In the Shadow of Mau Mau', p. 544.
[293] *Ibid.*

maintenance of detainees' businesses, properties and dependents through the provision of allowances and a range of other material and administrative support.'[294]

The coming of the Rhodesian Front (RF) into power in 1963 led to a shift in the way political dissent was viewed and dealt with. The RF had been formed from the coalition of right wing settler groups and included among its key aims ensuring that 'the Government of Southern Rhodesian would remain in responsible hands' and ensuring 'the permanent establishment of the European' in the colony.[295] As a result it took an uncompromising stance when it came to dealing with any threats to continued settler rule. This was clear in the way they dealt with detained African nationalists. As Alexander points out: 'In contrast to its predecessor, the Rhodesian Front did not view detainees as citizens temporarily deprived of their rights in the interests of security. It constructed detainees as something considerably worse than convicted criminals, referring to them as violent thugs and terrorists, miscreants who had placed themselves outside society and so – quite literally – deserved to be isolated in the "bush"'.[296]

The laws that had been passed by the Whitehead administration served as the foundation on which the RF immediately set about expanding the already substantial powers of the state. Between 1960 and the late 1970s the Law and Order (Maintenance) Act was amended 12 times, while the Emergency Powers Act was amended 32 times.[297] These amendments were concerned as much with the expansion of state powers as they were with providing for more

[294] Alexander, 'Nationalism and Self-government', p. 553.
[295] P. Godwin and I. Hancock, *"Rhodesians Never Die": The Impact of War and Political Change on White Rhodesia c. 1970-1980* (Oxford, 1993), p. 57.
[296] Alexander, 'Nationalism and Self-government', p. 554.
[297] Cited in J. Alexander, *The Unsettled Land: State-making and the Politics of Land in Zimbabwe, 1893-2003* (Oxford, 2006), p. 82.

severe punishments for 'offenders'. Perhaps the most infamous of the amendments to the Law and Order (Maintenance) Act was the 1963 'hanging clause' which introduced a mandatory death sentence for individuals found guilty of using petrol bombs. It also provided for the administration of corporal punishment, in addition to imprisonment, for those convicted of political offences on the grounds that imprisonment on its own was not a sufficient deterrent for Africans.

The strident language used by the proponents of the 1963 amendment to justify the mandatory death sentence for petrol bombers captures the new shift in the way that the RF establishment constructed Africans who engaged in nationalism. While they had previously been presented as children requiring a firm disciplining hand, they were now constructed as animals that needed to be killed. Clearly influenced by the Mau Mau rebellion and the language used to describe it, J. A. Newington, the MP for Hillcrest, asserted that '…Mau Mau and even this petrol bombing is merely an expression of tribal bestiality.'[298] He maintained that:

> The alternative argument, which to my mind is fallacious, is that it is contrary to our concept of justice, of democracy. I believe that in the peculiar circumstances of our environment we are at a disadvantage. It is easy to ensure the rule of law is maintained where people are prepared to live according to the rule of law, where it is a natural progression, where they have been used to it over the centuries. Here the vast majority have no real understanding of what democracy means and I think it is true to say they only obey the law because of the penalties imposed. The greater the severity in many cases the greater the obedience.[299]

Echoing these sentiments Col. George Hartley, the MP for Victoria and a former director of the Salisbury Native Administration Department, declared:

> If a mad dog is loose in the community the whole community as a rule rises to shoot it down. – [MR GAUNT: Hear, hear.] – They do this from one desire and

[298] *Southern Rhodesia Parliamentary Debates*, 26 February 1963, col. 590
[299] *Ibid*.

> that is to protect society from that class of offender. – [MR GAUNT: Or rabid animal.] – I believe that drastic measures of a similar sort should be introduced to deal with the mad dog who throws a petrol bomb. – [HON. MEMBERS: Hear, hear.][300]

The fervour of the advocates for capital punishment was especially evident not only in the cheering in Parliament, but in their insistence that there be no room for judicial discretion in the matter.

Among the few members of Parliament who opposed the amendment were the African MPs who had been elected to Parliament after the adoption of 1961 Constitution which set aside fifteen seats in Parliament for Africans. C. Hlabangana, for example, asserted: 'Unless and until the voice of the African to-day is heard when he claims his right no death sentence, no severe penalty will ever stop him from achieving his end and this is one of those bills which will lead to an Act that will, in the long run aggravate the situation instead of bettering it.'[301] These objections went unheeded and the Bill was passed into law. However, this was not to be the final word on the matter: the debate over the political questions facing the Southern Rhodesian body politic would be reconvened in courtrooms across the country.

Courtroom Encounters

The arrest and prosecution of Africans for political offences began fairly early in the 1950s. However, the annual figures of those prosecuted rose significantly in the late 1950s and in 1964 as many as 2 017 Africans were prosecuted.[302] These political trials served a number of functions for the Southern Rhodesian state. In the first instance they were instruments which

[300] *Ibid*, col. 607.
[301] *Ibid*, 26 February 1963, col. 531.
[302] Feltoe, 'Law, Ideology and Coercion', Appendix B- Criminal Offenders. The number of those who were arrested in 1964 was 4 435.

facilitated the state's desire to apprehend and punish those it deemed its political enemies.[303] At another level they were performances in which state power was ritualised and presented as unquestionable.[304] These performances were also meant to authorise the official narrative about African politics. As Paul Gready aptly notes, the political trial 'reconstructs and rewrites events as they are perceived by the government, and reproduces for the public the image of a society threatened by people and organisations who seeks its violent destruction, thereby serving to justify actions taken by the state against political opponents'.[305] However, an analysis of the courtroom encounters between nationalists and their supporters and the state shows that state designs were actively challenged and subverted.

Up to the mid-1960s, many nationalists responded to prosecution by investing a great deal of energy and resources in putting up legal defences. While they were critical of the repressive laws and the actions of the state, nationalists by and large still recognised the legitimacy of the courts and looked to them to deliver just outcomes. Their defences were structured according to the prescriptions of Rhodesian law and they generally conformed to the niceties of the Rhodesian courts. It is misleading to see these actions as being founded on a naïve and misplaced faith in the legal system. Such a perspective misses the fact that the actions were also expressions of an imaginary of rights-bearing citizenship.[306] It should also be added that they won their cases on a number of occasions especially in the higher courts. The

[303] M. Chanock, 'Writing South African Legal History: A Prospectus', *Journal of African History*, 30 (1989), p. 268.
[304] D. Hay. 'Property, Authority and the Criminal Trial', in D. Hay *et al* (eds), *Albion's Fatal Tree* (Middlesex, 1975), pp. 17-63. See also J-G Deutsch, 'Celebrating Power in Everyday Life: The Administration of Law and the Public Sphere in Colonial Tanzania, 1890-1914', *Journal of Cultural Studies*, 15 (2002) and S. Verheul, 'Performing the Law: Plays of Power in Harare's Magistrates Court, Zimbabwe,' (M. Phil. Thesis, University of Oxford, 2011).
[305] P. Gready, 'Autobiography and the "Power of Writing": Political Prison Writing in the Apartheid Era', *Journal of Southern African Studies*, 19 (1993), p. 498.
[306] See J. Alexander, 'The Political Imaginaries and Social Lives of Political Prisoners in Post 2000 Zimbabwe', *Journal of Southern African Studies*, 36 (2010).

importance of political trials went beyond the opportunity they provided for nationalists to defend themselves legally. Such trials were also high profile moments of conflict with the state which could be used to gain political mileage locally and abroad. In such moments, courtrooms could be usurped and used as sites of personal performance by nationalists.

Part of the reason for nationalists' victories in court was the relatively rule-bound nature of the Southern Rhodesian state which meant that up to the mid-1960s it could be prevailed upon by means of legal argument. Their chances in the courts also improved the higher up the judicial hierarchy they went. This was in large part because of the backgrounds of the officials who served in the lower courts such as magistrates and prosecutors. A significant number of these officials were upwardly mobile individuals who had begun their careers in the police or the railways.[307] They often had no formal legal training and had become prosecutors or magistrates by passing a civil service law exam. In 1959, for example, only 16 prosecutors had legal qualifications while 83 prosecutors were members of the British South Africa Police. Of these 83, only 11 had successfully undertaken one or both parts of the civil service lower law examination.[308] In addition to this, up to 1962 Native Commissioners also acted as assistant magistrates. What this meant was that the magistrate's courts were run by individuals with limited legal training who often shared the racial prejudices of the settler community and this found expression in the way they conducted their duties.

One of the early trials was that of Joshua Nkomo, who was charged in 1953 with bringing in a WFTU pamphlet from his trip to Britain. On his own admission, however, the 'offence'

[307] Interview with A. Masterson, Harare, 28 April 2011.
[308] *Southern Rhodesia Parliamentary Debates*, 22 April 1959.

had not been intended as a deliberate act of protest. Notable in Nkomo's account of the trial was his conscious self-identification as a 'respectable citizen' as opposed to a criminal:

> I was, at first, frankly rather alarmed by having to appear in court. I was a respectable citizen, and I did not like being put on trial. So I enquired about getting a lawyer, and found that although there were law firms perfectly willing to act for me, I would have to put down £400 in cash before they started. That much money I did not have, so I decided to defend myself in person.[309]

The niceties of the courtroom were not without their attractions to Nkomo:

> The presiding magistrate first put me in the dock, like any criminal. Then I requested more room to arrange my documents. The magistrate politely agreed, and allocated me the place usually occupied by defending counsel, right alongside the prosecutor. The prosecutor himself was polite too. I laughed aloud the first time he answered a point of mine by referring to me, in English barristers' style, as "My learned friend". I was tempted to return the compliment but managed to keep to the rules and not seem impertinent.[310]

At the conclusion of the trial Nkomo was convicted but got off with a caution. The trial foreshadowed a key challenge that the settler administration would face in trying to deal with its political opponents through the courts: the publicity prosecution afforded them. Nkomo recalled, perhaps with some exaggeration, that 'factories had closed because so many people had taken time off to go to court: white people found their domestic servants missing, gone to Bulawayo for the trial. There had never been anything like it before. The government by putting me on trial, had helped to rally African opposition to their plans for Federation.'[311] While Nkomo had lost in the courtroom he had won in the court of African public opinion. In the years to come, nationalists would become adept at converting their prosecution into political capital. The individuals on trial became symbols of defiance to the settler government and their convictions only served to portray them as 'martyrs'. In 1958, for example, after being found guilty of libel for accusing the Minister of Native Affairs of theft

[309] Nkomo, *Nkomo: Story of My Life*, p. 59.
[310] *Ibid*, p. 60.
[311] *Ibid.*

in a political address, Chikerema was carried out of court triumphantly on the shoulders of the nationalist supporters who had come to witness the trial.[312]

However, political trials did not always end well for nationalists; neither did they always lead to greater unity in the nationalist cause. Such was the case with the 1959 trial of the leaders of the NDP Mawema, Samkange and Takawira. The three were arrested on the 19th of July for making statements that were deemed to be subversive. Mawema was also charged with continuing the banned SRANC under a different name.[313] Israel Maisels, a prominent South African advocate, was brought in to defend the NDP leaders and was assisted by Chitepo. When the trial opened at the Salisbury Magistrate's Court it attracted such huge crowds that the police struggled to control them. Consequently, the trial was moved to Inkomo Barracks a few miles outside Salisbury. The shift in its location as well as the fact that the trial took months to reach its conclusion meant that it gradually fell out of the spotlight.[314] Samkange and Takawira were ultimately acquitted when the prosecution failed to make its case. However, the charges against Mawema remained. At the same time tensions arose within the NDP leadership over the distribution of funds as branches from outside Salisbury complained that a disproportionate share of the money was being allocated to Salisbury where it was used to pay for the legal expenses of the leadership. The dispute over funds ultimately led to Mawema's resignation from the leadership of the NDP.[315] Mawema was initially sentenced to four years with hard labour for being a member of an unlawful organisation.

[312] Interview with T. Ranger, Oxford, 27 September 2011.
[313] Ranger, *Are we not also Men*, p. 182.
[314] *Ibid*.
[315] *Ibid*, pp. 191-93. Nyagumbo's account of Mawema's resignation suggests that he was suspected of embezzling funds and of being a security risk. See Nyagumbo, *With the people: An Autobiography from the Zimbabwean Struggle* (London, 1980), p. 139. However, West suggests that the NDP leadership was unstable due to a large number of 'highly educated new recruits who fancied themselves as natural leaders.' See West, *The Rise of an African Middle Class*, p. 223.

The trial of Mawema is also important for what it reveals about the workings of the Southern Rhodesian legal system. The charges against him were based on security reports supposedly drawn up from the notes of the African police details who attended the NDP meetings. In reality, senior European police officers had edited the security reports and added more incriminating statements in order to ensure the conviction of the NDP leadership. During the cross-examination of the state's witnesses, it soon became clear that many of the African police details did not understand much of the content of the reports.[316] Part of the cross examination of Hode, one of the African police details, went as follows:

Maisels: You are interested in subversive organisation? [sic]

Hode: Yes

Maisels: What is meant by subversive?

Hode: Group of people.

Maisels: What is meant by colonialism?

Hode: I did not read it.

Maisels: Have you heard the word colonialism at these meetings?

Hode: If it was used I cannot remember.

Maisels: What does it mean?

Hode: I don't know. I cannot explain it.

Maisels: Tribalism. What does that mean? What was the attitude of the National Democratic Party to tribalism?

Hode: You said nationalism?

Maisels: No, tribalism.

Hode: They did not want it.

Maisels: What is racialism?

Hode: It is the same as tribalism. They did not want it.

[316] Rhodes House Library, Terence Ranger Papers, Trial of Michael Mawema 1960.

As the questioning went on the magistrate was forced to remark: 'The witnesses don't seem to understand what the report is that they have signed. They don't seem to understand the report.' To which the prosecutor replied 'I am only too aware of it'. The magistrate went on to remark of Hode that: 'He is virtually refreshing his memory from something which he does not appear to comprehend and I think that criticism can be levelled at the previous witness too.' Despite the numerous irregularities in the testimony of many of the state's witnesses, when it came to handing down judgement, the magistrate changed his opinion about the evidence given by the witnesses. He dismissed the words they could not explain as editor's gloss added by a European typist and saw nothing sinister in the fact that some of the original notebooks had been lost. He therefore found Mawema guilty on all charges brought against him. However, Mawema successfully appealed the conviction in the High Court.

Notwithstanding the challenges in the lower courts, there was some room for nationalists to exercise agency within the courtroom in ways that caused great anxiety amongst state officials. A trial that clearly illustrated the possibilities that existed to exercise such agency was that of Nkomo, Chikerema and Nyagumbo in Rusape in February 1963. Nkomo and his colleagues were charged under the Law and Order (Maintenance) Act with participating in an illegal procession and for obstructing a police officer from carrying out his duties.[317] A charge of common assault was also made against Nkomo for poking a policeman in the ribs with his walking stick. Nkomo had come to Rusape to speak to the Aged and Destitute People's Association in Vengere Township and was accompanied by Nyagumbo and

[317] I have reconstructed this case using newspaper reports from the *African Daily News* and the *Rhodesian Herald* as well as government correspondence.

Chikerema who had just been released from 'restriction'.[318] They arrived in Rusape by train where a crowd of approximately 1000 people waited for them and escorted the three men to the township which was about a mile away.

In the evening Nkomo and his colleagues went to Abisha Mudzingwa's home in the single men's quarters where they were to have supper. Whilst they were eating three policemen came and ordered them to leave the township on the grounds that they did not have the approval of the Township Management Board to spend the night. The policemen, who appeared as the state's witnesses, alleged that their orders had been greeted by defiant shouts of 'warrant' from inside the room. They therefore decided to force their way into the room and a scuffle ensued which led to the arrest and prosecution of the three men.[319] The regional magistrate, P. van Renen, came down from Umtali to preside over the case. On the nationalists' side Chitepo, who was now working as the Director of Public Prosecutions in Tanzania, flew back to lead the defence team and was assisted by Leo Baron, a Bulawayo-based lawyer.

The amount of anxious correspondence by senior officials from different branches of the state and the energy devoted to following the local and foreign coverage of the trial suggests that courtrooms were important as sites of struggle. From the outset the state struggled to impose its authority inside and outside the courtroom. The small Rusape courtroom, which could only take 28 people, was filled with members of the now banned ZAPU. Outside the courtroom hundreds of people gathered, many of whom were wearing fur hats, which were

[318] 'Restriction' was the term used by Southern Rhodesian authorities to refer to the confinement of individuals who were viewed as a threat to law and order in remote areas around the country.
[319] *Rhodesian Herald*, 19 February 1963.

important cultural symbols of nationalist resistance. As Sabelo Gatsheni-Ndhlovu and Wendy Willems note:

> Advocates of nationalism drew from pre-colonial language and culture and reinterpreted pre-colonial histories as they mobilised across ethnic lines as fighters for independence. Early nationalists appealed to ethnic cultural symbols such as the leopard skins and fur hats worn by pre-colonial Shona and Ndebele chiefs, which leaders like Joshua Nkomo and Leopold Takawira often wore when addressing the masses.[320]

A little over a decade earlier members of the Sofasonke movement had similarly drawn on cultural symbols in their efforts to resist eviction from the Matopos National park.[321] Terence Ranger notes that in March 1949 *Sofasonke* members appeared at a hearing of the Commission of Enquiry into the Matopos Park in the Bulawayo High Court dressed in Ndebele war regalia.[322] On the first day of the trial, Nkomo and his colleagues entered the Rusape Magistrate's Court wearing their fur hats. The magistrate quickly instructed them to remove them and in the days that followed Chikerema and Nyagumbo resorted to giving their hats to members of the crowd before the trial. However, they immediately wore them outside the court. The wearing of these nationalist symbols in the courtroom was important in so far as it was both a performance of the nation and a challenge to the state's own symbols and rituals.

[320] S. Ndhlovu-Gatsheni and W. Willems 'Making Sense of Cultural Nationalism and the Politics of Commemoration under the Third Chimurenga in Zimbabwe', *Journal of Southern African Studies*, 35 (2009), p. 948.
[321] T. Ranger, *Voices From the Rocks: Nature, Culture and History in the Matopos Hills of Zimbabwe* (Oxford, 1999), pp. 153-177.
[322] *Ibid*, p. 163.

Picture 4: From left Robert Mugabe, Stanislus Marembo, Joshua Nkomo, Maurice Nyagumbo and Terence Ranger [Source - J. Nkomo, *Nkomo: The Story of my Life*]

The *Rhodesia Herald,* a conservative daily newspaper that was part of the South Africa-based Argus Printing and Publishing Company, gave daily coverage of the trial. In comparison to the *Daily News,* which took a sympathetic stance towards the nationalists, it was less positive in its portrayal of the actions of the nationalists and clearly omitted certain events such as the triumphant carrying of the nationalists' lawyers by the crowd. However, it gave a more detailed account of the exchanges in the court and events outside it and therefore provides a valuable insight into the trial. It described the atmosphere outside the court on the first day as follows:

> Leaving the courtroom the three men were greeted by loud cheers, hand clapping and whoops from the assembled crowd which had now swelled to about 500 people. Ignoring police appeals, the crowd swept across the road and surrounded the car as it tried to back out. Two police attacker dogs were brought into action and the crowd dispersed. On their return, the accused were again acclaimed by the crowd as they entered the courtroom. At the end of Mr. Chitepo's cross-examination the three accused were remanded until tomorrow morning on existing bail of £25 and one surety of £75 each. The crowd outside the courtroom

> slow-clapped and cheered and the women ululated when the convoy headed by Nkomo's car, left in the direction of Umtali.[323]

The trial itself was punctuated by moments of humour often at the expense of state officials. Nkomo, now a seasoned politician, poked fun at the proceedings much to the delight of the crowd witnessing the trial. The *Rhodesia Herald* recorded the following excerpts of Nkomo's cross-examination by the prosecution:

> During the proceedings Nkomo was asked by the prosecutor to demonstrate how the police had entered the room. He left the dock, closing the door behind him, and then burst into the courtroom to loud laughter and cheers from the audience...The prosecutor asked him whether it did not occur to him at any time during the progress of the gathering that he was taking part in a procession [he replied] "It did not, because short of a helicopter picking me up I could not have got out in any case."[324]

Nkomo's antics evidently had an impact on the audience's view of the proceedings. The *Rhodesia Herald's* report of the last day of the trial recorded the following incident: 'As Mr Nkomo took his place this morning an African man called out in the courtroom "This is your last meeting, you had better address it now."[325]

The lawyers representing the three also assumed great prestige in the eyes of the crowds who turned up to witness the trial. Chitepo impressed the crowd with his forensic skills and oratory. Something that is likely to have made an impression on the audience was his lengthy grilling of the European policemen, Detective Sergeant C. D. Sewell and Inspector Leamon, who were amongst those who conducted the arrest. Chitepo questioned the policemen for hours on end in order to demonstrate that their actions had been deliberately provocative.[326] This questioning of white policemen by a black lawyer inverted the racial hierarchy in a way that made the magistrate very uncomfortable. Nyagumbo later recalled that the magistrate's

[323] *Rhodesia Herald*, 19 February 1963.
[324] *Ibid*, 22 February 1963.
[325] *Ibid*, 27 February 1963.
[326] *Ibid*, 20 February 1963.

'attitude to our defence counsel was very startling. He would interject at nearly every question advanced to the police by the defence.'[327]

On the last day of the trial, Chitepo made a 135 minute long closing address and at the end of the hearing was carried triumphantly by the crowd. The mood of the day was captured in the following terms by the *Rhodesia Herald*:

> More than 70 Africans packed the courtroom at Rusape, designed to seat 30, to hear the address at the close of the defence case today. Outside the court a crowd of about 300 Africans cheered Mr Nkomo's party across the streets to an African restaurant. Women wearing hats of leopard, buck and wild cat skin danced and sang as the accused men and their colleagues packed to leave.[328]

This triumphant carrying of nationalists' lawyers highlighted the prestige that lawyers began to assume as individuals uniquely positioned to advance Africans' struggle against colonial rule. In the end Nkomo was convicted and sentenced to 6 months in prison with hard labour, but immediately appealed the sentence. His conviction does not appear to have dampened the mood of the crowd. If anything, the trial seemed to recharge nationalist fervour. On the day the ruling was handed down Baron was carried out of the court by the crowd. Importantly, by prosecuting Nkomo, the government had drawn attention to the nationalist cause locally and abroad, and did a much better job at it than Nkomo's address to the Aged and Destitute People's Association could have done. Furthermore, it had failed to stamp its authority on the proceedings. For the crowds that thronged the court dressed in party regalia, the trial was generally not seen as a performance of state power: this was Nkomo's 'meeting'.[329]

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[327] Nyagumbo, *With the People*, p. 167.
[328] *Rhodesia Herald*, 20 February 1963.
[329] For an account of similar use of the courtroom by nationalists in South Africa see Mandela, *Long Walk to Freedom* (London, 1995), p. 385 and A. Sachs, *Justice in South Africa* (London, 1973), pp. 214-229. In the case of Nyasaland see the account of Henry Chipembere's trial in M. Vaughan, 'Words, Resistance and Colonial

Rethinking the 'Rules of Law'[330]

Southern Rhodesia senior state officials soon realized that political trials were a double-edged sword. Having followed Nkomo's Rusape trial closely, G. B. Clarke, the Secretary to the Prime Minister and Cabinet, realised that the government had inadvertently given prominence to the nationalist cause and was losing the struggle to frame the trial in the media.[331] He therefore suggested that A. M. Bruce-Brand, the Secretary of Law and Order, 'give consideration to the compilation of an authoritative version of the trial. This version could then be sent to London and other Federal External Missions, to be used to put across the proper story.'[332] Clarke's views were shared by B. Hutton-Williams, the Director of Information at the Southern Rhodesia Information Service, who observed:

> …we are into a period now where hostile elements, either by over-simplification or by distortion, are endeavouring to prejudice opinion in the UK and elsewhere against the granting of independence to Southern Rhodesia. For instance, the London 'Evening Standard' at 2.30 p.m. on the afternoon had banner front page headlines 'NKOMO GETS SIX MONTHS HARD LABOUR'. This sort of statement gives the impression to the man in the street and also to opinion formers who may be well disposed to Southern Rhodesia that there may be something to the claims of the hostile elements that Southern Rhodesia has introduced repressive racial legislation in order to keep a white minority Government in power.[333]

While officials from the Ministry of Law and Order shared these concerns, they disagreed with the proposed solution. Bruce-Brand felt that no good could come out of such a statement given that 'any official statement would probably highlight [Nkomo's] name in the

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laws of Sedition', unpublished paper. By contrast, the Mau Mau trials were a fairly grim affair. See Anderson, *Histories of the Hanged*, pp. 290-291.

[330] This phrase is adapted from Lonsdale, 'Kenyatta's Trials', p. 196. I use it to refer to the procedures and regulations that guide the administration of the law.

[331] NAZ S3331/17/12/1, Bruce-Brand to Hutton-Williams, 3 April 1963.

[332] *Ibid*, Clarke to Bruce-Brand, 3 April 1963.

[333] *Ibid*, Hutton-Williams to Bruce-Brand, 6 April 1963.

newspaper headlines, and would invite some kind of adverse comment from persons ill-disposed toward us.'[334]

Bruce-Brand's opinion is likely to have been influenced by a very frank memorandum on the trial written by his deputy. It observed:

> Having now had the opportunity of studying the reports submitted by Police, the Prosecutor and the Magistrate's judgement, in my opinion, it would be unwise to publicise this matter any further. My reasons for saying this are three-fold. Firstly I think the Police acted in rather a high-handed manner in this case. It is obvious from the evidence available that at 9.10 pm on the night in question they were looking for trouble and got it. Personally I think anybody would have been annoyed at the way the Police acted when there were obviously no signs of trouble, and Nkomo and his companions were just sitting down having a meal. Secondly I do not like the Magistrate's judgement. It seems to me quite a lot of it is completely irrelevant and some of it even shows signs of bias. If and when the matter comes to the appeal court I can easily visualise it will be torn to shreds in no time. Thirdly, an examination of the facts of this case reveals to me, and I think probably to the outside world, that the sentence of Nkomo was rather excessive in the circumstances. All he did was to poke Superintendent Eagleton in the ribs. My own opinion is that a more appropriate sentence would have been in the region of £5 for common assault.[335]

The opinion of the Deputy Secretary was a reflection of the aforementioned tensions within the different levels of the legal system. The approach of magistrates in the conduct of their duties often grated against the legal sensibilities of the High Court judges and, true to the Deputy Secretary's predictions, the conviction was overturned on appeal.

Such unsuccessful prosecutions were very frustrating to state officials in the Law and Order Ministry and prompted a rethinking of the 'rules of law'. This frustration was evident in a memorandum sent by the new acting Secretary for Law and Order, J. A. C. Fleming, to his

[334] *Ibid*, Bruce-Brand to Clarke, 24 April 1963.
[335] *Ibid*, Deputy Secretary of Law and Order to Secretary of Law and Order, [Undated but was most likely written early April 1963].

Minister in January 1964. The Secretary expressed his concerns about 'gaps in the law' which were emerging in the state's efforts to deal with political dissent. He was particularly annoyed by the actions of nationalists of whom he remarked:

> There is no doubt that the Nationalists are making a mockery of the Courts. With regard to the Courts, I need only draw your attention to Mr Nkomo's present tactics, namely two Appeals (from Gwelo and Bulawayo) pending, not to mention calling 100 defence witnesses in his current trial at Umtali. The object of the exercise is obviously to delay proceedings, waste everybody's time and generally disrupt the smooth working of the courts; and Nkomo is not the only one adopting these tactics.[336]

What Fleming saw as unacceptable 'tactics' were appeals that followed on from the numerous prosecutions that had been brought against nationalists by the government. Between 1963 and 1964 Nkomo had faced prosecution in 7 towns and cities in Rhodesia which included Gwelo, Sinoia, Nyazura, Umtali, Rusape, Salisbury and Bulawayo. These prosecutions were largely for things he had said in political addresses. In Gwelo, for example, Nkomo had pointed out that the government had removed Africans from their land and given it to German and Italian veterans of World War II. As a result, he was charged with making a statement which, the state alleged, encouraged hostility between the races. Nkomo was tried in November 1963 and sentenced to nine months in prison by the Gwelo Magistrate's Court.[337] In Nyazura, Nkomo was convicted for making a 'subversive' speech and was restricted to Gonakudzingwa. He then challenged the legality of his restriction, along with 25 others leaders of the People's Caretaker Committee who were restricted with him.[338] In the Umtali case that Fleming referred to, Nkomo had been charged with making 'untrue statements about torture by the police'. In his defence he called 100 witnesses who testified that they had indeed been tortured.

[336] NAZ S3332/2/2 Acting Secretary for Law and Order J. A. C. Fleming to Minister of Law and Order, 11 January 1964.
[337] *Zimbabwe Review*, 28 December 1963.
[338] E. Mlambo, *Rhodesia: Struggle For a Birthright* (London, 1972), pp. 198-199.

Picture 5: Joshua Nkomo in one of his many confrontations with the police in 1962 [Source: *Nkomo: The Story of my Life*]

Fleming's words indicated his irritation at the fact that the nationalists were using the state's own institutions to frustrate government designs. Significantly, they signalled an important shift in the role that the law would play in the constitution of state power. While state officials had relied on the law both for its legitimating and coercive potentials, in the years that followed the balance shifted firmly towards coercion. He went on:

> As a result of all this nonsense that has been going on it now appears that the Government (whose stated policy is to rule via the Courts and not administratively) will soon have to decide whether to continue to rule by the Courts, with amendments to such items as regards Bail, Appeals, Increasing sentences for frivolous appeals etc. etc., or whether terrorists, who take every advantage of our present legal system, should be dealt with as such in the same manner that South Africa (or Ghana) deals with subversive elements. The object and aim of the terrorists is to overthrow our lawfully established Government by unlawful means. There is no doubt that whichever of the two courses we adopt to maintain law and order, we will be hammered from all directions and more

> especially by those who opposed our petrol bombing hanging clause – external as well as internal. But, this will probably just have to be faced, unless we are prepared to let people like Nkomo and Sithole make a mockery of our Courts.[339]

As I show in the next chapter, from the mid-1960s both courses of action were adopted and the procedural safeguards in the legal system were significantly undermined while scores of nationalists were detained for years without trial.

Conclusion

In responding to the rise of African nationalism in the post-Second World War era, the Southern Rhodesia government was forced to grapple with the question of the relationship between the law and the legitimate exercise of state power. For the majority of the settlers it was clear that African political dissent had to be suppressed. However, the challenge was how to tap into the coercive potential of law without undermining the legitimacy of law and the state in the eyes of the settlers, Africans and metropolitan officials. In their search for an answer colonial authorities turned to the canon of racial tropes and argued that the normal standards of due process did not apply when dealing with less 'civilised' Africans. For much of the 1950s Africans were discursively constructed as simpletons or errant children who were being misled by agitators. They were thus seen as requiring firm disciplining by means of strict laws in order to deter them from acts that disrupted law and order. However, with the coming of the RF, Africans who were involved in nationalism soon came to be seen as 'animals' who had to be killed and the law was amended to correspond with this new construction. In this, Southern Rhodesia differed from Kenya where African nationalism was interpreted as a psychological disease and dealt with as such.

[339] NAZ S3332/2/2, Fleming to Minister of Law and Order, 11 January 1964.

Nevertheless, the discussion among Southern Rhodesian settlers about African political militancy unsurprisingly failed to engage with the intellectual currents and political imaginaries that were driving African nationalism. Consequently, the legal engagements between the state and Africans were marked by the central irony that it was Africans who asserted themselves as rights-bearing citizens and demanded fair trials while colonial officials, who claimed to be the bearers of 'rule of law', often subordinated due process to political expediency. As nationalists became adept at using the courts to aid their cause, political trials became high profile moments where they clashed with the government. They subverted court rituals by staging their own performances, and challenged state symbols with nationalist ones. In addition, colonial racial hierarchies were inverted by Africans who took on colonial authorities in the courts. As a result, by 1964, state officials were calling for a revision of the legal procedural guidelines in order to enable them to effectively silence political dissent.

CHAPTER IV

Legality without Legitimacy: Law and Politics during UDI, 1965-1980

Introduction

The years between 1950 and 1964 witnessed efforts by successive Southern Rhodesian governments to come to terms with African nationalism and devise a response to it. This saw debates within the settler community over the principles that were supposed to inform the relationship between law and state power. At the heart of these debates was the question of how the coercive capacity of law could be harnessed to deal with rising African nationalism without sacrificing its legitimating capacity. By 1964 there was increasing frustration among officials in the Ministry of Law and Order, who felt that the law did not provide them with what they considered to be sufficient powers to deal with the 'problem' of African nationalism. This chapter analyses the administration of law in the sphere of politics between 1965 and 1980 and focuses on two main questions. Firstly, it examines how the calls for greater legal powers were dealt with by the Rhodesian Front (RF). Secondly, it explores how Africans responded to the changes in the legal system and the implications the changes had for the legitimacy of law as well as the legitimacy of the Rhodesian state.

Studies of the turbulent last decades of settler rule in Zimbabwe have paid detailed attention to a diverse range of 'struggles within the struggle'. From those related to land and labour to

those involving religion and ethnicity, as well as those around gender and generation.[340] However, the legal dimension of these struggles remains understudied. In many studies the law serves as a backdrop against which other struggles are examined. Studies that do focus on law and politics have, for the most part, highlighted the increasingly repressive nature of Rhodesian laws.[341] These studies do not show how Africans responded to these changes in the legal arena. There are, however, more recent studies that are taking a new look at legal and penal institutions as important sites of struggle.[342] This chapter builds on this literature and focuses on the struggles between the state and Africans about the law and by means of the law in the sphere of politics. It is divided into three sections. The first examines the key steps taken in the legal sphere by the Rhodesian Front government to respond to rising political agitation and the guerrilla war during the period following the Unilateral Declaration of Independence (UDI). The second section analyses the critiques of the Rhodesian legal system articulated by nationalists and guerrillas. In the last section I focus on the experiences of civilians in the increasingly militarised Rhodesian legal system.

Administering the Law during UDI

The RF's assumption of power in 1963, as we have already seen, signified the growing dominance of the right wing elements of Rhodesian society. Within the party itself, the

[340] See M. Sithole, *Zimbabwe: Struggles Within the Struggle, 1957-1980* (Harare, 1999); N. Kriger, *Zimbabwe's Guerrilla War: Peasant Voices* (Cambridge, 1995); N Bhebe and T. Ranger (eds), *Society in Zimbabwe's Liberation War* (Harare, 1996); B. Raftopoulos and T. Yoshikuni (eds), *Sites of Struggle: Essays in Zimbabwe's Urban History* (Harare, 2001) and N. Bhebe and T. Ranger (eds), *Soldiers in Zimbabwe's Liberation War* (Harare, 1995); J. Nhongo-Simbanegavi, *For Better or for Worse: Women and ZANLA in Zimbabwe's Liberation Struggle* (Harare, 2000).

[341] G. Feltoe 'Law, Ideology and Coercion in Southern Rhodesia' (M. Phil Thesis, University of Kent, 1978) and C. Palley, 'Law and the Unequal Society: Discriminatory Legislation in Rhodesia under the Rhodesian Front from 1963 to 1969, Part 1,' *Race and Class*, 12, 1 (1970).

[342] See J. Alexander, 'Nationalism and Self-government in Rhodesian Detention: Gonakudzingwa, 1964-1974', *Journal of Southern African Studies*, 37 (2011) and M. Munochiveyi, '"It was Difficult in Zimbabwe" A History of Imprisonment, Detention and Confinement during Zimbabwe's Liberation Struggle, 1960-1980' (Ph.D. Thesis, University of Minnesota, 2008).

growing dominance of hardliners was evident in the replacement of Winston Field by Ian Smith in 1964. These political changes had important consequences for the way law was administered. Soon after taking office, Smith proceeded to take strong measures to clamp down on nationalist activities with the backing of his Minister of Law and Order, Clifford Dupont. In 1964, five states of emergency were declared in various locations in Southern Rhodesia. This was followed by the arrest and detention of hundreds of political leaders.[343] As the administration prepared for the Unilateral Declaration of Independence, a large number of nationalist leaders and other individuals viewed as threats by the government, were placed in detention and the rules governing detention camps were made more stringent.[344] The legal challenges instituted by Nkomo and other nationalist leaders against their incarceration became less and less likely to succeed as a result. Following the Unilateral Declaration of Independence on 11 November 1965, the nationalist parties ZAPU and ZANU resolved to wage a guerrilla war and began training guerrillas and launching military incursions into Rhodesia. For its part the Rhodesian government responded by expanding its powers to deal with its political opponents. The period between 1965 and 1980 thus witnessed a vicious cycle of escalating political unrest and increased repression culminating in a bitter guerrilla war.

[343] E. Mlambo, *Rhodesia: Struggle For a Birthright*, (London, 1972), p. 209.
[344] Alexander, 'Nationalism and Self-government', p. 554.

Picture 6: Prime Minister Ian Smith announcing the Unilateral Declaration of Independence on 11 November 1965 [Source – National Archives of Zimbabwe (NAZ)]

Two key features characterised the administration of the law during the UDI period. The first was the extensive employment of what Giorgio Agamben has called the 'state of exception'. For Agamben the state of exception involved the 'suspension of the judicial order'. Amongst its essential features were the extension of military power into the civil sphere, the suspension of the constitution or constitutional norms and 'the provisional abolition of the distinction

amongst legislative, executive and judicial powers'.[345] Important in Agamben's analysis of the state of exception is 'its tendency to become a lasting practice of government.'[346] During UDI there was a clear expansion of executive power into the legislative domain, and the military progressively extended its authority over civilians. At the same time there was a drastic narrowing of what few civil liberties had existed for Africans. However, the state of exception in Rhodesia was not a complete 'suspension of the judicial order' or 'an emptiness of law' as per Agamben's formulation.[347] Rather, it sat somewhat uneasily with the second feature of the administration of the law: a commitment to legalism.

For Max Weber the importance of legalism in aiding state legitimacy lay in the fact that it gave the impression that the arbitrary exercise of state power was constrained by law.[348] While this legitimating function of the legalism had been important prior to 1965, this was less so during the UDI period. Chanock's insights on the role of legalism in South Africa are instructive in trying to understand its function in the context of Rhodesian during the UDI period. 'Legitimation', he argues, 'requires an audience with a potential to applaud, but the great majority of the population always watched with hostility.'[349] He thus proposes that: 'We must instead develop our explanation around the core notion that legalism exists because it is instrumentally effective, more of a mechanism than an ideology.' Seen from this perspective, 'trials are primarily instruments – a continuation of and a climax to the long processes of detention, interrogation and torture – to investigate, strip, divide, disillusion and

[345] G. Agamben, *State of Exception* (Chicago, 2005), p. 6.
[346] *Ibid*, p. 7.
[347] *Ibid*, p. 6. For a critique of Agamben's concept of the 'state of exception' that draws on the experiences of martial law in colonial Africa see J-G, Deutsch, '"State of Normalcy": Emergencies and the Rule of Law in German Colonial Africa', paper presented to the Violence and Post-colonial Africa Workshop, 1 June 2012.
[348] D. M. Trubek, 'Max Weber on Law and the Rise of Capitalism', *Wisconsin Law Review*, 720 (1972), pp. 736-739.
[349] M. Chanock, 'Writing South African Legal History: A Prospectus', *Journal of African History*, 30 (1989), p. 267.

punish opposition.'[350] Legalism served a similar instrumental function in the political sphere in Rhodesia. In addition, the adherence to legalism enabled the Smith administration to criminalize Africans' political dissent while ignoring their social, political and economic grievances. However, as in South Africa, the legalism of the Rhodesian state went hand in hand with numerous covert forms of illegality perpetrated by state officials.[351] By the 1970s cases of abduction, torture, killings and the destruction of people's property by government agents had become commonplace.

From the mid-1960s the role of law in the sphere of politics shifted away from legitimation towards coercion. As we have seen in chapter two, the function of legitimising the state increasingly fell to 'traditional' leaders. However, this strategy met with firm resistance from chiefs and their followers who objected to the efforts to mask authoritarian policies in customary garb. The trend toward a legalistic authoritarianism was strengthened by the intensification of the guerrilla war from the early 1970s. In 1966 Desmond Lardner-Burke, the new Minister of Law and Order, defended the Rhodesian government's actions by invoking the 'state of exception' argument. 'We have been accused of being a police state', he noted:

> …and not applying the rule of law. If the allegation was not so serious it would be laughable. For Britain to shout about the rule of law is hypocritical when one knows the action that was taken in Kenya, what is happening in Aden today, and what happened during the Irish rebellion.
>
> It would be interesting to know how many people the British Government have directly restricted or detained without any pretence of trial. The cry for the rule of law is echoed in the world today, and I can only say that in Rhodesia we respect the rule of law to a far greater extent than many other countries in Africa and elsewhere. A fundamental truth is that the rule of law only operates when

[350] *Ibid*, p. 268.
[351] See and R. Abel, *Politics by Other Means: Law in the Struggle against Apartheid, 1980-1994* (New York, 1995), p. 539.

> there is tranquillity. When there is any chaos it is impossible to apply the rule of law.[352]

Lardner-Burke went on to defend this position by quoting a statement made by Thomas Jefferson during the American War of Independence, which read as follows:

> A strict observance of the written law is doubtless one of the high duties of a good citizen, but it is not the highest. The laws of necessity, of self-preservation, of saving our country when in danger are of higher obligation. To lose our country by a scrupulous adherence to written law would be to lose law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end for the means.

That Lardner-Burke should quote Jefferson is not surprising. The wording of the Rhodesian declaration of independence was itself closely modelled on the American Declaration of Independence.[353]

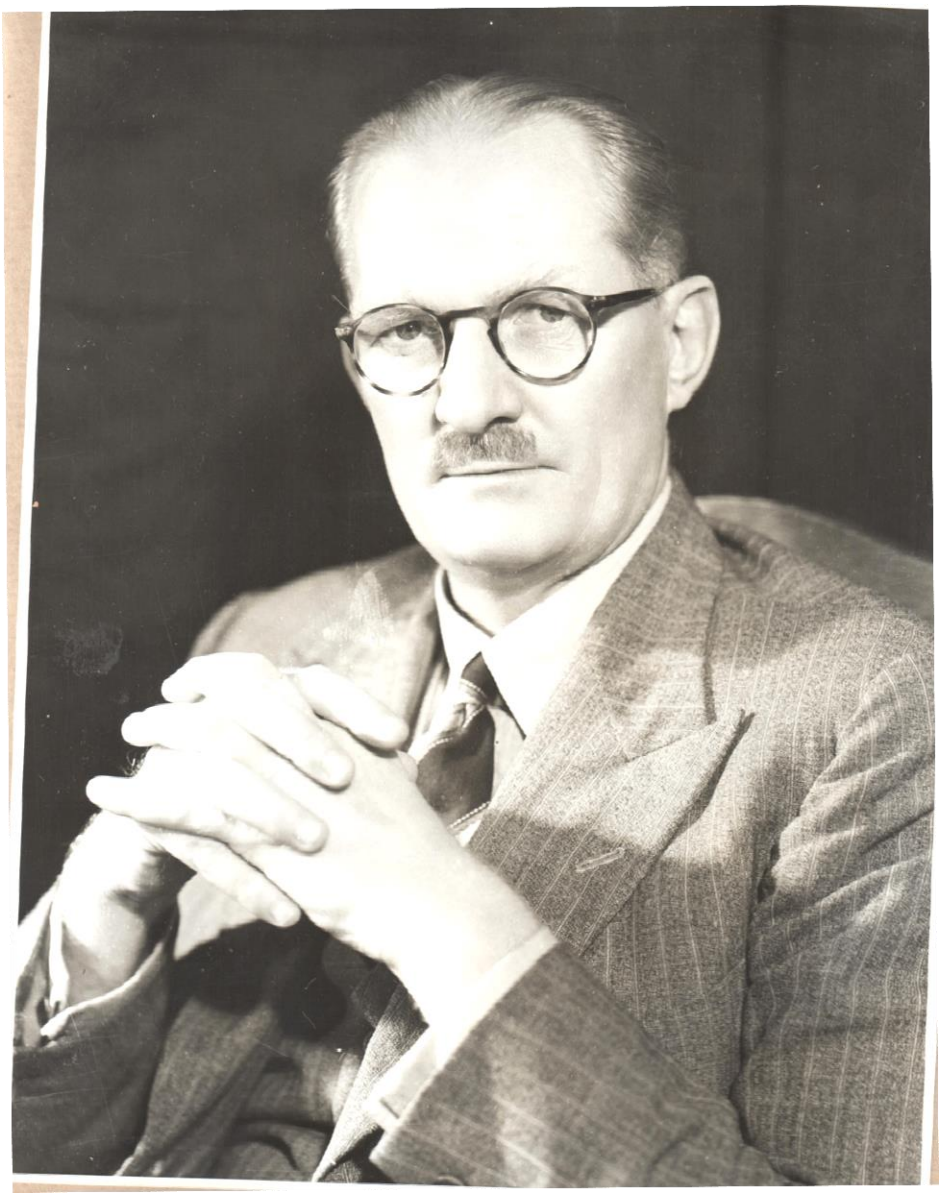
The rhetoric around the need for exceptional measures to deal with nationalist agitation and the war continued to be a feature of official discourse about law during UDI. During the presentation of the Indemnity Bill in 1976, which protected government forces from legal action for a range of actions taken in the course of their duties, Lardner Burke, who was by then the Minister of Justice, again employed this language. Of particular importance is the fact that this statement was coming from the Justice Ministry which had previously prided itself in strict adherence to due process.

> …one of the features of our Constitution is the absolute supremacy of the law. If any man's rights or property is threatened, whether by the Government or by a private individual, the courts are open for his protection, and behind the courts is ranged the full power of state to ensure the enforcement of their decrees. But an inherent right reposes in every state to use all means at its disposal to defend itself when its existence is at stake: when the force upon which the constitution is based is itself challenged. Under such circumstances, the State may be compelled by

[352] D. Lardner-Burke, *Rhodesia: The Story of Crisis* (London, 1966), p. 57.
[353] See a copy of the UDI proclamation at http://upload.wikimedia.org/wikipedia/en/7/75/Rho-udi.jpg

> necessity to disregard for a time the ordinary safeguards of liberty in defence of liberty itself.[354]

As Agamben points out, the arguments being made by Lardner Burke had long been used by governments that sought to justify the employment of exceptional measures, and the aspect of 'necessity' on which the decision turned was always essentially a subjective judgement.[355]



Picture 7: Minister of Law and Order, Desmond Lardner-Burke [Source: NAZ]

[354] *Rhodesia Parliamentary Debates*, 28 August 1975, col. 1438.
[355] Agamben, *State of Exception*, p. 13.

Guided by this thinking the Rhodesian Front proceeded to make significant changes in the content of the law and its administration during the late 1960s and the 1970s. Where existing legislation proved to be inconvenient or inadequate for government purposes, it was amended. As Feltoe observes, 'government by executive regulation became the order of the day. Ministerial action in this area required no explanation and was not subject to scrutiny. The Parliamentary institution was to a large extent rendered redundant as emergency powers exercisable at the instance of executive members became widespread.'[356] In a wide range of circumstances, taking legal action against the state for abuses perpetrated by its agents was blocked by the passing of the 1976 Indemnity and Compensation Act. The principles of due process were progressively undermined under the pretext of 'preserving law and order'. Basic practices such as ensuring prisoners' right to legal representation and a fair trial, as well as the presumption of innocence were increasingly disregarded.[357] In trials where Africans were charged under the Law and Order (Maintenance) Act and other security legislation, the burden of proof was shifted onto the accused. In addition, judicial discretion was progressively eroded by legislation that provided for mandatory sentences and the torture of individuals arrested for political offences became routine.

Individuals who were considered a significant threat to the government were detained or imprisoned. This saw many prominent nationalist leaders in ZAPU and ZANU spend a decade in custody, often without trial. While they were periodically brought before a Detainees Review Tribunal, their applications for release were repeatedly rejected.[358] It was only as a result of the Détente negotiations between the nationalists and the Rhodesian

[356] Feltoe, 'Law, Ideology and Coercion', p. 50.
[357] *Ibid.*
[358] For a detailed account of experiences of detention in Rhodesia see Munochiveyi, "It was Difficult in Zimbabwe" and Alexander, 'Nationalism and Self-Government'.

authorities that a large number of detainees were released in 1974.[359] In addition to detention, thousands of Africans were hauled before the courts and charged with contravening the Law and Order (Maintenance) Act and the numerous regulations made under the Emergency powers Act. Put together, this legislation effectively criminalized all acts of political protest from wearing party regalia to participating in the armed struggle. As the backlog in the courts grew too large, the jurisdiction of magistrates' courts was expanded and new courts were created.[360]

From the late 1960s a degree of secrecy came to surround political trials and *in camera* hearings where the public was forbidden became a common practice. Judges were also empowered to bar the reporting of all or certain aspects of trials that were deemed sensitive. This secrecy had a number of functions. The ban on reporting details of the trials was intended to prevent nationalist forces from acquiring potentially useful information about the fortunes of their units in the battlefield. The secrecy was also driven by a need to keep the settler community from knowing the true extent of the guerrilla war for fear that this might trigger increased emigration. At the same time there was a desire to contain any information that might be viewed negatively abroad. Another consequence of this secrecy was to undermine the effectiveness of courtroom performances by accused individuals.

There were other instances, however, when the government desired maximum visibility for trials amongst Africans. This was particularly so with the Special Courts, which were created

[359] These talks had been advocated for by Kenneth Kaunda and John Vorster, the leaders of Zambia and South Africa respectively. Both leaders were anxious to see the Rhodesian conflict come to an end because of the negative impact it had on their countries.
[360] NAZ MS591/2/4, Legal Sheridan, Lazarus and Sarif to Bernard Sheridan and Company, 22 August 1975.

in 1976 through the Emergency Powers (Criminal Trials) Regulations.[361] These were mobile courts that were convened in the areas where guerrillas were operating. At one level the intention behind the Special Courts was practical as they were meant to expedite the hearing of the numerous cases around the country involving people charged with contravening the security legislation. At another level the trials were performances of state power. As the state's sovereignty was increasingly being challenged by the guerrillas, who were also setting up their own quasi-judicial structures, these Special Courts performed the function of re-asserting state sovereignty. An important component of the trials was the audience of villagers from the neighbouring areas who were frogmarched to witness the captured guerrillas or accused civilians being tried and severe sentences being handed down. According to the International Defence and Aid Fund (IDAF), during their first month these courts had handed down death sentences to at least eleven guerrillas in trials held in different parts of Rhodesia.[362] These severe sentences which were handed down in full view of the public were meant to intimidate villagers who might be inclined to assist the guerrillas and, as an IDAF report noted, '…the new courts [we]re being used as a psychological weapon to terrorise local villagers into collaborating with the security forces.'[363]

Capital punishment was one of the key features of the Rhodesian government's attempt to deal with political dissent during the UDI period. As shown in chapter three, the mandatory death sentence had been introduced by Parliament in 1963, guided by the thinking that the greater the severity of the punishment the greater the deterrence.[364] Throughout the 1960s

[361] Feltoe, 'Law, Coercion and Ideology', p. 60.
[362] NAZ MS591/2/7, Ian Smith's Hostages, Geneva Press Conference October 1976, IDAF Notes on the Zimbabwe Situation. IDAF was actively involved in providing assistance to individuals arrested or detained for political reasons.
[363] *Ibid*.
[364] *Rhodesia Parliamentary Debates*, 26 February 1963, col. 607.

and 1970s the list of acts punishable by a mandatory death sentence was progressively expanded to include a wide range of acts such as recruiting for the guerrilla cause, attempting to leave the country for training, failing to report the presence of guerrillas and giving assistance to them. However, in practice capital punishment proved to be much more complicated to implement than had been anticipated. In the first instance, it became increasingly clear that the death sentence was not an effective deterrent for guerrillas. Indeed, some Rhodesian Parliamentarians began to express concerns that it might in fact be pushing guerrillas to fight to the death. This concern influenced the Minister of Law and Order's decision to in July 1968 to table an amendment to the Law and Order (Maintenance) Act which provided that any freedom fighter who "satisfies the court that he abandoned (his weapons) and surrendered as soon as practicable after entering Rhodesia" would not be liable to the death sentence but lengthy imprisonment.[365] In addition, it usually took several years for cases to go through the full process of trial and appeals.

The first execution of political prisoners in Rhodesia was conducted on the sixth of March 1968, when three ZANU activists, James Dlamini, Victor Mlambo and Duly Shadreck, were hanged.[366] The three had been arrested in 1965 for petrol bombing a car that was driven by a European reservist who subsequently died of his burns. In the intervening period the case had gone from court to court as the defendants appealed the sentence.[367] The process of appeals came to an end in 1968 when the Appellate Division of the Rhodesian High Court rejected both the defendants' application to appeal to the Judicial Committee of the Privy

[365] *Zimbabwe News*, 6 July 1968.
[366] *Zimbabwe News*, 3 March 1968. Two other Africans were hanged on the 11 of March 1968.
[367] Interview with Ken Reagan, Harare, 13 April 2011. Reagan was one of the lawyers who represented the captured guerrillas.

Council, as well as the royal reprieve issued by Queen Elizabeth II.[368] The three were executed on the sixth of March, followed by two other activists who were executed on the eleventh. These first executions during UDI served as a punishment for the regime's political enemies as well as an assertion of independence from Britain.[369]

The international uproar that followed, and the difficulties in controlling the meaning ascribed to the executions forced the government to reconsider the value of such brazenness. As Stacey Hynd points out: 'Executions have several meanings, both intended and inferred, for different audiences, which can be either affirmed or subverted by the actors involved.'[370] Domestically, nationalist newsletters seized on the executions and made efforts to interpret them for their constituencies. The March 1968 issue of the *Zimbabwe News* published a letter that was said to have been written by James Dlamini to his parents, and used it to portray the activists as martyrs. The letter read in part:

> Our lawyers have tried all they could to have our lives spared. They appealed to the British Queen who authorised a reprieve, but it all failed. Now, it's all right, father, because I know I die for my people. Many, like me, have sacrificed their lives throughout the world so that their people may live freely in their own countries. Your conscience and mine are clear, dear father, for I die not as a thief or a lover of riches. I die for the liberty of my country and people. My comrades and I will be remembered in the pages of history, not as criminals, but as champions of the cause of our people. So don't let my death trouble you; because I chose this road myself and I die without any doubt as to the justice and worth of this noble cause.[371]

It is not possible to determine the authenticity of the letter. However, what is evident is that the newsletter sought to use the 'last words of a condemned man' in order to neutralize the

[368] Mlambo, *Rhodesia*, pp. 207-208.
[369] NAZ MS591/2/7, Ian Smith's Hostages.
[370] S. Hynd, 'Killing the Condemned: The Practice and Process of Capital Punishment in British Africa, 1900-1950s', *Journal of African History*, 49 (2000), p. 407. See also Foucault, *Discipline and Punish: The Birth of the Modern Prison* (London, 1977), pp. 59-69.
[371] *Zimbabwe News*, 16 March 1968.

government's intended message of deterrence and re-cast his death as the ultimate sacrifice for the liberty of the 'people'.[372]

As the Rhodesian authorities worked towards a settlement with the British government during the early 1970s, a greater degree of caution came to characterise their approach to executions. In the context of these diplomatic efforts, it was not the actual execution but the commutation of sentences that served the Smith regime's political interests as they could serve as diplomatic levers. This, however, was not the premeditated choreography of 'majesty' and 'mercy' that Douglas Hay refers to.[373] Rather, it was a shift that was tied to the conflicting political imperatives of the moment. By 1972, 225 people had been sentenced to death by Rhodesian courts since 1965. Of these, seven sentences had been quashed while 22 had been commuted to imprisonment.[374] On 14 September that year the government released a statement indicating that the President, Clifford Dupont, would exercise the prerogative of mercy and commute the death sentences of 54 of the 59 individuals who had 'exhausted their legal remedies', to life imprisonment.[375] As the conversations between Ian Smith and the British Secretary of State revealed, it was hoped that the commutation of death sentences would defuse the tense political atmosphere in Rhodesia that prevailed during the Pearce Commission's consultations.[376]

[372] M. Foucault, *Discipline and Punish*, p. 66.
[373] D. Hay. 'Property, Authority and the Criminal Trial', in D. Hay *et al* (eds) *Albion's Fatal Tree: Crime and Society in Eighteenth Century England* (Middlesex, 1975).
[374] *Rhodesia Herald,* 14 June 1972. These figures were provided by the Minister of Justice to the Parliament. Minister did not say how many had been executed.
[375] *Rhodesia Herald*, 14 September 1972. The remaining four whose sentences were not commuted had been convicted of brutal murders. It was therefore felt that their sentences should not be commuted.
[376] BNA FCO36/1273, Commutation of Death Sentences in Southern Rhodesia, P. R. A. Mansfield to Mr Le Quesne, 23 February 1972. The Pearce Commission was tasked with investigating whether Africans accepted the prospective agreement between the Rhodesian and the British governments for independence on the basis of the 1969 constitution. The said constitution did not provide for universal suffrage or the realistic prospect of majority rule. As a result it provoked significant political agitation amongst Africans and campaigns for the rejection of the proposal.

From April 1975 executions were shrouded in secrecy, as the government tried to manage the local and external political ramifications. Given the efforts that were underway towards reaching a political settlement between the RF and the nationalists, the former recognised that publicising executions might prove to be very costly in diplomatic terms. 'Since April 1975', IDAF reported:

> …convicted prisoners have been hanged in secret in Salisbury prison, with little advance warning, and, it has been claimed, during the night hours. On 21 April 1975 the Ministry of Justice announced that in future, no public announcements would be issued when executions had been carried out, on the grounds that the issue of hangings was an "emotive" one. It was subsequently confirmed by the Ministry of Justice that once an appeal against the death sentence had been dismissed, it must be assumed that execution would follow without delay. From March 1968, when 5 condemned men were put to death by the regime in defiance of a British royal reprieve, up to April 1975, at least 35 Zimbabwean are known to have been hanged on conviction of political charges. It is impossible to tell how many have since died.[377]

It remains unclear how many people were actually executed by the Rhodesian government during this period. However, the figures compiled by Marie Chihambakwe from the High Court records on death sentences for the 1970s show that executions did indeed continue in secret. In 1975, 36 individuals on death row were executed and 40 death sentences were handed down. In the following year another 27 were executed while 28 death sentences were handed down.[378] However, these figures do not include cases that were heard in the Special Courts and the Special Courts Martial and are therefore likely to be lower than the actual figures of death sentences and executions.

[377] NAZ MS591/2/7, Ian Smith's Hostages.
[378] M. Chihambakwe, 'Study of Zimbabwean Cases on the Death Penalty, Part 1', *Legal Forum*, 1 (1990), p. 42. The individuals who were executed were those whose appeals had run their full course, not those who were sentenced that year.

Table 1: Rhodesia High Court Capital Punishment Statistics, 1970-1979[379]

Year	Total high Court death sentences	Executions carried out	Commuted sentences	Other outcomes – release, sentence altered on appeal
1970	23	-	19	4
1971	24	3	16	5
1972	9	4	3	2
1973	30	24	3	3
1974	33	27	5	1
1975	40	36	2	2
1976	28	27	-	1
1977	22	15	4	3
1978	31	18	8	5
1979	37	9	24	4

In sum, the UDI period witnessed a decidedly authoritarian shift in the nature and function of the law in the sphere of politics. The period was characterised by a near permanent nationwide state of emergency, the powers of the executive were greatly expanded, and the military became increasingly involved in the maintenance of law and order as well as the administration of justice. The range of offences punishable by capital punishment was greatly expanded. However, the use of capital punishment came to be influenced not only by the desire to punish and deter political opponents, but by a range of political calculations related to shifting domestic, regional and international developments.

[379] Adapted from Chihambakwe, 'Study of Zimbabwean Cases on Death Penalty', p. 42.

Nationalist and Guerrilla Critiques of the Law

The authoritarian shift in the content of the law and its administration during UDI resulted in a loss of legitimacy for the Rhodesian legal system particularly amongst nationalists and guerrillas. Eshmael Mlambo traces this loss of legitimacy of the law to the declaration of independence in 1965.[380] While the step certainly strengthened nationalist antipathy towards the courts, it is possible to detect a growing feeling amongst nationalists prior to 1965, that the courts were neither legitimate nor effective in pursuing their cause. In his presidential address at the ZANU inaugural congress in Gwelo in May 1964, Ndabaningi Sithole made the following observation:

> The white minority made laws are indeed inherently unjust in relation to the majority who do not have the vote, and since the so-called courts administer such laws, it is not wrong to say that such courts are in fact rubber stamps of injustice. This is why many of our people cannot find justice in these courts. The legislature and the courts reflect minority and not majority interests.[381]

Unsurprisingly Sithole was arrested and charged for making this statement. There are also indications that the courts began to be viewed as being complicit in the oppression of the African population and therefore legitimate targets for guerrilla attacks. Terence Ranger, for example, notes the case of Elliot Ngwabe who participated in the Zhii riots and then left to train as a guerrilla in Zambia and Tanzania during 1964.[382] His mission upon returning to Southern Rhodesia was to kidnap the Chief Magistrate who had banned the NDP meeting of 24 July 1960. UDI served to confirm this growing sense among nationalists that legal strategies alone would not be sufficient to challenge the settler regime.

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[380] Mlambo, *Rhodesia*, pp. 196-7.
[381] Cited in C. Nyangoni and G. Nyandoro (eds), *Zimbabwe Independence Movements: Select Documents* (London, 1979), pp. 77-78.
[382] T. Ranger, *Are we not also Men? The Samkange Family and African Politics in Zimbabwe, 1920-1964* (London, 1995), p. 189, footnote 101.

The nationalist newsletters that were published in exile such as ZANU's *Zimbabwe News* and ZAPU's *Zimbabwe Review* provided a platform for critiques of the content and administration of the law. Some of the key contributors to these newsletters were African journalists and nationalists such as Nathan Shamuyarira and Saul Gwakuba Ndlovu, both of whom had worked for the *African Daily News* prior to its banning in 1964. In the early 1960s the newsletters had regularly reported on the prosecution and detention of nationalist leaders and activists and criticised the state's persecution of its political opponents. Over time their criticism of repressive laws developed into critiques that successfully unmasked the legalistic pretences of the Rhodesian legal system. These critiques ultimately encompassed a challenge to the legitimacy of the state, which came to be routinely derided as 'fascist' or 'evil'.[383] Several articles drew on alternative ideas about the law and legitimacy in their critiques of the content and administration of law in Rhodesia.

An example of this trend was an article carried by the September 1968 issue of the *Zimbabwe News* entitled 'What in Hell is Justice'. The article attacked the ruling by the Rhodesian Chief Justice, Hugh Beadle, in the Baron and Madzimbamuto cases, which challenged the constitutionality of the Rhodesian state after UDI. The ruling was significant in that it effectively gave judicial endorsement to the RF's declaration of independence. Drawing on Marxist ideas, the writer dismissed the comments made by 'British legal commentators' that the Rhodesian judges had forgotten British legal traditions. The writer pointed out that, '…the important thing to remember is that there has never existed such a thing as abstract "justice". Laws have always been created to serve the interests of the powerful. Thus in

[383] See *Zimbabwe Review*, 12 December 1963. African nationalists were not alone in recognizing the similarities between the Rhodesian Front's actions and Fascism. Elaine Windrich notes that the *Rhodesia Herald* carried several letters from members of the settler population which made similar observations. See E. Windrich, 'Rhodesian Censorship: The Role of the Media in the Making of a One-party State', *African Affairs*, 78 (1979), p. 525.

capitalist countries, "justice" is there to guarantee the supremacy of the ruling cliques just as socialist justice in, say, China is there to look after the interests of the working class and peasants. In Rhodesia Judge Beadle at least understands his assignment.'[384]

Another article entitled 'Prostitution of Justice' argued that: 'The Smith fascist clique has always used magistrates' courts as tools for oppressing the African population. Every case which smacked of resistance by Africans has always been decided in favour of the regime.'[385] Rejecting the few victories as part of the charade it argued: 'If the clique has found any discordant steps in any magistrate's dance to its tune this has been because the magistrate concerned has deemed it in keeping with his colonial manners to put on the appearance of impartiality on his judgement without giving the slightest concession to the forces of justice.' An editorial carried by the *Zimbabwe Review* entitled 'Recognition and the Law' challenged the calls by Rhodesian officials for international recognition and challenged the legitimacy of the Rhodesian state citing historical precedents. It read in part:

> From the time of the Peace of Westphalia in 1648 down to the Vienna Congress in 1815 after the Napoleonic wars, no state has ever been recognised when its administration has systematically oppressed a people that comprises a majority just because that regime believes in racial supremacy. The African people of Zimbabwe have the right to wage wars against oppression and for their own nationhood. The Smith regime has no right, moral or legal to exist in any form whatever in Zimbabwe. To suggest that because it is in power and in what people like Vorster call effective control of the country and must, therefore, be recognised, is to encourage and foment racial anarchy and lawlessness.[386]

The 1969 trial of the ZANU leader Ndabaningi Sithole on charges of plotting to assassinate Smith and two of his Ministers, Lardner Burke and Jack Howman, also provoked sharp criticism. An article carried in the *Zimbabwe News* observed: 'While the Portuguese use devices such as time bombs to murder their revolutionary adversaries, the Rhodesian fascists

[384] *Zimbabwe News*, 14 September 1968.
[385] *Zimbabwe News*, 3 March 1968.
[386] *Zimbabwe Review*, 29 November 1969.

are employing the semi-legal method of fascist legality to achieve a similar end. For that is the only difference – a difference of style – between the dastardly murder this week of Edwardo Mondlane by agents of Portuguese colonialism and the planned hanging of Ndabaningi Sithole and company.'[387]

Similar critiques of the Rhodesian legal system were increasingly expressed in the courts by captured ZIPRA and ZANLA guerrillas. Instead of enlisting the services of lawyers and staging legal defences as had been the case with nationalist leaders in the early 1960s, many chose to use the dock as a platform to challenge the legitimacy of the Smith regime.[388] Rather than answer the charges put to them by the prosecution they sought to place the government on trial. For many guerrillas the legal system and the state had completely lost legitimacy, as such they refused to participate in what they viewed as a charade. As Pierre Bourdieu points out: 'To join the game, to accept the law for the resolution of conflict, is tacitly to adopt a mode of expression and discussion implying the renunciation of physical violence and of elementary forms of symbolic violence, such as insults. It is above all to recognize the specific requirements of the juridical construction of the issue.'[389] It was this constraining effect of the judicial process that the guerrillas rejected. The trial of four ZANLA guerrillas, Thomas Mutete Makoni, Jonathan Maradza, Amidio Chingura and Joseph Muyambo in 1968 illustrates the new strategies adopted in the courts by guerrillas.[390] The

[387] *Zimbabwe News*, 8 February 1969.
[388] Not all guerrillas chose the path of defiance. In the 1968 case of Regina vs Esironi Fani, Langton Chakusa, Gladman Gurapira and Joburg Mabutu the accused guerrillas engaged lawyers and upon conviction they appealed the ruling.
[389] P. Bourdieu, 'The Force of Law: Towards a Sociology of the Juridical Field', *Hastings Law Journal*, 38 (1987), p. 831.
[390] NAZ S3385, Salisbury High Court Criminal Cases 11496 – 11502, Regina vs Makoni *et al*. Two other individuals were tried during the case. These were the lorry driver who gave them a lift into Rhodesia and the friend who subsequently reported them to the authorities. The driver was charged with failing to report the presence of 'terrorists' while the friend was charged as an accomplice. The two chose to secure legal representation and went on to appeal their convictions.

four had entered Rhodesia in 1968 from Zambia and hid their arms at a homestead in Mrewa. The arms were subsequently discovered by the police acting on information provided by a friend of the four, leading to their prosecution. During the trial Makoni and his colleagues refused to retain legal counsel or to call any witnesses in their defence and they refused to conform their testimonies to the stipulations of the Rhodesian legal system. In addition, they resisted the government's efforts to frame their actions within a discourse of crime and terror. Below is an excerpt of the exchange that transpired between Makoni, Justice Lewis and the prosecutor Mr Glaum, when Makoni was asked to plead:

> **Lewis, J**: Please put the indictment to the accused, Mr Interpreter.
>
> **Interpreter:** The first accused, my Lord, there is nothing at all among the weapons that I did not bring with me.
>
> **Lewis, J:** Let me be clear about that. He says there is nothing in this list of arms and ammunition that he did not bring with him, is that right?
>
> **Accused 1:** In other words I admit being in possession of these things.
>
> **Lewis, J**: Well, the main charge, Mr Interpreter, alleges that he had possession of these weapons wrongfully and unlawfully and with intent to endanger the maintenance of law and order in Rhodesia. What does he say about that?
>
> **Accused 1**: According to my knowledge, my lord, I knew that I was doing nothing wrong.
>
> **Lewis, J:** Mr Glaum it seems to me that there is a plea of not guilty on count 1 and guilty to the alternative charge.
>
> **Mr Glaum:** I think that is correct, yes, except possibly if he says he was doing nothing wrong he might deny that his possession is unlawful.
>
> **Lewis, J:** Just clarify that, Mr Interpreter. He has admitted being in possession of these arms, ammunition, weapons of war as set out in both the main and the alternative counts of the indictment. In regard to the alternative count, does he allege that he had lawful authority or reasonable excuse for the possession of these arms and ammunition?
>
> **Accused 1:** Yes, my Lord
>
> **Lewis, J**: Well, what excuse does he allege?
>
> **Accused 1**: The reason being that these arms will never be laid down until such a time as the country will have been released and handed over to the black man.

> **Lewis, J:** Yes. Well, the legislature does not regard that as a lawful excuse; lawful authority or reasonable excuse means lawful permission to have possession of these weapons. I think that must be a plea of guilty on the second, alternative count.
>
> **Mr Glaum**: Yes

The disregard exhibited by Lewis for the political grievances behind the actions of the four and the insistence on what he called 'lawful' excuse, authority and permission was a fairly typical response of Rhodesian judges who heard these overtly political cases. This rigid commitment to formalism was a fig leaf beneath which many judges sought to conceal their solidarity with the Smith regime. Justice Lewis exemplified the judiciary in this respect. He had been born in London in 1917 and later moved to Rhodesia where his family became part of the Rhodesian establishment. His father had been a Minister of Justice in Godfrey Huggins' Cabinet before serving as Chief Justice.[391] Lewis himself had studied at Rhodes University in South Africa and later at Oxford University. He had then practised law as a member of the Rhodesian bar up to 1960 when he was appointed as a judge. Lewis had been amongst the judges who heard the Madzimbamuto case and Claire Palley makes the following comment about his conduct during the trial:

> During the hearing of Madzimbamuto v. Lardner-Burke N. O. Lewis J. interrupted counsel on a number of occasions and the language in which these interventions were couched indicated that the judge was strongly "Rhodesian," was critical of the British government, was critical of the Africans and African government, and felt a personal responsibility for maintaining the workings and financial machinery of present Rhodesian society.[392]

Like Lewis, Justice Hector Macdonald made little effort to hide his RF sympathies and was known to berate Africans accused of political offences from the bench. There were a few judges, such as Justices Fieldsend and Dendy Young, who followed former Chief Justice

[391] C. Palley, 'The Judicial Process: UDI and The Southern Rhodesian Judiciary', *The Modern Law Review*, 1 (1967), p. 265.
[392] *Ibid*, p. 266.

Robert Tredgold's example and resigned in protest. However, for the most part Rhodesian judges ruled in favour of the state in these political cases.

Ideally, the rigid application of formal legal rationality aided governments by depoliticizing political trials. In addition to eliminating political opponents by imprisonment, this strategy would also discredit these individuals by portraying them to their own supporters as ordinary criminals.[393] However, in Rhodesia these efforts were not successful and many guerrillas who were brought before the courts actively contested such attempts. During their trial Makoni and his colleagues consciously resisted the effort to depoliticize the case and to brand them as criminals or terrorists. On being asked what he had to say in his defence Makoni rejected the authority of the Rhodesian government to try him:

> I am surprised to learn that I am being charged with the crime of entering Rhodesia carrying arms when Rhodesia is in fact my own country. I am also surprised to find that I am facing trial in this court. When a person has fought with someone, it would not be expected that one of the parties in the fight will try the other. It is equally surprising to learn that I am being accused of having entered the country with arms without permission to do so. I do not know who is the true owner of this country?[394]

He went on to explain the political grievances that led him to take up arms against the Rhodesian government. However, Justice Lewis was keen to narrow the scope of the case and responded, 'Yes. Well you have made a political speech and you have had your say. Do you wish to deal with the merits of this case, that is to say do you wish to put forward any defence based on the fact that you didn't have the intention to endanger the maintenance of

[393] Feltoe, 'Law Ideology and Coercion', p. 52.

[394] Regina vs. Makoni *et al*. See also the defiant testimony of Nelson Mandela and his co-accused in the Rivonia Trial in Mandela, *Long Walk to Freedom* (London, 1995), p. 439. For the full transcript of Mandela's famous speech see Nelson R. Mandela, Statement to the court during the Rivonia Trial, April 20 1964, http://www.aluka.org/action/showMetadata?doi=10.5555/AL.SFF.DOCUMENT.rivon0001, accessed 10/6/2012.

law and order in this country?'[395] Feeling constrained by the judge's efforts to limit his testimony Muyambo addressed the Judge in frustration: 'I cannot understand your lordship's attitude. When we referred to politics why did you take it upon yourself to try political issues? This is purely a political dispute. You consented to try it why can't you listen to it?'

In his final statement to the court Makoni made a defiant assertion of the illegitimacy of the Rhodesian laws, the courts and the very state itself:

> My lord, I do not know if your lordship appreciates the words you addressed to us during the course of the trial and whether you abide by them. This is what I have got to remind you: You said this court has been constituted and it is independent of any governmental influence. The present Government is an unlawful Government, and yet if you are not depending on the laws which are promulgated from time to time by that unlawful government, why do you associate yourself with an unlawful entity and conduct the court with the law promulgated by an unlawful body.
>
> I am not accusing you in your personal capacity. I am accusing the Government of this oppressive law. This government knows fully well that it does not belong to Zimbabwe. This country shall ever be called Zimbabwe. If the Government is interested in calling this country Rhodesia, or if it is interested in the name Rhodesia, it should transfer the name Rhodesia to Holland and declare Holland to be Rhodesia.
>
> I know that your lordship is about to pronounce the death sentence upon me now. I still maintain that I have not been lawfully tried. Had I been tried in a country outside Rhodesia I should know for certain that it was a legal sentence. The judge and assessors are white people, the people who we came to fight, and they are the people that say they are lawfully trying me. I wonder where a black man is, why isn't a black man among the members of the court?
>
> I am going to tell you this High Court, Smith and his regulations and all his new laws that he has promulgated in this country – to hell with him, let him leave this country with them. That is all, my lord.[396]

What is clear from Makoni and his colleagues' statements in the court was that they were challenging not only repressive laws, but the way the law was made and administered in Rhodesia. Like many guerrillas, he dismissed the courts on the grounds that they were biased

[395] *Ibid.*
[396] *Ibid.* The use of the title 'Lord' appears frequently in the court transcript. However, it is inconsistent with the content of Makoni's testimony. It was most likely added during the process of translation or transcription.

and were playing a part in holding up the Smith regime. While judges emphasized a procedural conception of justice, they insisted on a substantive one. His final address to the courts also challenged the legitimacy of the existence of minority rule and racial dominance in Rhodesia. Makoni and his colleagues were ultimately sentenced to death and unsurprisingly, they did not appeal the conviction or sentencing.

The use of the dock as a platform from which to critique the Rhodesian government by Makoni and his colleagues was by no means unique. The *Zimbabwe News* and the *Zimbabwe Review* regularly carried articles which recounted the defiant testimony of guerrillas and took full advantage of their propaganda value.[397] Often these trials were held up as evidence of the oppressiveness of the Smith regime and the defiant testimonies of guerrillas were celebrated as examples of bravery. The reporting of these trials by nationalist newsletters had additional significance in that it was part of the effort to interpret these trials for their African readers as well as the international community. In March 1968 the *Zimbabwe News* carried an article entitled 'They Told it like it is' which celebrated the defiance of nine 'Chimurenga fighters' tried in the Salisbury High Court. The leader of the group, Comrade Mutangamberi, was reported to have said 'I came to fight. Even at this moment as I sit quietly, I am planning and scheming to kill.'[398] An article entitled 'Freedom Fighters in an Enemy Court' carried in the May 1968 issue similarly celebrated the menacing statements of defiance made by three guerrillas tried in the Bulawayo High Court.[399]

[397] For other accounts of courtroom defiance by guerrillas see Ian Smith's hostages: Political Prisoners in Rhodesia, *International Defence and Aid Fund Fact Paper*, Special Issue, October 1976, p. 5; Munochiveyi, "It was a Difficult Time in Zimbabwe", Chapter 3 and Mlambo, *Rhodesia*, pp. 206-7.
[398] *Zimbabwe News*, 16 March 1968.
[399] *Zimbabwe News*, 11 May 1968.

By the late 1960s it was clear that nationalists and guerrillas in Rhodesia no longer recognised the legitimacy of the legal system. The laws and the courts that administered them were dismissed as tools for the repression of Africans by an illegitimate settler government. If the capacity of the law to legitimise state power lay in its ability to instil a sense of awe, to give the impression that it was impartial and that it constrained the exercise of state power, then the by the late 1960s the law was no longer able to legitimise the Rhodesian state in the eyes of the nationalists and guerrillas. In the next section I consider the experiences of civilians in the Rhodesian courts.

Civilians in the Rhodesian Courts

The defiant rejection of the Rhodesian legal system by the nationalists and guerrillas discussed above was only one form of response by Africans to the repressive nature of the legal system during UDI. Civilian engagements with the government in the courts often took a different form.[400] Their experiences in the Rhodesian courts bring to the fore the repressiveness of the Smith regime, as well as the fact that these legal encounters were between unequally matched parties. The courts were part of what Taylor Sherman has described as wider 'coercive networks' or the chain of institutions and coercive practices that were geared towards maintaining settler rule.[401] The coercive function courts played in this larger network comes out very clearly in the experiences of civilians who were charged with political offences.

[400] I am using the word 'civilian' to refer to Africans who did not fall into the categories of senior nationalist leaders or guerrilla fighters.
[401] T. C. Sherman, 'Tensions of Colonial Punishment: Perspectives on Recent Development in the Study of Coercive Networks in Asia, Africa and the Caribbean', *History Compass*, 7 (2009), p. 669.

A distinctive feature of the 1970s was the increase in the number of civilians who were charged under the Law and Order (Maintenance) Act for offences punishable by lengthy imprisonment or death. As the guerrilla war intensified with the support of civilians living in the rural areas, the state responded by targeting them through amendments to the security legislation. This trend was confirmed in a letter by the law firm Winterton, Holmes and Hill in 1976 which observed that: 'An increase in the number of arrests [reported] by both ANC factions is apparent, from a monthly average of 60 to one of 207. A large proportion of these come from Tribal Trust Lands adjacent to the Operational Area and, in a few cases, it has been learned that subjects have been convicted and sentenced for failing to report the presence, and the feeding and harbouring of terrorists.'[402]

Some of the people charged in such cases were local party members or officials. However, a significant number were 'ordinary' villagers who found themselves caught between the guerrillas and government forces. These individuals often had neither the experience of engaging government officials in the courts that nationalist leaders had, nor the military and political training that guerrillas had. Arrest was usually followed by severe torture and it was not uncommon for people to die in police custody.[403] More often than not, civilians did not take the defiant approach of guerrillas discussed above. Instead, they sought legal representation and made efforts to defend themselves in the courts. Some of the common strategies they used included denying involvement or alleging coercion.[404] As Munyaradzi Munochiveyi shows, many civilians endured the detention and torture at the hands of security agents and exercised agency in the face of prosecution. Among other things, they feigned

[402] NAZ MS591/2/4, Legal Sheridan, Winterton, Holmes and Hill to Bernard Sheridan and Company, 6 May 1976.
[403] Munochiveyi, "It was a difficult time in Rhodesia", pp. 105-139.
[404] See NAZ MS589/7/3, Kurehwandada Muzheri vs The State.

ignorance and colluded in order to give conflicting evidence that would jeopardise the state's case.[405]

Notwithstanding this agency, by the 1970s it was becoming increasingly difficult to use the law as a shield against persecution by the government. A number of cases from different areas in Rhodesia illustrate the strategies used by state officials to undermine the effectiveness of the law as a means of resistance. In Buhera Austin Mhizha and Sebbedia Masomera had been called as state witnesses in the trial of another African charged under the Law and Order (Maintenance) Act.[406] Much to the disappointment of the prosecutor, the two recanted their sworn statements resulting in the collapse of the state's case. After the trial the prosecutor decided to bring charges against the two for making conflicting statements under oath.

A similar problem befell the state in the prosecution of Reverend Kadenge, a United Methodist Church minister who was based in Headlands. The clergyman was charged with encouraging youth to go to Mozambique to train as guerrillas during church services and meetings. The trial of Kadenge, who was represented by Bryant Elliot of Scanlen and Holderness, was scheduled to go on for three days and the prosecution had indicated that it would call twelve witnesses, all of whom were young members of Kadenge's congregation. This was not to be. In a letter to Bernard Sheridan and Company, the London law firm that administered the IDAF funding, Elliot reported that:

[405] Munochiveyi, "It was a difficult time in Rhodesia", p. 136.
[406] NAZ MS591/2/4, Legal Sheridan, Scanlen and Holderness to Bernard Sheridan and Company, 19 January 1976.

> The first four prosecution witnesses were completely unco-operative to the State and the prosecutor was forced, on each occasion, to put to them the conflicting statements which they were alleged to have made to the Police. Each witness stated that what they had told the Police was false and that they were induced to make these statements because the Police had assaulted them. By putting their conflicting statements to them, the Prosecutor, in effect, negated the evidence of the witnesses. During the lunch adjournment, the Prosecutor spoke to the remaining civilian witnesses who obviously stated that they would also be unco-operative. This resulted in the charge against our client being withdrawn.[407]

However, the collapse of the state's case did not guarantee the defendant's freedom. Often they were immediately re-arrested and detained under the Emergency Powers (Maintenance of Law and Order) Regulations. Section 23 of these regulations allowed the police to detain a person without warrant for 30 days and then for another 30 days if they felt there were grounds for continued detention. In Kadenge's case, he was taken back to the Rusape police who subsequently informed Elliot that they were applying for a Ministerial Order for his detention.

Such trials were evidently not about proving guilt. They served as instruments by which the Rhodesian government sought to persecute its perceived enemies and their supporters. As such, when evidence or legal procedure stood in its way, the government resorted to other means. A similar fate befell Jeremiah Masiyane who was due to stand trial at the Bulawayo Regional Magistrate's court charged with 'recruiting for the terrorist cause'.[408] Upon discovering that he had been tortured into admitting the offence, his law firm, Lazarus and Sarif, informed the prosecutor of their intentions to challenge the admissibility of Masiyane's statement. The prosecution decided to withdraw the charges before the case came to trial. However, Masiyane was subsequently detained under the Emergency Powers Act and confined to Whawha Prison.

[407] *Ibid*, B. Elliot to Bernard Sheridan and Company, 3 March 1976.
[408] *Ibid*, Lazarus and Sarif to Bernard Sheridan and Company, 19 September 1975.

In a case from Belingwe district, Chipachiyi Chinyerere was charged under the African Affairs Act with convening an African National Council meeting of more than 200 people without giving the necessary formal notice to the police. In his defence Chinyerere argued that the numbers had swelled as a result of uninvited people who had attended. Reluctant to let him off, the magistrate decided to convict him for an 'offence' he had not been charged with. Commenting on the ruling, Chinyerere's lawyers noted that:

> The Magistrate's reasons for judgement are in our opinion somewhat strange as he stated that in his opinion the accused had not committed any offence when he failed to give the notice but committed an offence when he failed to ensure that the uninvited persons were not allowed to attend the meeting. We say that we find this strange because the accused was charged with failing to give notice and not with the offence of failing to control the meeting which is dealt with separately in the regulations.[409]

In a move designed to check his political activities, the magistrate postponed Chinyerere's sentencing for five years on condition that he was not convicted of any offence laid down in the first part of the Law and Order (Maintenance) Act.

The experience of Albert Ndambe and Sizwe Sibanda, two local ANC leaders in Matabeleland West, was similar to that of Chinyerere and Kadenge in terms of the procedural discrepancies and the subsequent detention. The two were charged and pleaded guilty to addressing an ANC meeting. The magistrate sentenced Ndambe to a fine of R$100-00 or two months in prison, and Sibanda received a sentence of R$50-00 or one month in prison.[410] However, when the law firm Lazarus and Sarif became involved it emerged that Ndambe had been arrested on the basis of a warrant which had already been cancelled by the magistrate.

[409] *Ibid*, Winterton, Holmes and Hill to Bernard Sheridan and Company, 30 January 1976.
[410] *Ibid*, Lazarus and Sarif to Bernard Sheridan and Company, 3 November 1975.

Before legal action could be taken to challenge the conviction, Ndambe was arrested by the Special Branch, detained, and an '*incommunicado* order' was issued against him.[411]

Despite their limited success in the courts, 'ordinary' Africans continued to seek legal representation or sought the assistance of organisations like the Catholic Commission for Justice and Peace (CCJP), Christian Aid and the Interdenominational Legal Information Centre (ILIC) in securing legal representation. This trend continued even during the martial law period in the late 1970s. In his March 1979 report to the team coordinating the finances for legal defences in London, Joshua Shumba, the ILIC secretary, wrote:

> I am sorry that I have not been able to send you the weekly reports from 15th January. The truth is that this has occurred owing to circumstances completely beyond my control. The period from December to now has been one of my busiest occasions since I joined the Legal Information Office. I have been, and I am still getting clients almost every ten minutes. They knock at my door one after another and most of the cases they bring are such that one has to listen and sympathise.[412]

This trend begs the question as to why Africans continued to seek legal recourse at a time when the courts had been so blatantly restructured to serve the repressive interests of the state. In addition, did this appeal to the courts legitimise the legal system as Stephen Ellman argues in the case of South Africa during the apartheid period?[413]

Civilians' appeals to the courts were influenced by different reasons. Part of the explanation lies in the difficult experiences of being in Rhodesian custody alluded to above, which made people more inclined to do whatever they could to secure their release. At the same time, the assistance offered by organisations such as the CCJP, ILIC and IDAF made legal services

[411] *Incommunicado* orders forbade detainees from communicating with anyone including their lawyers.
[412] NAZ MS587/4, J. J. Shumba to Roy, 5 March 1979.
[413] S. Ellman, 'Law and Legitimacy in South Africa', *Law and Social Inquiry*, 20 (1995).

more accessible to Africans regardless of class. Once a relation was known or suspected to have been arrested or detained, approaching a lawyer or these organisations were amongst the few options available for civilians. In addition, the decision to seek legal recourse was driven by the imaginary of rights-bearing citizenship and the attendant ideas regarding the limits of state power. Approaching a lawyer was also tied to the prestige that lawyers had come to assume as people equipped to engage the state in the courts. As I show in chapter five, lawyers like S. K. M. Sibanda went above and beyond the call of duty in their efforts to defend their clients. Such legal action did not necessarily legitimise the Rhodesian legal system. This was partly because in the course of the 1970s it became increasingly difficult to succeed in the courts. More importantly, the Rhodesian state was beyond legitimation in the minds of the vast majority of Africans.

An important development from the mid-1970s was the increasing involvement of the military in the administration of 'justice'. As the guerrilla war intensified, large portions of the country were placed under martial law and this was accompanied by the establishment of Special Courts Martial which heard cases involving people charged under security legislation. Martial law led to a marked deterioration of procedural standards in the administration of the law. What made this particularly troubling was that these courts were empowered to hand down the death sentence. These courts operated on the assumption that the accused was guilty until proven innocent and therefore torture was a routine experience for accused individuals. In cases where lawyers were able to locate their clients before trial, they were often forbidden from seeing them, because legal representation was at the discretion of the President of the court. Defendants could also be denied the opportunity to call witnesses to speak in their defence. Unlike the Special Court hearings where an audience was a central part of their operations, Special Courts Martial hearings were held behind closed doors. This

secrecy in their operations reinforced the low procedural standards observed by these courts. Individuals who were tried by these military courts did not have the right to file an appeal in civilian courts. Instead, their appeals were heard by another body that fell under the military; a Reviewing Authority which was set up under the Emergency Powers (Special Courts Martial: Martial Law) Regulations of 1978.[414]

In May 1979, Joshua Shumba, the secretary for the ILIC painted a depressing picture of the situation in the areas under martial law in Matabeleland:

> There are a lot of people who are presently held under the martial law regulations as you can see from the above report. Our lawyers are very helpful in this regard because they are at least able to establish the whereabouts of most of the clients, although it is very difficult for them to represent our clients legally.
>
> In the Nkai District alone it is reported that over a 100 people are being held at a large detention centre. Some of them are tried through the courts martial and others are released and yet others are sent to other detention centres in the country. We have no knowledge of what happens in other martial law areas but would imagine that the picture is very much the same.[415]

Shumba's report went on to explain the implications of this militarisation of 'justice' for civilians:

> Whether or not an accused person can be represented legally depends entirely on the decision of the President of the courts martial who is not necessarily a man trained in law.
>
> The reason for this is that legal representation would bog down proceedings on matters of procedure, evidence and perhaps mere technicalities. I do not think that the courts martial as presently set up are necessarily conducive to a better administration of justice, in fact it is my view that they merely serve as a mechanism for military justice on a civilian population. I have a feeling that martial law was introduced to enable the security forces to do or commit any act which they consider necessary to stamp out terrorism. The security forces can arrest and detain people for as long as they wish, impound their cattle, confiscate their assets without having to give an account to anybody, beat up the local people and raze their huts to the ground without any possible recourse against

[414] NAZ MS587/4, Untitled, The Acting President of Rhodesia, The Director of Prisons, The Commander Combined Operations vs John Antony Deary.
[415] NAZ MS587/4, J. J. Shumba to Roy, 3 May 1979.

> them. It is a rather hopeless situation from my point of view and in defence of that it is argued that the only way to defeat terrorism militarily is by engaging in tactics of that nature.

Prior to the declaration of martial law in the late 1970s there was the possibility that High Court judges might be outraged by the excesses of the army. However, as the military took charge of both the security functions and the administration of justice, there was very little to check its actions. This impunity was reinforced by the fact that the Indemnity and Compensation Act protected state officials from legal action in a wide range of circumstances. Shumba thus concluded his report on a sombre note: 'My very grave concern is that a situation has been reached where sometimes innocent tribesmen lose their property or are incarcerated in prison without any remedy available in law.'

A personal account by an unnamed woman of her experiences in a Special Court Martial which was published by the IDAF magazine *Focus,* gives valuable insight into the operation of these courts. The accused woman and her husband owned a shop in the rural areas and came under suspicion of assisting the guerrillas. Her husband was forced to flee their home for some time after receiving threats from the police. In February 1979 she was detained under Martial law and accused of feeding 'freedom fighters' and failing to report their presence. After three weeks in detention she was moved to a police station in a nearby town where she was to be tried. Not only was she tortured so as to extract an incriminating statement, but so were her employees who the state intended to call as witnesses. In addition, the bench was composed mostly of soldiers and farmers who did not have any legal training. Given that they were the groups within settler society that were most vulnerable to guerrilla attacks, they were least likely to accord a fair trial to individuals accused of being associated with the guerrilla war. Her account of her experiences in the period leading up to and during her trial is worth rendering in some detail:

> In the town I was kept in a cell to myself in the police station, still under martial law. There were no windows. I was given food through a tiny window. Each morning I was forced to repeat a statement in which I admitted all the charges. They told me if I should deny they would kill me straight away. Every morning I was reciting the statement. The black police hit me. I could see the security forces beating others. My husband was not allowed to see me. I was not allowed to speak to anybody. I was not allowed to speak to any lawyer.[416]

After a month in custody she was informed that she would soon face trial and that five of the state's eight witnesses would be her employees. The trial itself was held in the DC's office and was conducted *in camera*:

> There were security force officers on the bench, including four white farmers. They were wearing uniform. A defence lawyer came into the room but was told to go out. I saw him but we never talked. The president and the other members of the court martial were sitting on a bench with a table in front of them. I was with a policeman and the Member-in-Charge. I was not feeling well so I was told to sit down. My husband was allowed to come in but was not allowed to say anything.
>
> The Member-in-Charge presented the case against me. I was accused of aiding freedom fighters. I was accused of failing to report their presence and that I was able to move freely in the area whereas the security forces could not. The witnesses where brought in one at a time. All witnesses declared that they were forced to allege that I was feeding and failing to report the presence of the freedom fighters. They claimed my innocence. The people on the bench just sat listening. The court went on all day from 9 am to 12.30 pm and from 2 to 4 pm. The Member-in-Charge tried to persuade the witnesses to accuse me. But it was all in vain. All the witnesses claimed that they were told that I would be gaoled for life and also that my husband would be detained and there would be no one to revenge on behalf of us.
>
> Afterwards the members on the bench went into a private room to discuss. I was able to ask the witnesses questions, but the bench did not ask me any questions. The witnesses said they had been beaten up. The bench were blaming the Member-in-Charge and police because it was clear that the witnesses had been forced to make statements. The Member-in-Charge said it was not his fault because two other policemen had brought the case forward from the detention centre, and he had not been involved in preparing the statements. Eventually I was dismissed and told to go back. I was allowed to join my husband and go back home.

The witnesses who bravely attested to her innocence despite having been tortured, were crucial in securing her freedom. This was not to be the end of the matter. She and her

[416] NAZ MS591/4, Political Prisoners Box, *Focus: IDAF Magazine*, 'A Personal Account by a Defendant in a Special Court Martial', 24 September – October, 1979.

husband were later visited at their shop by soldier who told her: 'We can shoot you and we can do what we want', and proceeded to loot the shop. In the end they closed their shop and left the area. Despite her harrowing experience, she was amongst the fortunate ones. Others defendants were tortured into signing admission statements, their torturers were called as witnesses for the prosecution and in the end they were sentenced to death.[417]

Owing to such travesties of justice the CCJP decided to intervene. They secured the services of the law firm Scanlen and Holderness and applied to the High Court for a ruling quashing the decision by the Executive Council that petitions made by people sentenced to death 'be forwarded to the Commander, Combined Operations, for consideration by the Review Authority established pursuant to the proclamation of martial law whose decision will be final.'[418] The High Court found in their favour and ruled that according to Section 60 of the 1969 Constitution, which provided for the exercise of the prerogative of mercy, the President had to have the opportunity to 'address his mind' to the petitions.[419] The CCJP's victory was short lived as the government appealed the ruling, arguing that the President had the powers to delegate the prerogative of mercy to the Review Authority. The ruling handed down by Chief Justice Macdonald on the 13th of June 1979 read:

> '…in my view there can be no doubt that the Acting president acting on the advice of the Executive Council was entitled to exercise his prerogative of mercy in the manner set out in the letter of the 15th March, 1979 in the same way as the monarch in Britain delegates the exercise of that power to the Home Secretary. Just as the Home Secretary is not obliged to refer the refusal of the petition to the monarchy for even formal ratification, so too the review authority is not obliged to do so.'[420]

[417] See NAZ MS587/4 Untitled, for examples of such cases.
[418] *Ibid*, The Acting President of Rhodesia, The Director of Prisons, The Commander-Combined Operations vs John Antony Deary
[419] Interview with Bryant Elliot, Harare, 4 April 2011.
[420] NAZ MS587/4, The Acting President of Rhodesia, The Director of Prisons, The Commander-Combined Operations vs John Antony Deary.

The two other Appellate Division judges, Justices Lewis and Davies, concurred with this ruling. At least two things were significant about this ruling. The first was that the judges, who had formerly been scrupulous about legal procedure, had effectively endorsed the rough justice of the army. Secondly, the decision removed the legal obstacle to continued executions and within days of the ruling the CCJP was unpleasantly surprised to hear that the government was moving ahead with executions.[421]

The CCJP then resorted to appealing directly to Abel Muzorewa, who was the Prime Minister under the Internal Settlement, to allow civilians arrested in martial law areas legal representation and that they be tried in civilian courts, given the severity of the sentences being handed down by the Special Courts Martial.[422] As an alternative, they requested that all who were convicted by Special Courts Martial be at least allowed to present their petitions of mercy to the President. The response from George Smith, the Secretary to the Cabinet, was uncompromising:

> It is regretted that the present situation in the country necessitates the establishment of martial law courts in martial law areas. As soon as the situation improves sufficiently to permit the abolition of such courts, this will be done. In the meantime, however, it is necessary to continue with them and in the circumstances in which they operate. The position regarding legal representation cannot be changed. The question of legal representation was considered very carefully at the time when the present policy was agreed.[423]

On the question of the petitions of mercy he pointed out that: 'At this point cabinet is not prepared to consider allowing all persons convicted by special courts martial to present their petitions for mercy to the president.'

[421] *Ibid*, Telegram from CCJP to the Prime Minister, Abel Muzorewa 24 June 1979.
[422] NAZ MS590/15, Political Trials, Scanlen and Holderness to Prime Minister, 3 August 1979.
[423] *Ibid*, G. Smith to Scanlen and Holderness, 30 August 1979.

Conclusion

An important development in the UDI period was the increasingly authoritarian nature of the law. The Rhodesian Front's administration of the law was characterised by the employment of the 'state of exception', which saw the expansion of executive power and the increasing extension of military authority over civilians. However, this did not constitute a total suspension of the judicial order, as the government continued to observe a degree of legalism. What was happening was a shift in the function of law away from legitimation towards coercion. This uneasy combination of the state of exception and legalism produced a situation where the application repressive laws operated hand in hand with numerous instances of covert illegality committed by government officials. In addition, under martial law the judiciary became complicit in undermining of the most basic aspects of due process.

Africans responded to these changes in different ways. For nationalist and guerrillas, the law, the courts and the Rhodesian state were condemned as illegitimate. They made this clear in critiques that were articulated in nationalist newsletters and in the courts. These critiques drew on alternative ideas about the law and justice and unmasked the repression beneath the legalism of the Rhodesian government. The civilians who were brought before the courts exercised agency. However, their chosen mode of agency was not to use the dock to declaim, as the guerrillas had. Instead, they sought legal counsel and 'tested the remedial value' of the courts. Notwithstanding this, in the course of the 1970s it became difficult to use the courts as a shield against persecution by the government. This was especially the case as the martial law was declared in more and more parts of the country during the late 1970s. The use of torture became routine, the right to legal representation was disregarded and the courts were

overtly biased against defendants in political cases. In the few occasions that Africans won their cases, this was often followed by detention or illegal forms of coercion by state agents.

CHAPTER V

Intermediaries, Intellectuals and Translators: African Lawyers and the Struggles in the Legal Arena, 1950-1980

Introduction

In examining legal struggles between Africans and the state officials, previous chapters have highlighted the point that these legal encounters reflected emergent political imaginaries and shifting ideas of personhood and alternative visions of the colonial social order. I have argued that these were connected to long term social, economic and political changes that African communities experienced during the colonial period. In this chapter I develop this argument by focusing on the role played by African lawyers as intermediaries and 'translators' in the legal struggles between Africans and the colonial authorities. African lawyers are also revealing because their entry into the legal profession came after difficult struggles against the government and the legal fraternity's efforts to exclude them. The battle over African entry and survival in the profession constituted an important front in the struggle over the distribution of the symbolic capital of the legal profession. African lawyers were important in another respect. They acted as intellectuals who formulated and articulated critiques of the law. In examining the contributions of these lawyers, I am primarily interested in their roles as legal professionals *viz* the ways they applied their legal training in

the struggles between Africans and the colonial state both inside and outside the courtroom.[424]

With the exception of a few studies on South Africa, the study of African lawyers in countries following the common law tradition has largely been focused on West Africa.[425] Omoniyi Adewoye's work on Nigeria, for example, looks at the origins and growth of the legal profession between 1865 and 1962. He maintains that the African lawyers formed a 'fearless bar' which 'constituted a threat to the prestige of the colonial rulers'.[426] Chidi Oguamanam and Wesley Pue have similarly argued that lawyers in Nigeria played an important role in challenging colonial rule as they 'challenged arbitrary power, asserted local values, played to, but also promoted Nigeria's incipient "public"'.[427] In his work on African lawyers in Ghanaian politics between 1900 and 1945, Bjorn Edsman is, however, less inclined to see their challenges to colonial authority as stemming from an alternative vision of the Ghanaian social and political order. He argues that their 'opposition to the British did not signify opposition to the social order represented by alien rule, but signified resentment at being denied full recognition within it'.[428] Broadening the focus to the cultural agency of lawyers, Richard Rathbone has highlighted the role of lawyers in the Gold Coast in

[424] I am less interested in their roles as politicians as this is an aspect that has already been accorded significant attention in the literature. See, for example, L. White, *The Assassination of Herbert Chitepo: Texts and Politics in Zimbabwe* (Bloomington, 2003); W. Z. Sadomba, *War Veterans in Zimbabwe's Revolution: Challenging Neo-colonialism and Settler International Capital* (Suffolk, 2011), pp. 9-19 and D. Martin and Phyllis Johnson, *The Chitepo Assassination* (Harare 1985).
[425] For studies which discuss black lawyers in South Africa see K. Broun, *Black Lawyers, White Courts: The Soul of South African Law* (Athens, 2000) and A. Sachs, *Justice in South Africa* (London, 1973).
[426] A. Adewoye, *The Legal Profession in Nigeria, 1865-1962* (Nigeria, 1977).
[427] C. Oguamanam, and W. Wesley Pue, 'Lawyers, Colonialism, State Formation and National Life in Nigeria, 1900-1960: "the fighting brigade of the people"', *Social Identities: Journal for the Study of Race, Nation and Culture,* 13 (2006).
[428] B. Edsman, 'Lawyers in Gold Coasts Politics, c. 1900 – 1945' (Ph.D. Dissertation, University of Uppsala, 1979), p. 250.

contributing to the acceptance of English law amongst the coastal trading elite.[429] For his part, Mitra Sharafi views indigenous lawyers in Ghana as 'cultural translators and ethnographic intermediaries' who produced ethnographic studies of the legal systems of local communities and aided the imposition of colonial rule.[430]

These studies provide useful insights into the contributions of African lawyers. However, the story they tell differs in several respects to the experiences of their counterparts in British colonies outside West Africa, especially those in settler colonies such as Southern Rhodesia. In the first instance, the development of a legal profession composed largely of Africans who used their legal training to acquire wealth, power and influence and at times engaged in 'bargains of collaboration' with colonial authorities does not resemble the experience of British colonies in East and Southern Africa. In Southern Rhodesia, for example, Africans were actively excluded from the profession and only joined it from 1953, in the context of rising nationalism and demands for the transfer of power. Their roles and their self-image as lawyers were substantially shaped by this political context. Up to the attainment of independence these lawyers stood on the margins of a profession dominated by European lawyers. In addition, Sharafi's view of indigenous lawyers as 'cultural translators' and 'ethnographic intermediaries' largely applies to colonies where indigenous lawyers emerged before or around the time of colonial occupation. What is more, because of the specific historical experiences of Gold Coast and Nigeria, the aspect of race is not significant. In contrast, race was a central factor which shaped the experiences of African lawyers in East and Southern Africa.

[429] R. Rathbone, 'Law, Lawyers and Politics in Ghana', in D. Engels and S. Marks (eds), *Contesting Colonial Hegemony: State and Society in Africa and India* (London, 1994).
[430] M. Sharafi 'A New History of Colonial Lawyering: Likhovsky and Legal Identities in the British Empire', *Law and Social Inquiry*, 32 (2007).

In this chapter I contribute to the study of African lawyers in three main ways. Firstly, I shift the focus onto African lawyers in Southern Rhodesia, a settler colony where the profession was dominated by European lawyers and where Africans had to struggle to enter and survive in the profession. Secondly, I take the notion of indigenous lawyers as translators in a different direction to that of Sharafi. I view them as cross-cultural brokers who were constantly involved in a two-way translation. This involved translating the concepts of western law to their African clients and translating their clients' grievances into the language of the law. This process of translation in turn acted as a catalyst in the reshaping of subjectivities and enabled their expression in the legal arena.[431] Lastly I explore their role as intellectuals who articulated critiques of the law and the political situation in Rhodesia. The chapter is divided into 4 sections. I begin by examining the struggles Africans faced in their effort to become lawyers. In the second section I examine their role as cultural translators, while the third section examines their role as legal intermediaries in cases that were related to the nationalist struggle. In the last section I explore the contributions that they made outside the courtroom.

Becoming a Lawyer

As we have seen in chapter one and two, administrative officials in Southern Rhodesia had long been opposed to Africans having access to lawyers as it was felt that this would lead to unacceptable interference with their efforts to administer their areas. It was not surprising therefore that they would be opposed to Africans becoming lawyers. On this matter they were not alone. Owing to racial prejudice and a desire to control the supply of legal services,

[431] See S. E. Merry, 'Transnational Human Rights and Local Activism: Mapping the Middle', *American Anthropologist*, 108 (2006), pp. 38-51.

the legal fraternity was also opposed to the idea of Africans joining the profession. In addition, given the symbolic as well as instrumental role of the law in colonial rule, senior government officials were concerned that Africans who became 'authorised interpreters' of the law would undermine the authority of state officials and might gravitate towards politics. The government and European-owned law firms thus joined forces in their efforts to restrict entry into the profession on the grounds of race and gender.[432] As a result, while members of the indigenous population in West African British colonies like Ghana and Nigeria had entered the profession around the late 19th century, it was only in 1953 – over half a century later – that the first African, Herbert Chitepo, joined the Southern Rhodesian legal profession.[433] By 1960 there were three African lawyers in Southern Rhodesia compared to approximately 540 African lawyers in Nigeria.[434] By 1978 the situation in Rhodesia had improved marginally. Of the 175 attorneys and 40 articled clerks in Rhodesia, five attorneys and seven clerks were Africans, and only seven of the 56 advocates were Africans.[435]

The exclusion of Africans from the legal profession in Southern Rhodesia was made easier by the existence of a large settler population as the state could feasibly restrict the membership of the legal profession to members of the settler population. As in East Africa, this fear of African lawyers found expression in the area of scholarship provision.[436] While the government provided some scholarships for Africans to pursue university studies related to the teaching or the medical profession, there was no such provision for the study of law. As a result, Simbi Mubako, who became the first Minister of Justice after independence, struggled to get funding in order to study law and ultimately got funding through the Roman Catholic

[432]Interview with Bryant Elliot, Harare, 4 April 2011.
[433] E. Mlambo, *Rhodesia: Struggle For a Birthright* (London, 1972), p. 305.
[434] It is worth pointing out that despite the higher number of lawyers in Nigeria, their activities were tightly circumscribed up until the reforms of the 1930s. See Adewoye, *The Legal Profession*, p. 179.
[435] NAZ RG4, Committee of Enquiry into the Legal Profession, Provisional Report, April 1978. This figure excludes those African lawyers who were practising or studying outside the country.
[436] S. D. Ross, 'Rule of Law and Lawyers in Kenya', *Journal of Modern African Studies*, 30 (1992), p. 422.

Church.[437] Africans who overcame the challenges of acquiring the necessary financial resources and educational qualifications to pursue a legal career, were soon confronted with the reality that law firms were generally unwilling to take them on as articled clerks.

The circumstances which led the members of the first generation of African lawyers into a legal career were diverse. However, a common factor underlying their motives was an understanding of the instrumental and symbolic power of the law and a desire to gain possession of the symbolic capital that came with being a lawyer. Many hoped that legal expertise would be an avenue for personal advancement as well as a means of aiding other Africans in their everyday struggles under settler rule. Godfrey Chidyausiku, for example, was inspired by Herbert Chitepo's use of the law to defend the interests of Africans:

> In fact my mentor really was Chitepo. He had such a reputation as a good lawyer and when I was in primary school I always admired what he did and especially that he used his legal knowledge in order to advance the interests of his fellow blacks. That was one thing that really inspired me.[438]

Honour Mkushi's motivations were linked to defending the rights of Africans living under settler rule as well as more personal concerns around masculinity. He explained:

> …my father had schooled me into believing the law profession was the right profession for a man, and it was the sort of profession he thought would equip me to go into the world and fight for myself… I know very well that he pounded that into my mind and I never really let go and thank God up to now I don't think I could have done any other profession.[439]

As Jocelyn Alexander's work on political prisoners' memoirs shows, this concern with defending a threatened masculinity was something which Mkushi and his father shared with a host of nationalists who were held in Rhodesian detention camps.[440] That the idea of

[437] Interview with S. Mubako, Harare, 26 April 2011.
[438] Interview with Godfrey Chidyausiku, Harare, 14 March 2011.
[439] Interview with Honour Mkushi, Harare, 23 March 2011.
[440] J. Alexander, 'Political Prisoner's Memoirs in Zimbabwe: Narratives of Self and Nation', *Cultural and Social History*, 5 (2008), pp. 398-403.

pursuing a career in law could be encouraged at an early age reflected the social class of his family. His father was a trained teacher and was therefore part of the African middle class. After working as a teacher for a few years, he resigned and went into business in Gutu district. Consequently, Honour Mkushi had received a good education and could realistically aspire to a career as a lawyer from an early age. Significantly, he spoke of his legal career almost as a vocation and much of his narrative revealed how being a lawyer was an important aspect of his identity.

Chitepo's path into the Southern Rhodesian legal profession, like that of the African lawyers who came after him, was a difficult one. He completed a Bachelor of Arts degree at Fort Hare University in South Africa specialising in History and English in 1949. After this he left for London where he took up a job as a teaching assistant at the School of Oriental and African Studies.[441] During his time in London, Chitepo studied law and was ultimately called to the Bar in Middle Temple in 1953. Having completed his studies, Chitepo made plans to return to Southern Rhodesia to pursue a career in law. Anticipating problems in joining the legal profession, he wrote to the Chairman of the Bar Association of England, Sir Hartley Shawcross, requesting his assistance.[442]

A central question for officials in London and Salisbury was whether Chitepo should join the profession as an advocate or an attorney. The consensus that emerged amongst officials in London and Salisbury was that Chitepo should be discouraged from trying to practice as an advocate. The three main reasons cited for this position were all related to Chitepo's race. These were enumerated by the Southern Rhodesian Attorney General, V. L. Robinson, in his

[441] Mlambo, *Rhodesia*, p. 305.
[442] BNA DO35/7715, Sir Hartley Shawcross to Sir Kenneth Roberts-Wray, Colonial Office, 26 June 1953.

correspondence with Sir Hartley.[443] The first had to do with the fact that Chitepo was unlikely to take up offices in the Salisbury Advocates' Chambers as the lessor would most probably be unwilling to lease an office to an African. The problem of where Chitepo would conduct business was further complicated by the stipulations of Section 41 of the Land Apportionment Act which restricted Africans from owning or leasing land in areas designated as European areas. Lastly, Robinson pointed out that the 'great majority of the cases where counsel are [sic] briefed are cases in which the client is a European, and however willing attorneys might be to brief Chitepo, they might find themselves in difficulties with their clients because I doubt whether public opinion has advanced sufficiently in the colony for Europeans engaged in litigation to accept an African as their counsel.'[444]

While Chitepo had been willing to consider this advice, he found law firms in Southern Rhodesia unwilling to take him on as an articled clerk. Chitepo expressed his frustration at this state of affairs in a letter to a friend in London:

> When I arrived here, knowing that everyone wished me to be a solicitor I approached the matter with an open mind. I listened to all the arguments and they are pretty strong. But when I suggested being articled, practically everyone of the larger, and presumably more liberal firms, found an excuse for not taking me. Holderness has not actually said no, but he is hesitating, and I know that several Africans have made application to him for Articles. Sir Ernest Guest's reply was a clear negative, and so was the indication of Mr. Honey. It seems unreasonable, therefore, that anyone should continue to talk of my going to the side bar, when no firm has so far been found willing to take me into Articles. I can only presume that someone is playing a dirty game. Sir Robert Tredgold was one of the people who recommended it, but when I told him I could find no firm willing to take me he said "that ends the matter." The Bishop of S. Rhodesia, the Rt. Rev. Edward Paget, was present with me and knows that I have not turned down any offer to serve articles. Quite the contrary, I have applied and been turned down. The usual argument against it is that they have no space, or they are doubtful what the

[443] *Ibid*, Attorney General Southern Rhodesia, V. L. Robinson to Sir Hartley, 31 July 1953.
[444] *Ibid*.

> reaction of their white clients will be to a black clerk. What will be my relation to the white typists, etc. etc.[445]

Chitepo eventually joined the Bar as an advocate. The Land Apportionment Act was amended to enable him to take up chambers in Salisbury and he began to provide legal services to a predominantly African clientele.[446] However, in 1962 Chitepo voted with his feet and left for newly-independent Tanzania where he became the Director of Public Prosecutions.[447] Two other Africans, Walter Kamba and John Shonhiwa, joined the legal profession in the 1950s but also left the country after a few years later. Shonhiwa had trained as a barrister in London and joined Gill, Godlonton and Gerrans in 1959 where he faced discrimination in areas such as the use of toilets and crockery.[448] Shonhiwa left the firm before completing his articles to take up a seat on the bench in newly independent Zambia. Kamba had studied law at the University of Cape Town before being articled by Scanlen and Holderness. However, by the mid-1960s he too had left the country.[449] This was to be the path of the few Africans who tried to enter the legal profession in the 1960s. As a result, by the late 1960s there was not one African lawyer practising in the country.[450]

With the launching of a law degree at the University College of Rhodesia and Nyasaland in 1965 a new wave of African lawyers began to seek entry into the profession and, like Chitepo, they found the doors closed. The challenges for this new wave of lawyers began in university where they were faced with hostile lecturers and the reality that their employment

[445] Cited in BNA DO35/7715, Laurens Van der Post to Under Secretary of State, John Foster, 1 June 1954.
[446] BNA DO35/7715, E. Lucas to Mr Aspin, 24 August 1954.
[447] Mlambo, *Rhodesia,* p. 305.
[448] Interview with K. Reagan, Harare, 13 April 2011. M. E. Currie, *The History of Gill, Godlonton and Gerrans, 1912-1980* (Harare, 1982), p. 39.
[449] Interview with S. Chihambakwe, Harare, 16 March 2011. My research suggests that Kamba left Scanlen and Holderness under a cloud after an incident involving the misappropriation of clients' funds.
[450] For an account of the experiences of black lawyers in South Africa see Sachs, *Justice in South Africa,* pp. 209-229; N. Mandela, *Long Walk to Freedom* (London, 1995), p. 140, Broun, *Black Lawyers, White Courts* M. Chanock, 'The Lawyer's Self: Sketches on Establishing a Professional Identity in South Africa, 1900-1925', *Law in Context Special Issue*, 16 (1999) and.

prospects were bleak. Godfrey Chidyausiku recalled that 'the first day I went to the university I was told … "you are on a wrong course, law is not advisable for blacks because when you finish you will not get a job." And indeed that very first year when I went to university the first two black graduates from law school were roaming the streets without a job and eventually they had to leave the country to get a job in Malawi.'[451] After graduating, Mkushi was more fortunate than most of his colleagues in that, while he struggled for several months to get a job in a law firm, he ultimately got the first opening that arose for an African articled clerk in the 1970s. The law firm, Winterton, Holmes and Hill appears to have required an African clerk in order to take advantage of the demand for legal services amongst Africans. Mkushi recalled:

> After my law degree it was very difficult to get anything in the line of the profession and I got a job as an assistant in the Ministry of Finance purely from a personal contact just to … get something to do…. I worked for the ministry of Finance for 7 months then there was an opening for a black articled clerk in a law firm. There was none at the moment at that time. I remember very well virtually everybody who had a law degree, we lined up for that particular opening and the opening was at a firm called Winterton, Holmes and Hill…I recall very well the likes of Dr Edison Sithole, Godfrey Chidyausiku, George Chinengundu, Sylvester Maruza and other students who had gone to the university. We lined up for that place and I was lucky to be picked up for serving articles.[452]

A few others would follow Mkushi's path of entering the legal profession as an articled clerk. These included Simplisius Chihambakwe who joined Gill, Godlonton and Gerrans, Sidney Mafara who was articled by Gallop and Blank, as well as Patrick Chinamasa who joined Honey and Blackenberg.[453]

The experience most African lawyers faced was one of constant rejection by law firms and the only path that was open to them was to join the Rhodesian bar as advocates. However,

[451] Interview with Chidyausiku and interview with S. Chihambakwe, Harare, 15 March 2009.
[452] Interview with Mkushi.
[453] Interview with Chihambakwe, 15 March 2009.

the irony was that after all its efforts to prevent Africans from entering the legal profession for fear they would engage in politics, the government ended up paying these lawyers to represent other Africans on trial for political charges related to the liberation struggle. SKM Sibanda, who had studied law at the University of Natal, returned to Rhodesia in 1970 to pursue his career. Like many other African law graduates he was unable to find a placement:

> I got a list of all the law firms in the country and applied. All refused to accept me. All of them, they would not have me as an articled clerk. What was left for me was to join the bar. Joining the bar meant I had to do what was then called a pupillage. Pupillage meant also studying under an advocate as a pupil of that particular advocate. There were five advocates in town [Bulawayo] so I approached them. They then agreed to take me on as their pupil, and be attached to all of them, all five of them. What it meant was that I had to receive research work from all of them which I did. I ultimately sat for the exam sometime in November 1971.[454]

Sibanda passed the exam and became the first African advocate in Bulawayo but he was soon confronted with the reality that the majority of law firms were reluctant to brief him. The firms that were prepared to brief him often offered him 'marked briefs'. 'A marked brief', Sibanda explained,

> …is a brief that already carries the amount that you are going to charge. You got a brief with $50 or $20. I used to travel to go outside Bulawayo to Gwanda, Gwathemba you name it on a marked brief for $20-00… They would tell you that "the client cannot afford more than so much, are you prepared to take this?" You had to choose whether to accept or not to accept, but we simply accepted that it was better than nothing.[455]

The situation was equally difficult for the African advocates in Salisbury who had to depend on the poorly paid *pro deo* cases.[456] These were cases where the state paid for legal representation to be provided to poor defendants whose charges involved the possibility of the death sentence. In the 1970s such cases were almost always related to the Law and Order (Maintenance) Act. The government thus found itself paying African lawyers to represent Africans accused of political 'offences' related to the nationalist struggle.

[454] Interview with Sibanda, Bulawayo, 28 November 2010.
[455] *Ibid*.
[456] Interview with Chidyausiku.

Faced with the struggle to survive in the profession, in 1972 the African advocates organized themselves under the leadership of Edson Sithole and Godfrey Chidyausiku. They entered into negotiations with the Rhodesia Bar Association (RBA) between 1972 and 1973 to find ways of overcoming their marginalisation in the profession.[457] The African lawyers challenged their discrimination as well as the structure of the profession in Rhodesia. They pointed out that the practice of a divided profession not only facilitated their marginalisation, but it also raised the cost of legal services thereby placing them out of the reach of most Africans.[458] In support of this claim they cited a letter that was published by the *Rhodesian Herald* on the 27th of April 1972 which carried the title 'Could not pay a lawyer'. The letter read:

> Sir, I am an African who holds a Cambridge School Certificate. I am working and I earn $50 per month. I have a wife and two children to support. I was recently accused of a crime. Just before my trial I approached an African Advocate to defend me. He told me to go and search for an attorney. I approached a certain attorney and he told me that he was fully booked for the following two weeks. I went to another attorney and he told me be [sic] he wanted about $120, but I have only $50 in my bank which I was prepared to give to a lawyer. So I went back to the African Advocate and told him of my experience with the attorneys. His reply was "hard luck". He would not have minded defending me for $50 if he had been briefed to do so, as my case was fairly simple, but without a brief from an attorney the Bar Council would be after his blood if he should defend me. At the trial although the magistrate was sympathetic and tried to assist me, I could see a blank and could not ask any meaningful questions when I asked to question police witnesses. The result of the trial was that I was convicted and fined $40. If I had been able to have secured the services of the lawyer who was prepared to defend me for $50, it would have been a different story. I am sure there are other Africans who have had similar problems. Now my question is, is it not high time that even we poor Africans have access to lawyers at a reasonably low charge?[459]

After failing to reach an agreement with the RBA, the African advocates broke away and formed the African Bar Association (ABA) which allowed its members to be approached by

[457] *Ibid*.
[458] NAZ RG4, Committee of Enquiry into the Legal Profession.
[459] Cited by Chidyausiku in *Rhodesia Parliamentary Debates*, 27 August 1976, col. 1619.

clients directly, thereby bypassing the attorneys' firms. A compromise was ultimately reached. However, this was not before Sibanda had been charged and convicted under the Attorneys Act for acting as an attorney.[460]

Africans who aspired to become lawyers in Southern Rhodesia were driven by a desire to gain possession of the symbolic capital of the legal profession for both personal advancement and for the assistance of other Africans living under settler rule. However, they faced resistance from the government and the European-owned firms. This meant that only a few Africans were able to make it into the profession and these few found themselves marginalised and having to struggle for professional survival. Ironically, this marginalisation meant that the bulk of the cases they ended up taking were political ones that were connected to the nationalist struggle, often on the request of the government.

Translating the Law

Having gotten into the profession African lawyers went on to play an important role as legal intermediaries. A key part of this role was that of 'translating' the law for their African clients. As argued in chapter two, the political ideas of the post-World War Two period, rural to urban migration and education, among other things, were important in reshaping the way Africans perceived themselves in relation to the state. To this list must be added the role of translation played by lawyers. A number of studies in legal anthropology have drawn attention to the role of translation in the legal arena and its influence on legal consciousness and legal struggles. Sally Engle Merry, for example, demonstrates that human rights 'become a part of local social movements and local legal consciousness' through the efforts

[460] Interview with Sibanda, 28 November 2010.

of intermediaries who 'translate global ideas into local situations and retranslate local ideas into global frameworks'.[461] Harri Englund's work focuses on the linguistic dimension of translating human rights discourse in Malawi and Zambia. He highlights the fact that human rights discourse 'can be deprived of its democratizing potential' as a result of the choices made during the process of translation which may actually limit the range of claims that can be made on the basis of human rights.[462]

These scholars' insights on the possibilities and constraints of 'translation', both in terms of concepts and language, are useful in reflecting on the roles played by African lawyers and their impact on the legal consciousness and subjectivities of their clients.[463] Virtually all of their clients were Africans and their work invariably involved a significant amount of translation of both kinds. On the one hand, they interpreted the concepts and stipulations of Rhodesian law for their clients. On the other, they translated their clients' grievances into the language of law. In the process they reframed the disputes into questions of rights and informed their clients of the limits of the state's authority over them. This interaction with lawyers helped to reshape how Africans viewed their relationship with the state and enabled them to assert themselves as rights-bearing citizens. In this regard Oguamanam and Pue observe: 'The courtroom combines the language of rights, privileges of expression that may not be enjoyed elsewhere, and high visibility in the community at large. It is, in a word, entirely political. What's more, the nature of the forensic contests pits rights against power,

[461] Merry, 'Transnational Human Rights and Local Activism', p. 38.
[462] H. Englund, *Prisoners of Freedom: Human Rights and the African Poor* (Berkley, 2005), pp. 47-69.
[463] Diana Jeater has examined translation in the legal sphere in Southern Rhodesia and focuses on the short-lived efforts of colonial officials to translate African legal concepts during the early colonial period. See D. Jeater, *Law, Language and Science: The Invention of the Native Mind in Southern Rhodesia, 1890-1930* (Portsmouth, 2007). My focus here is on the opposite process *viz* Africans' efforts to come to terms with colonial legal concepts.

employs the language of justice, and, where state power is involved, begins down the road of constituting the subjects of state power as rights-bounded citizens.'[464]

As highlighted above, many African lawyers entered the legal profession consciously aiming to defend the rights of Africans. Touching on both his desire to defend his African clients' rights and the translation he engaged in during his day to day work, Mkushi observed that 'the legal profession from a black man's point of view was a very unattractive profession and it was a profession where you went in to try and help a lot of people who were ignorant about their rights. They had ideas about what is right and what is wrong but being able to champion what they felt was right is difficult unless you follow certain routes.'[465] Law, he hoped, was the 'route' through which this could be made possible. As soon as it was known that there was an African lawyer in town Mkushi began to attract a large African clientele. This was confirmed by Chidyausiku who recalled, 'we were fairly popular among black clients, particularly those who were politically conscious.'[466] Regarding the reasons why many Africans preferred to consult him Mkushi explained:

> It was language and culture and the fear of being misinterpreted in an oppressive system. Going to somebody who you don't actually have confidence in, okay he may be a professional, but the whites were at that time looked at generally as people who belonged to an oppressive system. So they would obviously feel much better sitting down and speaking in their vernacular language telling you everything, the relevant and the irrelevant stuff and you then have the time to sift through whatever is coming on your desk. I think primarily that confidence that they were able to express themselves accurately and openly was the main reason, and as one progressed with the practice it was also a question of your own performance.[467]

Mkushi's reference to sifting 'the relevant and irrelevant stuff' indicates the ways in which the translation at play here reduced the nuanced nature of the disputes to matters deemed

[464] Oguamanam and Pue, 'Lawyers' Professionalism', p. 774.
[465] Interview with Mkushi.
[466] Interview with Chidyausiku. This also came out in my interview with Sibanda, 28 November 2010.
[467] Interview with Mkushi.

relevant by the court. Notwithstanding the fact that legal action tended to narrow complex struggles, there was something important that was also gained. Over and above the legal issue at hand, what was at stake in the clashes between Africans and the state in the 1970s was the question of the status of Africans in the Rhodesian polity and intimately tied to this was the extent of the state's power over Africans. In this regard, legal representation was important in reshaping Africans conceptions of themselves and their relationship with the state and enabling them to assert themselves as rights-bearing citizens.

This trade-off between the broader and complex set of grievances, and the narrow 'cause of action' that could be taken up legally was evident in the case that Mkushi handled involving residents of the Chamburukira area in Zaka District and the local District Commissioner. The case arose out of the efforts of the government to realign the border between Zaka and Bikita Districts. This meant that the area under Headman Chamburukira would be taken from Chief Nhema of Zaka and placed under Chief Mabika of Bikita. The action was influenced by the government's drive towards administrative rationalisation and the findings of government delineation officers that headman Chamburukira owed 'traditional allegiance' to Chief Mabika. However, this was only one of the many versions of the area's history. The VaZuruvi people maintained that headman Chamburukira was illegitimate and argued that they were the rightful holders of the Chamburikira headmanship.[468] For their part, the VaHove people claimed that the VaZuruvi had only received the title after allying with chief Mabika to depose their ancestor Nerongwe who was the original ruler of the area.[469] Based on these alternative narratives of the area's history, the VaHove and the VaZuruvi people opposed to the boundary realignment. They therefore resisted the DC's order for them to

[468] Interview with P. Dzoro, Chiredzi, 30 March 2009.
[469] Interview with C. Kunodziya, Zaka, 31 March 2009.

come and exchange their Zaka registration certificates for ones that listed Mabika as their chief and Bikita as their district of origin.

The resistance by the 48 village heads of the VaHove and VaZuruvi people led to their conviction in the Magistrate's Court under Section 43 of the African Affairs Act for defying an order by the DC. They were sentenced to a fine of R$50 or 50 days imprisonment of which R$30 or 30 days were conditionally suspended. Unsatisfied by the courts decision and the attempts to force them to come under Mabika, the VaZuruvi people consulted Mkushi who was then at Winterton, Holmes and Hill, while the VaZuruvi people consulted the Fort Victoria office of the firm. The lawyers lodged an appeal which focused mainly on the legality of the DC's order and Justice Macdonald who heard the case found in their favour. Part of his ruling read:

> …an order is not a lawful order because it is so described in a summons or other document. It assumes its lawful character not from the simple fact that it is given but from the legality of the reason for which it is given. An order for which no reason is apparent is, on the face of it, an unlawful order since until it is clothed in reason, it would appear in its nakedness to be capricious only. [470]

Justice Macdonald went on to underscore the limits of DC's authority over Africans by asserting: 'It cannot be said of tribesmen as it can of soldiers - "theirs not to reason why..."'.[471] The lawyers had not dealt with the deeper and contentious questions about traditional allegiances and claims to the Chamburukira title, from which their clients' outrage flowed. However, the ruling of the judge, which explicitly highlighted the limits of the powers of state officials, was significant.

[470] Cited in NAZ S3700/16, Kwangware & 47 Others vs. State, 10 October 1974.
[471] *Ibid.*

Sibanda's work with the Bulawayo Young Women's Christian Association (YWCA) in the mid-1970s brings out clearly the way translation could act as a catalyst in the reshaping of African subjectivities. Due to the numerous difficulties faced by their members on the grounds of their gender, the YWCA leadership decided to seek legal advice. They approached Sibanda and Washington Sansole, another Bulawayo based advocate, and requested that they explain the legal position regarding the status of African women in Rhodesia. Constance Mabusela, the regional Secretary for the YWCA at the time, explained that: 'One of the sorest points was you went to the post office to take some money from the post office. If somebody sent you a parcel from somewhere you had to bring an ID [identity document] and those days women had no IDs. So they would say bring your husband and if you're not married bring any man.'[472] She went on:

> …we saw many other areas where women were really ill-treated. Then we said "what is our status in this country?" And that's when we organised a conference which we invited advocate Sibanda. He had newly come from South Africa. He came and somebody else I can't remember, and addressed the women about the status of the women, the fact that you have no status at all. You are minors from birth until death. When you are born you are a child of your father, you are a minor under your father. When you get married you are a minor under your husband. And if your husband dies you are still a minor under your sons! That, we thought, that, we can't take that!

The YWCA decided to take action and organised a rally in Bulawayo on 15 November 1975, during which the two lawyers addressed the crowd alongside the YWCA leaders. Part of Mabusela's speech at the rally read: 'We feel we are being discriminated against and hope with the aid of legal advisors, to make representations to Government to have legislation affecting women changed.'[473] Their plans to hold similar rallies in different towns and cities in the country were frustrated by the escalating guerrilla war and opposition from ZANU supporters who associated the YWCA with ZAPU. However, what is clear is the role of

[472] Interview with C. Mabusela, Bulawayo, 29 November 2010.
[473] *Sunday Mail*, 16 November 1975.

lawyers in triggering shifts in the way the YWCA women understood their situation and in enabling them to make claims for a different legal status.

Picture 8 - YWCA leaders Agnes Dlula (left) and Constance Mabusela

WOMEN MARCH FOR STATUS

DRUM MAJORETTES and a band yesterday led more than 100 African women on a procession from the Young Women's Christian Association hall in Mpopoma Township, Bulawayo, to White City Stadium where they held a rally on the theme of "improving the status of the African woman".

At the stadium the women were addressed by Mrs. A. Dhlula, Mrs. N. Sibanda, Adv. K. Sibanda and Adv. W. Sansole. The speakers stood under a banner which read: "Customary tribal laws are outdated and should be buried."

The organiser of the procession and rally, Mrs. Constance Mabusela, who is the regional secretary of the YWCA, said that the event was supported by churches of all denominations and various other women's organisations.

Mrs. Mabusela said the purpose of the rally was to make the public aware of the plight of African women who had "very few" rights before the law.

"We feel we are being discriminated against and hope, with the aid of legal advisors, to make representations to Government to have legislation affecting African women changed.

"For a start, African women are regarded as minors in the eyes of the law, we have no property rights and we cannot inherit from a husband's estate. If widowed, we are unable to become the legal guardians of our children," she said.

TWO AIMS

Mrs. Mabusela said the YWCA had two main aims regarding rights for African women.

"The first is to make the public aware of cases where African customary law has been misunderstood as a basis for legislation.

"Our second aim is to draw attention to the fact that in cases where African customary law has been correctly applied to determine legislation, the African way of life, especially among the educated and urban class, has so changed that what was suitable for early 20th century women is no longer suitable for the present. This has led to many hardships among women and children."

Yesterday's procession and rally was the first organised by the YWCA and Mrs. Mabusela said she hoped the same thing could be done in other centres.—Sunday News Reporter.

Placard - carying women listen intently to a speaker campaigning for a better deal in the legal status of African women at a rally organised by the Young Women's Christian Association in Bulawayo yesterday. 1975.

Picture 9 - YWCA rally 15 November 1975 [Source - *Sunday Mail*, 16 November 1975]

Defending Political 'Offenders'

Scholars writing on the Rhodesian legal profession have identified a commitment to formalism as a central feature of the self-image of lawyers.[474] Feltoe suggests that this formalist identity partly explains their failure to object to the repressive legal measures that

[474] See G. Feltoe, 'Law, Ideology and Coercion in Southern Rhodesia' (M. Phil. Thesis, University of Kent, 1978) and W. Ncube, 'Legal History in Law: A Zimbabwean Perspective', *Zimbabwe Law Review*, 12 (1995).

were being implemented by the Rhodesian Front during the 1960s and the 1970s.[475] Feltoe's observations about the centrality of formalism to the Rhodesian legal fraternity were confirmed by my own interviews with white lawyers who practised during this period.[476] However, a number of qualifications are necessary. Firstly, there were a handful of white lawyers who objected to the actions of the Rhodesian authorities and fought tirelessly on the behalf of their clients. These included Bryant Elliot, Antony Eastwood, Ken Reagan and Leo Baron. Secondly, the public espousal of formalism did not necessarily mean that these lawyers were apolitical. As we have seen in chapter four, formalism could often be used to cloak sympathies for the Rhodesian Front.

Thirdly, interviews with black lawyers revealed that their views of law and justice often went beyond a commitment to rules and procedures and encompassed a concern for the substantive outcomes of those rules. In addition, their conception of themselves as lawyers was tied to the endeavour to use the law to bring about more just outcomes. A number of formative experiences shaped the way these lawyers conceived of their role as lawyers. Important amongst these was the experience of being part of the colonised population. Studies of African lawyers in Nigeria and South Africa show that it was not unheard of for them to buy into the 'civilising mission' and take on conservative views.[477] However, many of the first generation of African lawyers in Southern Rhodesia identified with the broader African population. This was clear in Mkushi's description of his early years as a lawyer. For him it was 'a fighting phase where you are fighting what you felt was unjust generally around you.

[475] Feltoe, 'Law, Ideology and Coercion', p. 82.
[476] Interview with A. Masterson, Harare, 28 April 2011; Interview with H. Simpson, Harare, 16 April 2009; Interview with Reagan and Interview with G. Smith, Harare, 16 April, 2011.
[477] Sachs, *Justice in South Africa*, p. 210 and Adewoye, *The Legal Profession in Nigeria*, p. 180.

Unjust in the sense that you felt that you were part of the society which was being victimised.'[478]

Another dimension of their experiences which had a significant influence on them was the hostility of the broader legal fraternity towards them. Describing the experiences of his generation of lawyers, Godfrey Chidyausiku, the current Chief Justice of Zimbabwe, put it thus '…we really had to push our way through the narrow gate from the beginning right up to the end.'[479] The significance of this professional hostility lay in the fact that it echoed the experience of discrimination of the wider African population in the country. It thus made African lawyers more likely to identify with other Africans than with the broader legal profession or an elite class of Africans. Furthermore, African exclusion meant that they were not subjected to the same degree of professional socialisation which fostered the formalist self-image. This allowed them to imagine their role as lawyers in contrasting ways to the legal profession at large. The nationalist politics of the 1960 and 1970s and the attendant ideological currents also shaped their self-image as lawyers. As Chidyausiku pointed out, from their time as law students it was impossible for him and his colleagues to avoid becoming involved in politics:

> …because politics really affected your life, everyday life. It determined where you slept, who you visited. You are not allowed to live or mingle with whites. I mean white areas, you could not live there. You had to live in a township where you had to get a permit if you are not a registered lodger. So you could not avoid politics whether you like it or not. We used to participate in demonstrations, getting arrested and that kind of thing.[480]

[478] Interview with Mkushi.
[479] Interview with Chidyausiku.
[480] *Ibid*.

Many African lawyers put their legal skills to use in the service of their political convictions and provided legal representation to Africans who were charged with political 'offences' in the Rhodesian courts.

Chitepo, the most famous lawyer of this generation, began his political involvement in the 1950s as a member of the 'inter-racial' organisations that had been popular with members of the African middle class. However, as the disillusionment with 'racial-partnership' set in, he embraced nationalist politics. Chitepo soon began providing legal representation to nationalist politicians and their supporters who were arrested or detained by the state and he earned himself a significant amount of prestige among Africans. As shown in chapter three, the legal representation provided by Chitepo was important in that it punctured the aura of invincibility of the colonial state. In addition, Chitepo used the courtroom to invert the racial hierarchies that were central to Southern Rhodesian society. Even after he had moved to Tanzania, Chitepo returned to defend senior nationalists in Rhodesian courts. Following the Unilateral Declaration of Independence and the decision by ZANU to wage an armed struggle, Chitepo followed the path that other Southern African lawyers such as Nelson Mandela and Oliver Tambo had trodden. He shifted the fight against settler repression from the court of law to the battlefield.[481] In 1966, he left his job in Tanzania and moved to Lusaka where he led ZANU's military efforts up until he was assassinated in March 1975.

[481] Sadomba, *War Veterans in Zimbabwe's Revolution*, pp. 9-19.

Picture 10: Herbert Chitepo (right) conferring with Ndabaningi Sithole in 1974 [Source – National Archives of Zimbabwe]

The lawyers who practiced in Rhodesia during the 1970s did so in a markedly different environment. By the 1970s the basic principles of due process had been significantly undermined by security legislation and practices such as torture and the denial of legal representation were the order of the day. Chidyausiku described the challenges of defending political prisoners in the 1970s as follows:

> It was very difficult but you just made the best out of a very bad situation. Having a lawyer was [better] than not having a lawyer but it was very difficult…

> because of the way the law itself was structured. For instance the general principle is that a man is innocent until he is proved guilty but there are many provisions or there were many provisions under the Law and Order (Maintenance) Act which more or less presumed a person guilty until he had proved his innocence. But once in a while you'd manage to get somebody off but it was not easy. Also the police system at the time was terrible. For instance I do recall one day going to Mbare Police Station to visit a client and being told to my face 'you will not be able to see your client until he has confessed to the police that he did what he did' and you literally had no recourse to anybody because that was the way blacks were treated at that time. And this was coming from the Member in Charge and you couldn't complain to anybody above him because he would have the same attitude. So you had just to wait until your client has been beaten and … made to confess. After that you would go into court and hope that the court would overrule the statement for having been obtained through undue influence.[482]

African lawyers were able to have some impact in their work due to the government's desire to present the appearance of adhering to the law. However, the situation progressively deteriorated as the government repeatedly amended the laws thereby undermining the procedural safeguards in the legal system. Ultimately, the declaration of martial law in large parts of the country in the late 1970s made it very difficult for lawyers to locate, let alone defend, their clients.

Despite these difficult conditions, many African lawyers threw themselves into the task of providing legal defence for their clients. Sibanda's efforts to defend Africans accused of political offences in the 1970s stand out. In the course of the 1970s he travelled the length and breadth of Rhodesia tracing and defending hundreds of Africans who had been detained or brought before the Rhodesian courts as well as representing those who sought to make claims against the state for damages to their property.[483] While he benefitted financially from this work, Sibanda's motives were also tied to his nationalist political convictions. His account of his experiences during the 1970s is revealing of his own conception of his role as

[482] Interview with Chidyausiku.
[483] This figure is based on statistics from the Interdenominational Legal Information Centre's Bulawayo office as well as my own assessment of the files in Sibanda's private archive.

a lawyer. Reflecting on his difficulties in getting a position as an articled clerk, Sibanda observed:

> The question is why? Why did they refuse to take me, to give me articles over them … when they were actually giving people articles? In Harare, when Chihambakwe completed he was given articles. I can't remember the other chap who was also given articles in Harare but not me. Why? Well I discovered later that the reason they wouldn't give me articles is because I had a role to play in the armed struggle defending 'terrorists' and I defended them. Yes I defended them![484]

Sibanda is correct in noting the irony that had he had been able to secure employment in a law firm, he would not have been able to devote as much time and effort as he did to defending Africans accused of political offences. Sibanda's statement also revealed an alternative imagining of his role as a lawyer that was tied to making a contribution to the armed struggle.

Among Sibanda's many cases was one involving 265 students of the United College of Education in Bulawayo. They had been arrested for being part of a protest against the efforts by the state to implement a compulsory call-up of young African men. The protest was triggered by the announcement by the college's principal on the 14th of November 1978 that the call-up registration forms had arrived and that all male students were expected to complete them. The students held a meeting chaired by the Students' Representative Council's president and agreed to stage a peaceful procession to the central police station where they would leave the registration forms. In a statement made for Sibanda's purposes, one of the students, Fudzai Pamacheche, explained his participation in the protest as follows:

> As a matter of fact after receiving the call-up forms we as students had a meeting in the hall where everybody had the right to put forward his suggestion. It was after this fact finding meeting that we came to a conclusion of going to town to demonstrate against the call-up for blacks under the minority rule which includes

[484] Interview with Sibanda, 28 November 2010.

> the Transitional Government. Personally I feel that no genuine majority rule no call-up for blacks because at present I can't see who I have to defend against who. It sounds ridiculous to me to defend a government which I feel is there to cheat the masses. Since there is no freedom of speech, I felt a demonstration would show the government that we are against its intensions [sic].[485]

The students collected the forms, pulled down the college flag and marched in silence towards the centre of Bulawayo holding the flag and banners that said 'No'. The procession was stopped by the police before they had reached their destination and the students were arrested and taken to Ross Camp police station.

The next day they were taken to court where they were charged under the Law and Order (Maintenance) Act with participating in an illegal procession. As a result of the charges, the principal sought the services of Sibanda to defend the students. Sibanda's initial strategy was to convince the prosecutor to withdraw the charges on the grounds that the state had not prosecuted students who participated in similar protests staged in Gwelo, Bulawayo, Salisbury and Seke.[486] This strategy proved unsuccessful and after reviewing the statements from all 265 students he managed to get 38 students acquitted. 227 students pleaded guilty and of these, 21 had their sentences postponed for two years on the grounds that they were juveniles. The rest were sentenced to a $25-00 fine which was suspended for two years.

Sibanda also tackled the problem of Africans who were being convicted on the basis of confessions acquired by means of torture. Owing to the fact that many of the accused were not aware of the procedures of the court, their admissions of guilt were not challenged in court. Instead, their statements were confirmed by the magistrate and incorporated into the

[485] Sibanda Private Archives (hereafter SPA) File, State vs United College of Education Students, Statement by Fudzai Pamacheche.
[486] NAZ MS584/7, Fee List of Advocate S. K. M. Sibanda, 2 January 1979.

state's evidence. The problem was compounded by the fact that even when the tortured individuals were able to secure legal representation through the ILIC, many of the European lawyers who dealt with their cases often failed to challenge the statements.[487] Consequently, Sibanda and a fellow lawyer, Dennis Mapani, secured an office from the African National Council (ANC) where they sifted through all the cases coming to the ILIC and ensured that all the serious ones involving the possibility of a death sentence came to Sibanda who then ensured that the admissibility of confessions acquired by means of torture was challenged.

Another important part of Sibanda's work involved searching for missing persons who had often been detained by the government. This involved travelling across the country to visit police stations often at considerable personal risk, and communicating with army and police officials who were often uncooperative. As shown in chapter four, military officials had the powers to deny a lawyer access to his/her client. While the police did not officially have such powers, they often imposed conditions that made it difficult for lawyers to access their clients. Such was the case with the police in Wankie who were clearly annoyed at having to deal with Sibanda's enquiries about the whereabouts of his clients and his request for access to the statements recorded by the police. In reply to Sibanda's enquiries they wrote:

> With reference to your letter dated the 2nd instant under your reference DM/PWM concerning the above named persons, I wish to advise that as a result of considerable research performed by this office, your 'clients' may appear to be similar to a certain Moffat Nkomo R.C. X24116 Lupane and Ndabezinhle Nkomo R.C. X24111 Lupane District.
>
> In the event of these persons being your 'clients' I wish to advise that both were arrested on the 18th January 1979 , both persons were dealt with in accordance with the Martial Law Regulations. Any further enquiries in this regard should be directed to Assistant Commissioner Jones, C/O Combined Operations Headquarters in Salisbury.[488]

[487] Interview with S. K. M. Sibanda, Bulawayo, 30 November 2010.
[488] SPA File, Bulawayo Law and Order Cases, Sibanda to ILlC, 17 July 1979.

The letter went on:

> I take this opportunity of advising you that difficulty is often experienced when insufficient particulars of your clients is provided. If you have been instructed to represent persons, you should at least be aware of their full particulars. It would be of considerable assistance to this department.
>
> Secondly, I am bound by instructions from the Commissioner of Police, in that, statements will only be submitted upon the written consent being made available from your client. The possibility of you being unable to obtain such written consent is not acceptable.

This condition, that a lawyer have written consent from his client in order to get police co-operation when the lawyer was in the process of trying to locate the said client, was clearly devised to prevent lawyers from representing people who had been taken into police custody.

Like Sibanda, Mkushi was also involved in defending Africans accused of political offences. Mkushi's memories about the political cases of the 1970s were centrally about fighting injustice. What emerges clearly from his narrative is a belief in upholding 'Law' and 'Justice' in its substantive sense:

> …you remember there used to be those politically charged cases where people were being arrested for assisting terrorists – freedom fighters. Where people were hung. Where people lost their lives through the legal system. We had the High Court set up what were called the special courts to quickly look at politically motivated cases and they really fired you into having to fight and they fired you into sometimes having to be very political because sometimes you came face to face with injustice. Where you can tell there the old man, he was caught by the Special Branch police officers carrying cigarettes and they said 'where are you taking the cigarettes to?' It was a common thing that people used to buy cigarettes, used to buy tinned beef, food, overalls and things like that and took them to the freedom fighters. Some of them voluntarily, some of them on orders and of course if you were caught and if you were taken to court you faced the death sentence for carrying a pack of cigarettes to go and give to the 'terrorists'.[489]

He went on: 'I remember one case which made me very very angry, of a headman down in Nyazura who obviously was forced to supply certain things to the freedom fighters and he

[489] Interview with Mkushi.

had a son who was a medical doctor here in Harare and we fought! He was sentenced to death and three days before the execution I managed to get that sentenced reduced to life imprisonment….'[490]

A key role played by African lawyers was that of providing legal representation for Africans who were charged with political 'offences'. Many of these lawyers who provided legal defence in these cases were not acting out of a formalist commitment to rules and procedures. They saw their efforts as part of a struggle for justice in its substantive sense. They had entered the legal profession in the context of the nationalist struggle pitting Africans against the settler regime, and their conception of their roles as lawyers was shaped by this political context. Their marginalisation in the profession also allowed them to imagine their roles as lawyers in ways that contrasted to the legal profession at large.

Beyond the Courtroom

Sibanda and his colleagues' efforts were not limited to the courtroom. Many African lawyers became closely involved with the nationalist political parties and put their legal skills at their disposal. An important role played by African lawyers was their involvement in the constitutional conferences in Geneva and London House in 1976 and 1979 respectively. While Sibanda was careful not to take up political office, he became closely involved with ZAPU. Sibanda was part of the ZAPU legal team along with Reg Austin, Leo Baron and Cyril Ndebele.[491] Regarding the role of lawyers at the conference, Fay Chung notes that the legal teams from ZAPU and ZANU worked closely 'and many of the details that were to

[490] *Ibid.*
[491] Interview with Sibanda, 28 November 2010.

form the final independence constitution were hammered out in Geneva.'[492] In conjunction with the ZANU team, which consisted of African lawyers such as Mubako, Kamba, Eddison Zvobgo and Mkushi, they advised the Patriotic Front, put its demands into legal language, and devised ways out of deadlocks during the negotiations.[493]

Sibanda was present at both Geneva and Lancaster House and his account of the negotiations consisted of anecdotes of backroom exchanges among the nationalists as well as the deadlocks he managed to resolve: 'At Geneva when we headed for a deadlock over what was called the interim period I worked out something and behind the scenes contacted one of the lawyers on the British side and got them to accept [a compromise position].'[494] However, Sibanda noted that the ZAPU legal team's proposal for a 'republican' system of government with an executive president was resisted by the British mediation team. Mkushi also recalled his participation in the constitutional negotiations in Geneva with a sense of pride: 'It was glorious being able to come up with a constitution which I directly took part in formulating. I still have my notes in my big black trunk, one day I'll be able to sit down and write my memoirs…they are original notes of what I was jotting down as the discussions were going on.'[495]

African lawyers also voiced their own critiques of the legal system in Rhodesia in different forums. Zvobgo, then the Director for External Missions for the African National Council (ANC), drew on Karl Marx's theory of history to develop a general theory about 'the role of

[492] F. Chung, *Reliving the Second Chimurenga: Memories from the Liberation Struggle in Zimbabwe* (Harare, 2006), p. 166.
[493] Interview with Mkushi and interview with Mubako.
[494] Interview with Sibanda, 28 November 2010.
[495] Interview with Mkushi.

law as an instrument of oppression'. Zvobgo's musings were not necessarily a thorough examination of the role of law in oppression. However, they were part of the broader efforts by nationalists to critique Rhodesian law. He posited that: 'There is a dialectic of law which is evident in all countries. In Rhodesia, as we have seen, each stage had its own marked characteristics.'[496] The five stages Zvobgo identified, which developed as a result of clashes between Africans and the colonial state, were 'the law of conquest', 'the law of dispossession', 'the law of suppression', 'the law of oppression' and finally 'the law of terror'. Zvobgo predicted that the majority would ultimately emerge victorious and he ended his analysis with a condemnation of the Rhodesian legal system: 'I am led to the conclusion that Rhodesia has become a full blown Police-state. The notion of law as arbiter in the orderly resolution of conflict has vanished. Law has achieved the opposite effect in man. It has become his enemy, as visible and as cruel as the racial clique that has enacted it in the quest of a dream – the perpetual rule of a black majority by an alien white minority clique.'[497]

For his part, Chidyausiku made use of the Rhodesian Parliament as a platform from which to challenge the government's actions. 'When I left university', he explained to me, 'I practised for about two years then there was an election and some of my colleagues including Dr Sithole said "well let's use this platform" because when you are in Parliament you enjoyed a certain degree of privilege or latitude. In other words you could say things that you couldn't say outside.'[498] He stood as an independent candidate and won the Harari Parliamentary seat with the support of the ANC. During his time in Parliament, Chidyausiku was forthright in his criticism of the Smith regime and firmly supported the nationalist cause. During a debate

[496] E. Zvobgo, *The Role of Law as an Instrument of Oppression* (Melbourne, 1973), p. 57.
[497] *Ibid*, p. 56.
[498] Interview with Chidyausiku.

in Parliament, Chidyausiku indicated how a sense of being part of the larger subjugated African population was at the base of his political convictions:

> Indeed the Minister in his reply says a person like myself who has had the chance to go to school or to university and acquire a number of things, why should I continually criticize the Government? There are even better examples; we have the example of the late Herbert Chitepo. He probably had a more flourishing law practice than I have. He was doing very well but gave it all up to take up the gun. And this is the real question. Why, the Government should ask itself should people who are doing very well seek to criticize the institution which prevails in this country? This is the reason, we criticize it because although it gives opportunities to the very few, I will not be happy to be successful alone, I would like my fellow Africans who have the ability to do so to succeed. I want equal opportunity for everybody. I had to persevere. I am where I am not because that is where I should be. If I were a European I would be doing greater things. [Hon Members: Inaudible interjections] Europeans with my ability or opportunity have done far greater things than I have. I am not content to be better than other Africans. I want everybody to have equal opportunity and this is the reason why we continue to criticize the present government and its doings.[499]

Many of Chidyausiku's contributions to Parliamentary debates were coloured by his training as a lawyer. He frequently challenged the Smith administration on the grounds that it was failing to live up to the ideals of the rule of law and pointed out the counterproductive nature of the repressive laws being passed by the Parliament.

During the debate on the Law and Order (Maintenance) Act Amendment Bill in 1974, which sought to deter Africans from recruiting or encouraging others to go for training as guerrillas by making it a capital offence, Chidyausiku pointed out that:

> …the Law and Order (Maintenance) Act may be unwittingly in fact recruiting terrorists. In fact the law is becoming so severe that it is driving people into frustration. In fact if this law is meant to deter people from committing such crimes I consider it will not fulfil its object. The tribesman who is mainly affected by the law will only become aware of this law when he has been arrested and is liable to be sentenced to death. The knowledgeable African or the urban African who has the opportunity to read these Acts, when he sees such Acts and

[499] *Rhodesia Parliamentary Debates*, 18 August 1976, col. 972.

> the penalties they are providing for, he is not frightened but he sees the need to overhaul the whole system.[500]

Chidyausiku's interventions during the debate on the 1974 Constitutional Amendment Bill dealt with the provisions relating to the appointment of judges and underscored the importance of the principle of the independence of the judiciary:

> I have no quarrel with the system whereby salaries of judges can be increased by regulation. However, I would like to point out in passing that the whole system of our constitution depends on the division of power and independence of our judiciary. If the Minister, by regulation, is to increase the salaries of the judges, I urge this House to give serious consideration to another aspect of announcing this independence of the judiciary. I propose that this can be done by removing the provision which empowers the Minister of Justice to appoint judges and to substitute in his stead...[Senator Lardner Burke: Read the constitution.] a college of retired judges and senior lawyers to elect judges. This, in my opinion, would eliminate any possibility of the Government packing the bench which is possible under the present system.[501]

Chidyausiku ultimately left the Rhodesian Parliament in frustration. 'At the end of the day', he explained, 'you said to yourself "what have I achieved, it's still the same we are not getting anywhere." So in the end I just decided it's not worth the effort.'[502] When the next elections were held in 1977 he chose not to stand for re-election.

Sottayi Katsere, an advocate and the ZAPU Director for Planning, articulated his critique of the Rhodesian legal system in a higher forum: the United Nations Human Rights Commission which met in Lusaka in July 1978. His submissions to the commission echoed the critiques of the legal system that had been made by guerrillas and nationalists since the late 1960s. While the guerrillas had challenged the legitimacy of the state and framed their arguments in a nationalist language of self-determination, Katsere's critique was couched in the language of human rights. Among other things, he pointed out the widespread use of torture on

[500] *Rhodesia Parliamentary Debates*, 14 November 1974, col. 914.
[501] *Rhodesia Parliamentary Debates*, 13 November 1974, col. 794-795.
[502] Interview with Chidyausiku.

Africans suspected of political offences, the violation of the rights of captured guerrillas as well as the biased nature of the Rhodesian courts. He extended the human rights critique to the issue of settler rule in Rhodesia in arguing thus: 'We contend, in the Patriotic Front, that the very existence of a minority colonial regime itself is an infringement of human rights because legislative power resides in the hands of a few people.'[503]

African lawyers' contributions were not confined to the courtroom. They also acted as intellectuals who articulated critiques of the Rhodesian legal system. In doing so they drew on diverse intellectual sources and contributed to the growing critiques of Rhodesian law that were being articulated by other groups such as the nationalists and guerrillas. They also played an important role as architects of the legal framework for the post-independence period. While the guerrilla war had required soldiers, the constitutional negotiations for the transition to independence required legally trained minds. The members of the first generation of African lawyers rose to the occasion and provided legal advice to the political leaders and translated the positions of the Patriotic Front into legal language.

Conclusion

The first generation of African lawyers in Rhodesia participated in the struggles in the legal arena in several ways. Their struggles to enter the legal profession constituted one dimension of the legal struggles in Southern Rhodesia: that over the symbolic capital of the legal profession. African lawyers also played an important role of 'translating' the law. On the one hand they translated the concepts of state law for their African clients. On the other, they translated their clients' grievances into the language of the law. Over and above its practical

[503] NAZ MS589/7/4, Katsere, Statement to the United Nations Commission on Human Rights.

purpose, this translation acted as a catalyst in the reshaping of African ideas of personhood. The legal representation these lawyers provided also enabled their clients to assert themselves rights-bearing citizens. They also acted as legal intermediaries in the cases of Africans who were charged with political offences.

In doing so, African lawyers were not acting solely out of a formalist commitment to rules and procedures. Their experience of marginalisation in the profession had contributed to their development of a more politically-engaged conception of their roles as lawyers. In the first instance, it ensured that they continued to identify with the broader African populace, as opposed to an elite professional body or class. In addition, it meant that they were not subjected to the professional socialisation of the larger profession which fostered a formalist identity. Breaking away from a rigid formalism, some like Mkushi defined their roles as lawyers as being more than just a commitment to rules and procedures but to fighting for justice in its substantive sense. Others like Sibanda drew on the law pragmatically and understood their roles as connected to a broader nationalist political project. Yet others like Chitepo decided to shift their focus from taking on the Rhodesian government in the courts, to engaging it in the battlefield.

CHAPTER VI

Transforming the Legal System in Post-colonial Zimbabwe, 1980-1990

> Law is necessary in another but equally vital sense even though it may be less obvious even to lawyers. In order for a country to develop it needs good laws that will induce development. You need law in order to protect and promote the interests of the workers and peasants. Our minimum wages regulations have greatly improved the lot of the poor, and the coming Labour Bill is designed to do even more. Similarly our policies to create equal opportunities for all, tax reform, new parastatal control of multinational investment, - all these can only be effective in the context of law. In order to transform Zimbabwe into a socialist society we can only do that through the instrumentality of laws.[504]

Introduction

The Lancaster House constitutional negotiations that took place between September and December 1979 resulted in a new constitution and paved the way for elections in February 1980. ZANU (PF), which decided at the last moment not to enter the elections under the banner of the Patriotic Front in partnership with ZAPU, emerged victorious and proceeded to form a government. The new government inherited an established set of legal institutions that were staffed by experienced and well-trained professionals.[505] However, these institutions were founded on racial difference and had long been used in its authorisation and reproduction. This was reinforced by the fact that the senior personnel in the legal system, such as prosecutors, magistrates and judges were almost exclusively white. The structure of 'traditional' courts had also been used to implement a system of differentiated citizenship. Finally, during the long decades of political unrest since the 1950s, successive settler

[504] S. Mubako, 'The Law and the Judiciary in Zimbabwe', Address given at the Zimbabwe National Army Staff College, August 16 1984, Department of Information Press Statement, 20 August 1984.
[505] For a broader discussion of the colonial legacy that the new government was confronted with see Colin Stoneman (ed), *Zimbabwe's Inheritance* (New York, 1982).

governments had built up an elaborate armoury of repressive legislation that was used to clamp down on dissent and had cemented the 'state of exception' as a feature of Rhodesian statecraft. The new government was therefore faced with the challenge of how to transform this system in which the law, violence and racial domination had become intricately connected. In this chapter I answer two main questions: Firstly, how did the new government deal with these 'legacies of law'? Secondly, what role did law play for the new government in the constitution of state power and legitimacy?

In grappling with these questions this chapter contributes to the debates on state-making and nation-building in postcolonial Zimbabwe. One strand in this literature has highlighted the importance of land and agrarian policies and shows how questions of authority over land and its use were important to the projection of state authority across space.[506] Another strand has drawn attention to the memorialisation of the liberation war and the use of the memory of the liberation struggle for the purposes of nation building and the legitimation of the state and the ruling elite.[507] Building on this literature, I examine the role played by law in the new government's state-making project. I argue that a central legitimating claim for the new government was the promise to bring about development and modernisation. As the Minister of Justice, Simbi Mubako, put it, it was 'through the instrumentality of laws' that these promises would be fulfilled. The law also provided a language of through which state power

[506] M. Drinkwater, *The State and Agrarian Change in Zimbabwe's Communal Areas* (New York, 1991); W. Munro, *The Moral Economy of the State: Conservation, Community Development and State Making in Zimbabwe* (Athens, 1998); J. Alexander, *The Unsettled Land: State-making and the Politics of Land in Zimbabwe, 1893-2003* (Oxford, 2006).

[507] N. Kriger, 'The Politics of Creating National Heroes: The Search for Political Legitimacy and National Identity' in N. Bhebe and T. Ranger (eds), *Soldiers in Zimbabwe's Liberation War* (Oxford, 1995); R. Werbner, 'Smoke from the Barrel of a Gun: Postwars of the Dead, Memory and Reinscription in Zimbabwe', in R. Werbner (ed), *Memory and the Postcolony: African Anthropology and the Critique of Power* (London, 1998); J. Alexander, J. McGregor and T. Ranger, *Violence and Memory: One Hundred Years in the 'Dark Forests' of Matabeleland* (Oxford, 2000), chapter 11.

was exerted and the new courts introduced by the government served as a site whose procedures, rituals and symbols instantiated the state.[508]

My analysis of the law in the 1980s adopts a wider lens than most studies which have tended to focus on legal changes in specific spheres such as gender relations, politics or labour.[509] While these studies have offered valuable insights, the changes in these spheres have not been located within the context of long term legal changes prior to independence as well as the broader designs of the new government. I therefore explore three main processes: the steps to 'Africanise' the legal system, the reforms to the laws regarding women's rights, and the reorganisation of chiefs' and headmen's courts. The changes in these areas were among the most significant and faced substantial opposition. They therefore provide a clear idea of the government's attempts at legal transformation during the first decade of independence.

These changes were legitimated by several means. The first was through the invocation of the liberation struggle and the goal of removing the legacies of settler rule. As I show below, official attempts to frame the changes in terms of the goals of the liberation struggle were frequently countered by alternative interpretations of what the struggle's goals were. A second strategy was by couching the changes in the language of modernisation and development.[510] Finally, the government's professed ideology of socialism was often used to

[508] See T. B. Hansen and F. Stepputat, T. B. Hansen and F. Stepputat, 'Introduction: States of Imagination', in T. B. Hansen and F. Stepputat (eds), *States of Imagination: Ethnographic Explorations of the Postcolonial State* (London, 2001), pp. 7-8 and A. Gupta and A Sharma, 'Rethinking Theories about the State in an Age of Globalisation', in A Gupta and A Sharma (eds), *The Anthropology of the State: A Reader* (Oxford, 2006), p. 13.
[509] E. Batezat, M. Mwalo and K. Truscott, 'Women and Independence: The Heritage and the Struggle', in C. Stoneman (ed), *Zimbabwe's Prospects: Issues of Race, Class, State and Capital in Southern Africa* (London, 1988), pp. 153-173; J. L. Kazembe, 'The Women Issue', in I. Mandaza (ed), *Zimbabwe: The Political Economy of Transition 1980-1986* (Harare, 1986); B. Raftopoulos and L. Sachikonye (eds), *Striking Back: The Labour Movement and the Post-Colonial State in Zimbabwe, 1980-2000* (Harare, 2001).
[510] See Alexander, *The Unsettled Land*, pp. 105-122.

legitimise particular changes. Several scholars have correctly questioned the extent of the socialist experiment in the first decade of independence in Zimbabwe and have shown that there was no real effort to seize 'the commanding heights of the economy'.[511] Nevertheless, socialist rhetoric was one of the key discursive tools by which the new state legitimated its interventions in society.

'Africanising' the Legal System

The task of transforming the legal system fell to Simbi Mubako, who was appointed the country's first Minister of Justice. In the course of the 1960s and 1970s Mubako had accumulated five law degrees, three of which were at Masters level, from University College-Dublin, the London School of Economics and Harvard University.[512] Mubako had also taught Constitutional Law at the University of Zambia in Lusaka during the 1970s. It was during this time in Lusaka that he became an active member of ZANU and worked closely with Herbert Chitepo in drawing up legal positions for the party on issues such as the 1972 Pearce Commission. Mubako was drawn more closely into the legal affairs of the party after it was thrown into disarray by the assassination of Chitepo in 1975, and the subsequent arrest of most of the senior leadership in exile. He arranged legal representation for the leaders and especially for Tongogara who was accused of the assassination by the Zambian government. His next important task for the party was to lead its legal team at the constitutional conferences in Geneva, Malta, and London.

[511] P. Bond, *Uneven Zimbabwe: A Study of Finance, Development and Underdevelopment* (Asmara, 1998); C. Sylvester, *Zimbabwe: The Terrain of Contradictory Development* (Boulder, 1992).
[512] Interview with S. Mubako, Harare, 26 April 2011.

Given Mubako's prominent role in the constitutional negotiations, his selection as the first Minister of Justice by ZANU (PF) came as no surprise. However, the story of his appointment bears testimony to the somewhat shaky start of the new cabinet.[513] At the end of the Lancaster House Conference, Mubako left for Roma University in Lesotho where he took up an appointment as the Dean of the Law School. Shortly after taking this post he found out about his appointment to the new cabinet in an unorthodox way:

> My leaders, the politicians, had not at that time written to me or anything, but my students read it in the South African papers and on TV and that sort of thing. They saw that and first thing when I went to class the next morning they said, 'Congratulations Professor, you have now been appointed Minister of Justice'. I said, 'I have not been told.' So I said, 'I can't take it just by your word. I have to wait'. Eventually, actually no-one told me. Eventually I did call. I called Vice President Muzenda and talked to him. He said, 'Yes, yes you have been appointed Minister of Justice, you pack up and come straight away'.[514]

Upon his appointment Mubako proceeded to push for a series of significant changes in the legal system. Given the leading role he had played in the constitutional negotiations in the 1970s, Mubako was much better prepared than most of his colleagues for his assignment.

[513] See also Dennis Norman's comments about the new cabinet in J. Herbst, *State Politics in Zimbabwe* (Harare, 1990), p. 33.
[514] Interview with Mubako.

Picture 11: President Canaan Banana Swearing in members of the first cabinet in 1980 [Source – National Archive of Zimbabwe]

Upon taking office Mubako sought to balance transformation with maintaining the 'confidence, efficiency and professionalism of the legal system.' High on his list of reforms was the Africanisation of the legal system:

> …the first challenge was to make sure that the legal system became African rather than what it was. It was dominated by whites and it was very difficult to find lawyers, to find judges, to find anything. There was not even a single black judge at the time. There was not even a single magistrate at lower levels. No no no, there were two who were very junior magistrates… The question is how do you then Africanise the system without the African lawyers?[515]

For Mubako, transforming the racial composition of the personnel in the legal system was partly about democratising it, and partly about altering the status of the courts as symbols of settler rule. In this regard Mubako explained '…if I didn't do that we would only have white judges still continuing and the impression would have been that there is no change and I was determined that at least there must be some change….' While Mubako's efforts to Africanise

[515] Interview with Mubako.

the system were politically driven, practical considerations also shaped his choices. His hand was forced by the exodus of large numbers of white prosecutors and magistrates which left a huge gap in the legal system.

In addition to the low number of African legal professionals, two obstacles to Mubako's efforts at Africanisation were the structure of the profession and the legislation that governed it. As shown in chapter five, the existing system of a 'divided profession' placed control over the entry into the legal profession in the hands of the white-owned law firms. Stipulations that were laid down in the constitution regarding the qualifications of judges also restricted Mubako's ability to appoint African lawyers to the judiciary. One stipulation, for example, was that eligible candidates for appointment to the judiciary had to have been practising *advocates* for at least 7 years. This ruled out all of the African lawyers who had qualified as attorneys in the 1970s. In order to open the way for more African legal professionals and to deal with the obstacles to appointing black judges, Mubako had the Legal Practitioners Act passed through Parliament in 1981.[516] The Act fused the legal profession and removed the privileges that had been reserved for advocates such as audience in the High Court and eligibility for appointment as judges. In addition, the period of articled clerkship was shortened from three years to one, thereby allowing newly trained lawyers to set up their own practices much quicker than before. At the University of Zimbabwe, efforts were made to enrol more black law students, while the Legal Resources Foundation set up a library for the new lawyers to conduct their research.[517] Similar programmes were run for prosecutors and magistrates at the government training centre in Domboshawa.

[516] Interview with Mubako.
[517] Interview with R. Austin, Harare, 29 April 2011.

At the same time, however, many members of the first generation of African lawyers were called upon to serve in the new administration. Eddison Zvobgo was appointed to the post of Minister of Local Government. Godfrey Chidyausiku was appointed Deputy Minister of Justice, a post he held for a year before he was appointed Attorney General. Simplisius Chihambakwe, who had been part of ZANU's legal team at Geneva, was appointed the government's representative on the Law Society Council and later became the President of the Council for much of the 1980s. He was also appointed to chair the Detainees Review Tribunal and the 1983 Special Commission of Enquiry into the disturbances in Matabeleland. George Chinengundu was appointed Deputy Minister of Local Government and Town Planning, while Honour Mkushi continued in private practice but was called upon to prosecute in high profile political cases during the 1980s.[518]

Despite the changes to the Legal Practitioners Act, Mubako continued to face difficulties in his effort to Africanise the judiciary. He found that a number of the experienced African lawyers in the country preferred to stay in private practice rather than enter into government employment as judges. Mubako recalled: 'I then approached people like Chihambakwe Mkushi, did they want to become judges?, and they said, "no", and people like Chinamasa. They said, "no", because the pay was not good enough. So that meant I could not find any black person to appoint to the judiciary. So because of that I had to look abroad.'[519] S.K.M. Sibanda was amongst those who declined the offer to be appointed to the bench in the early 1980s. However, his reservations had more to do with politics than pay. While he had been an active member of ZAPU in the 1970s, he developed a close working relationship with the ZANU (PF) establishment during the 1980s. Soon after independence, he became the Vice

[518] Interview with H. Mkushi, Harare, 23 March 2011.
[519] Interview with Mubako.

President of the Law Society Council and worked alongside the Minister of Justice and other African lawyers to end the practice of a divided profession. During the early 1980s he sat on the ZANU (PF) Central Committee and was appointed to the board of the government-owned financial institution Zimbank.[520]

However, when Zvobgo was sent to enquire if he would consent to be appointed as a judge, Sibanda felt compelled to decline the offer:

> I made that point to Zvobgo who had been sent to inform me that the [Prime Minister] wanted to appoint me a judge. He wants to know whether I would accept the appointment. I then told Zvobgo that, 'hmm my concern is simply that if I'm appointed a judge and now that ZAPU is in opposition and for reasons I cannot tell you if someone involved of some stature comes up and government arrests my fellow ZAPU members and they are brought to me to try them and I recuse myself I would not avoid being termed a political judge. And if I preside over the cases how do I deal with such cases?'[521]

Consequently, Mubako had to look further afield to get black judges to sit on the bench. He was able to get two judges from Ghana, which was experiencing political unrest due to the military coup. He also managed to negotiate with the Tanzanian government to have two judges seconded to Zimbabwe. In addition to these four judges, Mubako also convinced Telford Georges, a West Indian jurist who had served as the Chief Justice in Tanzania after independence, to come and serve as a judge in Zimbabwe.

The goal of Africanisation was always weighed against other considerations. One such consideration was ensuring that the legal system continued to operate in an efficient and professional manner in order to ensure its legitimacy in the eyes of the citizenry. The appointment of judges was also an inherently political task. The new government sought to

[520] Interview with S. K. M. Sibanda, Bulawayo, 28 November 2010.
[521] *Ibid*.

ensure that it appointed judges who would be 'sympathetic' to the new regime. The uncomfortable interaction between these different considerations was evident in the efforts to replace the serving Chief Justice, Hector Macdonald, who had openly supported the Smith regime. In the process, the goal of Africanisation took a back seat to concerns around maintaining the credibility of the justice system and political considerations. Mubako explained:

> When we became independent we wanted the Chief Justice who was there under Smith to go. We wanted him to go. We didn't tell him in so many words but there was enough pressure and he realised he was uncomfortable. So I had to look around for a Chief Justice. There was no black who qualified. I couldn't just appoint Dumbutshena straight to be Chief Justice although one could do it. Legally there was nothing to prevent that. But I figured that that would sort of devalue the courts in the eyes of, certainly the whites, but even of the blacks also.... They would not think very highly of someone who was just a novice and is promoted right up there. So I had to look around for someone who was sympathetic to us blacks or who had not supported Ian Smith and who knew the system. And we had to look for Chief Justice Fieldsend who had been a judge …before UDI and he opposed UDI and resigned because he could not support UDI. He resigned and went to England. So I looked for him and persuaded him to come and he was our first Chief Justice. So that was important to continue confidence in the courts.[522]

In the case of Leo Baron, politics and race ultimately stood in the way of his appointment as the substantive Chief Justice in 1983. Baron had been a close advisor of Joshua Nkomo and a member of the ZAPU legal team in the constitutional negotiations of the 1970s. In May 1980 he was appointed to the Supreme Court and during Fieldsend's leave pending retirement in 1983, Baron was appointed Acting Chief Justice and held the post for four months.[523]

During this period, the government announced its intentions to appoint a black Chief Justice despite the fact that Baron was the most senior judge on the bench. Prior to his retirement he was informed that it had not been his race, but his close ties with ZAPU, which ultimately

[522] Interview with Mubako.
[523] NAZ ORAL/239 Leo Baron.

stood in the way of his appointment as the Chief Justice.[524] The person who was appointed instead of Baron was Enoch Dumbutshena. However, his appointment was not automatic either. Mubako pointed out that:

> We were looking for quality, but Dumbutshena politically was not the best person for us because Dumbutshena had joined the Internal Settlement group. He was with Chikerema and Nyandoro. Even in the elections of 1980 he stood for Chikerema and Nyandoro but that party lost. They lost everything. So politically, he was not the best choice for us but nevertheless I recommended that he be appointed and the rest of the government agreed and he became our Chief Justice as time went on.[525]

By 1984 the majority of the judges were appointees of the new government. In the same year Mubako expressed confidence in the success of the transformation in the judiciary as well as optimism that the clashes between the executive and the judiciary would lessen.[526] As I show in chapter seven, this optimism was proven wrong.

Africanisation was not without its problems. One problem had to do with resistance from some of the white legal professionals who objected to it on the grounds that they were 'maintaining professional standards'. While there were certainly reasons to be concerned about professional standards given the rapid transformation in the legal system during the 1980s, the rhetoric around professional standards was largely connected to fears that the changes would weaken the control over access to the legal profession held by the white-owned firms.[527] Related to this was the tense relationship between the new officials at the helm of the legal system and the white civil servants under them.[528] Many of these new officials were members of the first generation of African lawyers who had faced discrimination in the profession during the 1970s. The relationship was therefore burdened

[524] *Ibid.*
[525] Interview with Mubako.
[526] Mubako, 'The Law and the Judiciary in Zimbabwe'.
[527] Interview with Austin.
[528] See Herbst, *State Politics*, p. 33.

with unpleasant historical baggage. Chidyausiku, for example, noted the initial difficulties he faced in working with some of his subordinates, who had been his class mates in the 1970s, after his appointment as Attorney General.[529] An example of these tensions was the acrimonious correspondence between Chidyausiku and the law firm Winterton, Holmes and Hill. The exchanges were occasioned by the fact that C. Dube, who was employed in the Civil Division of the Attorney General's office, had appeared as the defence lawyer for a Zimbabwe National Army driver who had been involved in a motor accident which resulted in the death of a mother and her three children. Dube had managed to get the said driver acquitted.

After being consulted by the husband of the deceased woman, Winterton, Holmes and Hill raised the matter with Chidyausiku and expressed their objections to the affair in fairly strong terms. Part of the firm's letter read:

> It seems to us most undesirable that an accused person should be defended by a member of your staff, because an obvious conflict of interests arises, since the Prosecutor falls under your authority and is endeavouring to secure a conviction, whereas the Representative from the Attorney General's Office is endeavouring to secure an acquittal. Please advise if Mr Dube appeared with your authority, if so, the reasons why this was permitted. Whatever your answer, we intend to raise this matter with the Law Society, as we feel that this type of situation should not have been permitted, under any circumstances.[530]

Chidyausiku took exception to the tone of the letter and the fact that he was being castigated for what he felt was a longstanding practice. He responded with a strongly worded letter which read as follows:

> Mr C. Dube for the Civil Division of the Attorney General's office did appear in the case you referred to with the approval of this office. As to why I permitted him to do so, it is none of your business. I am not accountable to you or your firm. Please take your problem to your Law Society. It is typical of some of you

[529] Interview with G. Chidyausiku, Harare, 14 March 2011.
[530] SPA File, Law Society 1983, Winterton, Holmes and Hill to Attorney General, 25 October 1983.

> white practitioners that you now see fit to complain about this in the manner that you chose to do and not during the time of my predecessors. This has been happening for donkey years [sic] and you choose to pretend it is happening for the first time.[531]

Chidyausiku's blunt response should be understood in the context of the long-standing racial tensions within the legal fraternity. The fact that Winterton, Holmes and Hill had long been considered a conservative firm which had been sympathetic towards the Rhodesian Front is unlikely to have helped matters.[532]

Another serious problem had to do with the inefficiencies in the legal system that resulted from the exodus of experienced personnel and their replacement by inexperienced and often hastily trained personnel. During an address at the opening of the Masvingo High Court circuit in 1988, Chidyausiku, by then a High Court judge, commented on the problems that plagued the legal system during the 1980s:

> Soon after independence, the administration of justice was beset by a number of very serious problems such as mass resignation of experienced staff. There were shortages of accommodation and staff, shortages of judges, prosecutors and magistrates, long delays in the completion of investigations into criminal cases, delays in the preparations of the medical reports in criminal trials and delays in the transcription of records required for appeals. The total effect of these problems and difficulties has been long, inordinate delays in bringing cases to trial. Some of these problems still bog down our criminal justice system. I note with satisfaction, however, that the situation appears to be showing signs of improvement. There appears to be light at the end of the tunnel. An example of this apparent improvement is that most of the offences I will be trying during this session were committed less than nine months ago. A short while ago it was not uncommon for cases to come to court three years after the offence had been committed.[533]

The problems in the administration of justice were regularly raised in the meetings of the Law Society Council. In a meeting with the Minister of Justice, Chihambakwe drew the

[531] *Ibid*, G. Chidyausiku to Winterton, Holmes and Hill, 25 October 1983.
[532] Interview with K. Reagan, Harare, 13 April 2011.
[533] Address by Mr Justice Chidyausiku on the Opening of the Masvingo Circuit in October 1988, 'The Quality of Administration of justice in Zimbabwe' *Legal Forum,* 2 (1988), p.3.

Minister's attention to the poor standard of prosecution in the courts and pointed out that this presented the risk of 'unjust convictions and unjustified acquittals.'[534]

Added to the confusion in the courts was the poor performance of a significant number of the new lawyers which arose, in part, due to the shortening of the pupillage period. Amongst the many signs of this was the rise in cases of lawyers embezzling money from trust funds in their care.[535] Chidyausiku also voiced concerns that: 'The quality of legal representation in our courts has degenerated to a level that is unacceptable. It is patently obvious to the courts that **some**, (and I emphasize the word **some**) are coming to court ill-prepared or not prepared at all. The cost of legal representation has gone up phenomenally but the quality of legal representation has gone down.'[536] He attributed these problems to the fact that lawyers were being 'let loose on the public' before they had accumulated the necessary skills and that many had limited 'access to legal materials such as law reports and other legal books'. He also pointed out the tendency for legal practitioners to take on more cases than they could efficiently handle.

An important aspect of the transformation of the legal system in the 1980s was the drive towards Africanisation. This was partly because transforming the racial composition of the legal system was seen as a crucial step in the effort to democratise it and alter its symbolism. However, there were also self-serving motivations on the part of the new government. The process allowed it to ensure that the bench was staffed with 'sympathetic' individuals. In addition, the goal of Africanisation was at times subordinated to political considerations. As

[534] SPA File, Law Society 1983, Minutes of the Law Society Council, 12 December 1983.
[535] Interview with S. Chihambakwe, Harare, 16 March 2011.
[536] Chidyausiku, 'The Quality of Administration of Justice', p. 4. (Emphasis in original).

a result of the programmes to train black magistrates, prosecutors and lawyers, and the drive to appoint new judges, by 1990 the racial composition of legal personnel had been significantly been altered. However, the process of institutional transformation in the 1980s had not been a smooth one. The massive exodus of white personnel and the racial tensions were some of the key obstacles that hindered the transformation efforts.

Reorganising Chiefs' Courts and the Administration of 'Customary Law'

Another set of important changes in the legal sphere during the 1980s was in the area of chiefs' courts and 'customary law'. As we have seen, from the 1960s the Rhodesian Front had elevated 'customary law' and chiefs' courts in its attempts to counter nationalist agitation and re-legitimise the state. In contrast, the new government, like many post-colonial African governments, sought to modernise the 'manner of administration and substantive content' of 'customary law' and bring it into step with social and economic changes. As part of its 'modernisation' efforts, the new government sought to introduce the symbols, forms and concepts of state law into 'customary law' courts. However, these efforts came up against resistance from 'traditional' leaders. As shown in chapter two, chiefs were not inherently opposed to the incorporation of 'modern' features in their courts. They had, in fact, lobbied for precisely that. The problem in the 1980s was that the new government's plans to reorganise the local courts side-lined traditional leaders. As a result, these leaders drew on alternative sources of legitimacy and challenged the authority of the presiding officers who replaced them.

In the 1980s, the old racially-segregated courts were reorganised and a single court hierarchy was established. The courts run by District Commissioners, Headmen and Chiefs were

replaced by 'primary courts' which were made up of two tiers of courts that were run by Presiding Officers (POs). The first tier of courts was the Village Courts (*matare apamusha*) and the POs in these courts were chosen by popular election. The second tier consisted of Community Courts (*matare makuru*), which were presided over by trained POs who were appointed by the Ministry of Justice. The primary courts were to be supervised by an inspectorate headed by Justice Brobbey, one of the judges recruited from Ghana.[537] Primary courts mostly heard civil cases and a limited range of criminal cases that were determinable by 'customary law'. Significantly, Community Courts were present in both the rural and the urban areas and they were open to citizens of any race. Next in the hierarchy of courts were the Magistrate's Courts, followed by the High Court and finally the Supreme Court.

Two key factors help to explain this reorganisation of courts. The first was the fact that, unlike the Smith regime, the new government no longer depended on chiefs as a major source of legitimacy. This was not an outright rejection of chiefs as had been the case in Mozambique after independence. However, what was clear was that chiefs were no longer seen as being at the centre of the new government's designs. Instead, the new government promised to implement development programmes and to create a new, modern society as well as a more democratic approach to government.[538] While the government's rhetoric emphasized democratising local government, in practice it resorted to the top-down approach of the Rhodesian Front.[539] The second factor that shaped the changes in the local courts system was the shift of decision-making authority on the question of 'customary law' court to

[537] A. Ladley 'Changing Courts in Zimbabwe: The Customary Law and Primary Courts Act', *Journal of African Law* 26 (1982), p. 108.
[538] See *Zimbabwe Parliamentary Debates*, 10 February 1982, col. 1610-1611.
[539] For a broader discussion of the fate of chiefs and the shortcomings of the participatory approach in the 1980s see Alexander, *The Unsettled Land*, chapters 5, 6 and 7.

the Ministry of Justice, as opposed to the Ministry of Internal Affairs which had been in charge of them in the 1960s and 1970s.

The Customary Law and Primary Courts Act of 1981 had a number of objectives. Important amongst these was the new government's desire to reorganise the administration of justice in line with its broader modernising project. In this regard, Mubako explained to Parliament that: 'The Bill before this House seeks to introduce a system of customary law and courts which will be seen by the people as being part of the new society. Judicial offices on these courts will be open to all people, chiefs and commoners and my Ministry will provide training for presiding officers of community courts.'[540] At the same time, the changes were about re-establishing state authority over the administration of justice. This was necessitated by the existence of 'Kangaroo Courts' or political party committees which had begun arbitrating over cases during the war and had continued to do so during the early 1980s, much to the irritation of government officials and ZAPU leaders.[541] As Mubako would later concede 'these could have led to a breakdown in the administration of justice had the government not intervened quickly.'[542] Another important aspect in the reforming of the local courts system was the removal of the element of racial difference that had long been embedded in the justice system.[543] Under this new system, Zimbabweans of any race could and did approach these courts and, in doing so, the new government broke away from the old system that defined Africans as ethnic subjects as opposed to full citizens.[544]

[540] *Zimbabwe Parliamentary Debates*, 3 February 1981, col. 1498.
[541] *Ibid*, col. 1497. See also N. Kriger, *Zimbabwe's Guerrilla War: Peasant Voices* (Cambridge, 1992), Chapter 6.
[542] Mubako, 'The Law and the Judiciary in Zimbabwe'.
[543] *Zimbabwe Parliamentary Debates*, 3 February 1981, col. 1496.
[544] Ladley, 'Changing Courts in Zimbabwe', p. 113.

The Act also aimed to bring about the 'modernization' of 'customary' law. Mubako hoped that 'customary law' would begin to incorporate new legal concepts and that its administration would be professionalised through the use of trained presiding officers. In presenting the legislation to Parliament he explained that:

> Any system of law which does not develop with the times in the manner of its administration and in its substantive content will be discredited and will decay. We must not forget that the developed systems of law of Europe which we have inherited through colonialism were also at one time administered by feudal lords and barons. But as their societies developed the feudal barons were replaced by trained officers of the government. No system of law which wants to survive, can escape that process of modernization.[545]

Mubako hoped that the process would lead to 'cross-fertilization between indigenous customary law and Roman Dutch law until there is a single common law of Zimbabwe.' He went on: 'The greater emphasis on compensation and restitution in customary law is something that would make the civil law more acceptable, and the Roman Dutch concept of the law of property would give customary law a new dimension, where it traditionally was very limited.'[546]

The legislation on primary courts was more concerned with the administration, as opposed to the codification, of customary law. Consequently, procedural aspects received a significant amount of attention, especially in the Community Courts which were to be administered by trained POs. The eligibility requirements for POs included a five Ordinary Level passes and a minimum age of 25 years. Their training course was divided into three stages which involved formal lectures as well as periods of attachment with Community Courts around the country. The curriculum consisted of a number of subjects which included customary law, law of evidence, criminal law and civil procedure. Community Courts were courts of record

[545] *Zimbabwe Parliamentary Debates*, 3 February 1981, col. 1498.
[546] *Ibid.*

and POs were expected to draw up satisfactory records of trials which could be referred to in the event that cases were appealed. Consequently, POs sat examinations in English essay and comprehension, translation from local languages to English, as well as English dictation.[547] An important factor was that these POs were being trained within a broader context of significant legal reforms which included the passage of several laws regarding women's rights.[548] As I show below, this would have an important bearing on the way POs ruled on maintenance cases.

As the primary courts system was implemented from 1982, new courts were established in large numbers across the country. In carrying out their everyday duties, the POs and their newly constituted courts enacted the modernising ambitions of the state and made the state present at the local level. Andrew Ladley notes that by the end of 1982, there were approximately 1500 village Courts and 50 Community Courts in operation which heard about 2500 cases each month, and this figure continued to rise in the course of the 1980s.[549] The background of the POs in Village Courts varied widely. In some areas chiefs and headmen and village heads were elected. In other cases, popular individuals linked to ZANU (PF) were elected. In many cases POs had both, a claim to 'traditional' authority and party credentials. However, very few women were elected as POs in Village Courts. In the case of Community Court, where POs were selected by the Ministry of Justice on the basis of educational qualifications, 16 of the first 100 trainees were women.[550] In a small number of

[547] Ministry of Justice, *The Training of Community Court Presiding Officers and Clerks*, 1982.
[548] A. Tsanga, 'Reconceptualizing the Role of Legal Information Dissemination in the Context of Legal Pluralism in African settings', in A. Hellum *et al* (eds), *Human Rights, Plural Legalities and Gendered Realities: Paths are Made by Walking* (Harare, 2007).
[549] Ladley, 'Changing Courts in Zimbabwe', p. 113.
[550] *Ibid*, pp. 109-110.

cases, white Zimbabweans were involved in community courts both as defendants and plaintiffs.[551]

In Zaka district (previously Ndanga) the primary courts had mixed fortunes. The District Administrator for Zaka, J. P. Chataurwa, made the following comments on the situation with respect to chiefs in his district:

> Some chiefs/headman who are popular/acceptable to the people have been made court presiding officer, assessors, councillors etc. However, certain chiefs/headmen who were against people's revolution were either killed or fled their homes thereby bringing the institution of chieftainship into doubtful integrity. From my contact with people on the ground, it is generally acceptable to the majority of the people. They (the mass/people) have not advocated for a complete abolition of the institution of chieftainship.[552]

Chief Ndanga, whose chiefdom fell within Zaka district, was amongst those chiefs who were not 'popular/acceptable' enough to be elected as POs. During the early 1980s party affiliation was an important form of currency in getting elected as a PO in the Ndanga Village Courts.[553] Consequently, it was Simon Musuka, a ZANU (PF) official as well as a member of one of the rival houses for the Ndanga chieftaincy, who was elected to be the PO for the Village Court.[554]

Unsurprisingly, this led to resentment on the part of the 'traditional' leadership. While the government had hoped that the democratic selection of POs would provide the new judicial officials with the necessary legitimacy, in practice things turned out to be much more complicated. 'Traditional' leaders contested the legitimacy of these POs on several grounds.

[551] *Ibid*, p. 113.
[552] NAZ-Masvingo: CHK & HM 14 1975-1982, District Administrator for Zaka, J. P. Chataurwa, to Undersecretary Development, 14 April 1982.
[553] Group interview with four Ndanga village heads – M. Magora, C. Ndume, J. B. Ngwaru and F. Mutape - Ndanga, 2 February 2011.
[554] Interview with R. Ndanga, Ndanga, 18 April 2011.

Some argued that they were new comers who could not be expected to exercise authority over the autochthons.[555] Others invoked 'custom' as the true basis for the legitimate exercise of judicial power.[556] The severe drought of 1982-84 provided a strong basis for Chief Ndanga to reclaim judicial authority. As in Chimanimani District, the 'traditional' leadership in Ndanga interpreted the drought as a sign that the 'soil' was angry at the rejection of chiefs.[557] Consequently, from 1985 Chief Ndanga was able to re-assume judicial authority.[558]

While primary courts in the rural areas were facing pressure due to opposition from 'traditional' leaders, those in the urban areas were facing a different set of problems. In Harare, the courts were struggling to cope with the volume of cases being brought to them and the situation was raised in the Law Society Council meeting of November 1983.[559] During the meeting, council members expressed concerns over the plans by the government to extend the jurisdiction of primary courts and pointed out that the POs were struggling to cope with their existing jurisdiction. Some councillors proposed that lawyers help with the training of these officials. The matter came up again in the December meeting with the Minister of Justice. David Zamchiya, one of the councillors, pointed out instances when he had gone to the Harare Community Court only to find that no PO had been allocated the case or that the presiding officer was not prepared.[560]

[555] Group interview with Ndanga village heads.
[556] See Alexander, *The Unsettled Land*, p. 166.
[557] Group interview with Ndanga village heads and Interview with R. Ndanga, 18 April 2011.
[558] Interview with R. Ndanga, 18 April 2011.
[559] SPA File, Law Society 1983, Law Society Council Minutes, 28 November 1983.
[560] *Ibid*, The Law Society of Zimbabwe Notes of a Meeting held by Harare Councillors with the Minister of Justice on 12th December 1983.

The primary courts system was ultimately abandoned in 1990, due to combination of factors. On the one hand there was pressure from the chiefs to have judicial powers restored to them. On the other, the ruling party increasingly came to see chiefs as an important source of political support and had become more amenable to their demands. This shift towards chiefs occurred in the context of growing frustration within grassroots party and local council structures due to the government's centralised approach to decision-making in important issues such as land distribution. As Jocelyn Alexander points out, 'the weaknesses of vidcos [village development committees] and the apathy within the party created space for the emergence of customary leaders as, at one and the same time, populist critics of state policy and a pivotal means for officials to implement policies and for politicians to build support.'[561] Recognising this, in the run up to the 1985 elections, Prime Minister Robert Mugabe promised to restore judicial power to chiefs and headmen.[562] This promise was fulfilled in 1990 through the Customary Law and Courts Act.

Even before the legislation had become operational, chiefs began exercising judicial powers to the extent that the new Minister of Justice, Emerson Mnangagwa, found it necessary to issue the following statement:

> It has come to my attention that a number of chiefs and headman have already assumed judicial functions in their areas of jurisdiction and are presiding over customary law cases. It is necessary, once again, for me to state quite categorically, that at this point in time this is illegal and that any judgements so pronounced will not have the force of law. My Ministry has previously made it quite clear that for a chief or a headman to preside over a local court, he will need a warrant signed by myself, authorising him to preside over such a court. [563]

[561] Alexander, *The Unsettled Land*, p. 165.
[562] *Ibid*, p. 166.
[563] 'Chiefs Trial Courts not Legal Yet', Press Statement issued by Minister of Justice, Legal and Parliamentary Affairs, Department of Information, July 6 1990.

The passage of the 1990 law did not amount to a full return of judicial powers to 'traditional' leaders. Many important areas of social dispute such as child custody, wills and inheritance, maintenance and dissolution of marriages were placed under the jurisdiction of magistrates. In addition, the jurisdiction of headman and chiefs was limited to cases where the value of claims did not exceed $500 and $1000 respectively. As Welshman Ncube observed: 'Considering that maintenance, custody and divorce claims probably take up more than 95 percent of the business of the current community courts, it is difficult to envisage what meaningful cases will be left to be heard by headmen and chief's courts.'[564] Chiefs were also well aware of this fact and they made their views known to the Minister of Justice during the provincial workshops organised to train them on exercising their new powers.[565] However, their calls for changes in the law were unsuccessful.

In summary, the progressive steps taken in the local administration of justice in the 1980s included the removal of the racially segregated court hierarchy and efforts to make the system more democratic. However, the political pressure from chiefs combined with ZANU (PF)'s need for their support, led to the reorganisation of the local court system yet again through the Customary Law and Courts Act of 1990. While the Act represented a political accommodation between the government and chiefs, it did not fully restore judicial powers to 'traditional' leaders. Many of the key areas of social dispute were placed outside their jurisdiction. In addition, there were lasting changes from the reforms of the 1980s, such as the desegregation of the court system. As I show below, Community Courts had also played an important role in mediating new social norms in the area of gender relations.

[564] W. Ncube, 'Customary Law Courts Restructured', *Zimbabwe Law Review*, 7 (1989-1990), p. 16.
[565] 'Chiefs not Happy with New Powers', *The Herald*, 13 December 1990.

Law and Gender Relations

One of the key areas of legal reform taken up by the new government was the legal status and rights of women. A number of important laws were passed in the 1980s in areas such as marriage, divorce, child custody, inheritance and employment. These included the Equal Pay Regulations of 1981; the Matrimonial Causes Act of 1985 which, among other things, provided for the equal division of property between husband and wife in the event of a divorce; and the Labour Relations Act of 1984, which explicitly made discrimination on the grounds of gender illegal in the workplace. These changes were met with significant resistance. In the often heated debates over the issue of women's rights, conflicting interpretations of African 'custom' and 'culture' and the goals of the liberation war were advanced to support opposed viewpoints. I will limit my focus here to the debates around the Legal Age of Majority Act of 1982, which had far-reaching implications for women's rights and was the most controversial law implemented by the new government. It provides a useful window through which to view the contestations around the legal status of women in the 1980s. I will also use maintenance cases heard in Zaka and Bikita districts to examine how gender struggles played themselves out in the legal arena and to show how courts mediated changes in social norms in the 1980s.

From the early colonial period African women had been defined in colonial law as 'perpetual minors', which placed them under the legal guardianship of a male relative from birth to death.[566] Calls to improve their legal status had been made periodically. As we have seen, in the mid-1970s, several organisations which included the Young Women's Christian

[566] E. Schmidt, 'Negotiated Spaces and Contested Terrain: Men, Women, and the Law in Colonial Zimbabwe 1890-1939', *Journal of Southern African Studies*, 16 (1990), p. 630.

Association (YWCA), the National Federation of Women's Institutes of Rhodesia and the Anglican Church began to call for the improvement of the legal status of African women.[567] However, the calls were often targeted at a particular stratum of African women who were referred to as 'emancipated' such as widowed or divorced women who had contracted a 'Christian' marriage as well as economically self-sufficient women.[568] By contrast, the Ministry of Internal Affairs (MIA), which had been working with African women through Women's Clubs and chiefs' wives since the mid-1960s, resisted these calls. It chose instead to continue pursuing its 'Community Development' drive with its less controversial emphases on 'self-help', 'popular participation' and 'decision making'.[569] This was partly due to its realisation that the Council of Chiefs opposed changes to the legal status of women. Given the need for chiefs' support to counter nationalism and legitimize the state, the MIA was reluctant to ruffle any feathers.

The position of the MIA was exemplified by an internal paper entitled 'The Rights of African Women' which was written by L. de Bruijn, one of the ministry's officials based in the headquarters in Salisbury. In keeping with MIA rhetoric of the time, his views were presented as being founded on respect for African culture. He argued:

> With a number of cultures living together in this country, and with such a diversity in the rules of separate cultures, it is of course necessary to lay down rules of behaviour which override cultural rules to avoid or to reduce clashes between the differing cultures. This is the role of the legislature and this is why we have some of the statutes in our law books. However, the legislature should really confine itself to making those rules without which the differing societies cannot live together and should not interfere in those cultural rules of each particular culture which affect only the members of that cultural group and no others. Let us not interfere in the matter of the rights of African women. Let their own culture slowly and effectively bring about the changes which may be

[567] See NAZ S3700/15, Legal Status of African Women.
[568] Chidyausiku also raised the question of the legal status of 'emancipated' African women in Parliament in 1974. See *Rhodesia Parliamentary Debates*, 15 November 1974.
[569] Interview with Betty Mutero, Harare, 22 March 2011.

> required. A cross we bear is our predilection for thinking with our hearts and not our minds.[570]

After independence, the new government resolved to combine efforts to economically empower women with measures to improve their legal status. These changes were driven by a number of groups such as female ex-combatants who included Teurai Ropa Nhongo, the Minister of Community Development and Women's Affairs, feminist legal activists such as Joan May and Julie Stewart, women academics based at the university of Zimbabwe, as well as members of the YWCA. The reform efforts also had the support of top level ZANU (PF) officials, though there was significant resistance within the lower echelons of the party.[571]

The Legal Age of Majority Act of 1982 stipulated that all Zimbabweans, irrespective of race, gender or class would 'assume the full rights and obligations of citizenship' upon reaching the age of 18.[572] In presenting the legislation, Mubako invoked the recent liberation struggle to emphasise the fact that women had earned their right to equal citizenship:

> The law will remove away any doubt surrounding the legal status of African women and will ensure that all our women will have all the legal rights that citizens of a democratic country should possess. They have fought in the war and thousands of them died just like their male comrades. They may still be called upon to defend their country at age 18, they pay taxes at the same age as men, they vote at that age; it is therefore only just and proper that women like men should become majors at the same age of eighteen.[573]

This position was reinforced by Nhongo in a speech during a colloquium on the rights of women which had been organised by the Legal Department of the Ministry of Justice. Her speech, which appealed to the government's declared ideology of socialism, read in part: 'It should be borne in mind also, that in the context of the national ideology and the principles

[570] NAZ S3700/14, Legal Status of African Women, L. de Bruijn to the Minister of Internal Affairs, 17 October 1975.
[571] *Zimbabwe News*, February 1985.
[572] *Zimbabwe Parliamentary Debates*, 17 June 1982, col. 67.
[573] *Ibid*, col. 68.

on which the liberation struggle was fought, a perpetuation of inferior status of women is a real embarrassment for it negates the very principles of socialism….'[574] Countering the argument about preserving culture that was frequently advanced by opponents of the legislation, she argued that: 'Cultures and traditions are not static but change as circumstances and situations change. Customs are made by people and it is people who can change them. They are fashioned to suit the prevailing socio-economic order and it is on this basis that women feel certain aspects of customary law are simply obsolete and out of step with the situation in Zimbabwe today.'

During debates on the Legal Age of Majority Act it was clear that senior government officials were anxious to conceal the far-reaching social impact it would have. Consequently, they expedited its passage into law. Under normal parliamentary procedure proposed legislation went through a first, second and third reading, as well as a committee stage. While the first reading involved the tabling of the Bill, the other stages often involved substantial debate in the House. In addition, a significant amount of time was left between the tabling of a Bill in Parliament and its second reading to allow parliamentarians to read the legislation and consult their constituencies before the debate. In the committee stage, the House often debated and voted on changes to the proposed legislation clause by clause. In the case of the Legal Age of Majority Act, the Bill was tabled on the 16th of June, and moved through the first, second and third readings as well as the committee stage in the next three days. During the second reading only nine of the 100 parliamentarians contributed to the debate, and there was no debate during the committee stage.[575]

[574] Cited in W. Ncube, 'The Decision in Katekwe and Muchabaiwa: A Critique', *Zimbabwe Law Review*, 1 & 2 (1983-4), p. 218.
[575] See *Zimbabwe Parliamentary Debates*, 17 June 1982, col. 65-100 and *Zimbabwe Parliamentary Debates*, 18 June 1982, col. 117-118.

After its passage, the legislation provoked a huge public outcry which was in large part a patriarchal backlash triggered by the realisation of the threat posed by legislation to patriarchal control and especially the practice of *roora* or bride wealth payment. This was not helped by the way the legislation was publicised by the government. According to Julie Stewart, who assisted with the drafting of the legislation, the publicity material gave prominence to the fact that the new legislation enabled girls to get married without parental approval.[576] Consequently, even those who had no qualms over the issue of equal rights for women became suspicious of the legislation. At another level, the public outcry was an expression of anxieties about rapid social change and its impact on the behaviour of the youth. These anxieties were in turn blamed on the issue of the legal status and rights of women.[577] At the same time, the concerns of the opponents of the legislation arose from the tensions they saw between the notion of personhood on which customary practices and social relations were based and that on which the legislation was based. The debate about the legislation also came to encompass questions about the broader direction of the nation and the place of African culture/custom.

Despite the brief window of debate, there were objections expressed in Parliament that echoed the objections made by male elders in the early decades of colonial rule to laws that enabled women to challenge patriarchal authority.[578] MPs invoked an essentialised notion 'African culture' which was discursively constructed in opposition to 'western culture' and

[576] Interview with J. Stewart, Harare, 12 April 2011.
[577] Kazembe, 'The Women Issue' and Interview with Stewart.
[578] See Schmidt, 'Negotiated Spaces and Contested Terrain'.

predicted that social degeneration would follow the Bill's passage.[579] In the late 1980s, many individuals attributed social ills such as 'baby dumping' to the moves to accord women equal rights.[580] For the most part, those who expressed their reservations in Parliament were members of ZAPU, and so were not bound to toe the party line. One critic was S. D. Malunga, a ZAPU MP from Matabeleland North. He spoke at some length about the importance of 'culture' and 'customs' for the nation:

> I take it that the yardstick of judging the values of any nation lies in its cultural infra-structure. I take it that Zimbabwe is no exception to that and that being the case, I particularly welcome change as long as it is progressive change, as long as it is change that is not want [sic] to destroy our being Zimbabweans [sic]. True to say, we have got to seek equality. But equality has got to have limits and it has to take cognisance of our real selves as Zimbabweans.[581]

Malunga was particularly concerned about the provision that girls over the age of 18 would be able to marry without their parent's consent. This, he argued, went against 'African customs' and he asserted that: 'An African girl will continue to seek permission from the parents, and if there is trouble it is a matter of must – she will go back to her parents, or brothers, or whatever relatives are there to talk about the problem.'[582]

J. E. G. Ntuta, another ZAPU MP from Matabeleland North, had initially been inclined to support the Bill but began to reconsider his position after hearing the speeches of others. He warned that the Bill might lead to further degeneration in the behaviour of the youth. Ntuta also engaged with the Minister's rhetoric regarding the goals of the liberation struggle:

> We fought for this country because our customs were not recognised. At my age, born in 1924, I am still answerable to my brother. I have a widowed mother to

[579] Similar arguments were made by opponents of the Matrimonial Causes Act. See Kazembe, 'The Women Issue', p. 390.
[580] Chief Ndiweni made this argument in the Senate debate on the 'Role of Chiefs'. *Zimbabwe Senate Debates*, 6 February 1990. See also Batezat *et al*, 'Women and Independence', p. 169.
[581] *Zimbabwe Parliamentary Debates*, 17 June 1982, col. 69-70.
[582] *Ibid*.

> whom I am still answerable. I never steamroll my mother. I have due respect for her, and I let her enjoy her maternal role. That maternal instinct must not be blocked by law. I believe if the Minister's speech is misinterpreted, it will make our children worse than they are.[583]

It was not just gender relations but also generational ones that concerned Ntuta. At the core of his concerns were the tensions between the notion of personhood on which the Bill was based and that on which customary social relations were founded. For him, the idea of seniority that underlay customary social relations was incompatible with the notion of individual rights on which the legislation was based. He thus saw the possibility of youth becoming increasingly disrespectful. His views highlighted the kinds of tensions that the government had to negotiate: the rhetoric of socialism and the goals of liberation proved unequal to the task of reconciling these kinds of tensions.

Amongst the supporters of the Bill, the few who spoke included Naomi Nhiwatiwa, a ZANU (PF) MP from Manicaland. She challenged the patriarchal concerns that underlay the opposition to the Bill and questioned the focus on girls by some of the Bill's opponents:

> …this lowering the age of majority applies to all people, there is nobody special, the idea that it will cause a problem as far as young women are concerned, gives a very erroneous assumption that women are irresponsible, yet they are the cradle of this country, they are the ones who have nursed this nation, they are the ones who have nursed our leaders today, our young women did not have to be 18, when the previous speaker was here, to be able to be a mother and to run a home.[584]

She added: 'If we look at our own traditions and culture, women were married at a much earlier age than 18 years. They became mothers and wives and they ran homes. So there is nothing contradictory about this Bill that should suddenly change our women, into irresponsible women.'[585] For her part, Ruth Chinamano, an MP from Matabeleland North,

[583] *Ibid*, col. 73.
[584] *Ibid*. Col. 72.
[585] *Ibid*.

was much more forthright: 'If I do not support this Bill I would be doing an injustice to womenkind – [HON. MEMBERS: Hear, hear] – It is long overdue to introduce such a Bill for women. The days when eggs were only for men and not for women are gone. – [HON. MEMBERS: Hear, hear] – *Chikanganwe hama* [a chicken portion]. The days when part of a chicken was only for men and not for women have gone. This is the year for social changes and the changes must be for everyone.'[586]

The Legal Age of Majority Act led to a number of landmark rulings in the course of the 1980s which revealed the extent of the legislation's impact on African women's status and rights. These rulings also invalidated the claims of particular categories of men over their daughters or wives and were therefore particularly radical. The first was that handed down in the 1984 test case between Katekwe and Muchabaiwa which had been sponsored by the Law Department at the University of Zimbabwe. The case was initiated in a Community Court and dealt with the question as to whether a father had the right to sue for seduction damages in the case of a daughter who was above the age of 18.[587] From the Community Court through the Magistrate's Court to the High Court, the rulings handed down held that the father no longer had the right to sue for seduction. The ruling also indirectly undermined a father's claim to bride wealth with respect to a daughter who was over 18 years of age. The second important ruling was handed down in the 1987 case between Auxillia Mangwende and her uncle Leonard Chihowa. It concerned the former's right to be considered an heir to her father's estate. In this case the Community, the Magistrate's and the Supreme Courts all ruled that, since the passage of the Legal Age of Majority Act, there was no reason

[586] *Ibid*, col. 78.
[587] Ncube, 'The Decision in Katekwe v Muchabaiwa'.

preventing a daughter from being appointed an heir in the event that her father died intestate.[588]

Despite the existence of progressive legislation and supporting judicial rulings, translating the improvements in the legal status of African women into actual improvements in their lived realities was a longer struggle. For many women concerns about possible marital disharmony, financial limitations, illiteracy and lack of information all influenced the extent to which they took advantage of the legal remedies available to them.[589] In addition, the publicity given to the rulings led to an intensification of the public outcry against the Act. In 1984, Eddison Zvobgo, the new Minister of Justice, was forced to concede ground and indicated that the government was looking into passing an amendment that would allow fathers to claim damages for seduction, regardless of whether the daughter in question had attained the legal age of majority.[590] On her part, Nhongo, the Minister of Community Development and Women's affairs, promised a gathering of parents in Mount Darwin that: 'We want to retain our cultural values and we shall invite parents, elders, and traditional leaders to advice [sic] us on the necessary amendments needed to retain those social values we cherish.'[591] The amendments were never passed. However, the public outcry that had forced government officials to make promises to amend the legislation indicated the extent of social resistance the legal changes had met on the ground.[592]

[588] J. Stewart, 'Legal Age of Majority Act Strikes Again: Chihowa v Mangwende SC 84.87', *Zimbabwe Law Review*, 4 (1986).
[589] Tsanga, 'Reconceptualizing the Role of Legal Information Dissemination', pp. 440-445.
[590] Cite in Ncube, 'The Decision in Katekwe v Muchabaiwa'.
[591] *Ibid*.
[592] See Kazembe, 'The Women Issue' and Batezat *et al*, 'Women and Independence'.

Notwithstanding these many challenges, the legal changes of the 1980s did open up new spaces in which gender relations could be (re)negotiated. One such space was the Community Court. In October 1982, the Customary Law and Primary Courts Act was amended to empower Community Courts to order maintenance to be paid to deserted and divorced wives/partners and their children.[593] This was significant for two main reasons. Firstly, these courts would play a key role in mediating change in gender relations. It is worth noting that the idea of paying maintenance was a radical change in the 1980s.[594] For much of the period of settler rule the practice of paying maintenance was largely restricted to the European population. In the event of a divorce within African families, questions relating to the custody of the children were dealt with by elders and if the wife's family took care of them, the husband would be expected to make a *chiredzwa* payment in recognition of this. The bulk of the property possessed by the couple went to the husband and there was no obligation for men to make any payments to their estranged partners.

By handing down rulings in favour of the women who brought cases before them, Community Courts were introducing the idea of maintenance payment as a new social norm.[595] They were also intervening in power relations between men and women. The use of the courts by women in these cases should also be understood within a much longer history of African women's engagement with the law highlighted in chapter one. It is important to point out that not all men were opposed to the paying maintenance. Male relatives of deserted women were often supportive of legal action and in some instances so were the relatives of the husband.[596]

[593] Kazembe, 'The Women Issue', p. 387. See also *Zimbabwe Parliamentary Debates*, 24 June 1982.
[594] Inteview with M. Mufuka, Jerera, 4 February 2011.
[595] S. E. Merry, 'Resistance and the Cultural Power of Law', *Law and Society Review*, 29 (1995), p. 20.
[596] Interview with Mufuka and Group interview with Ndanga village heads.

The number of maintenance cases heard in Community Courts around the country rose sharply between 1983 and 1990. These suits were almost exclusively brought by women and were not limited to urban areas or to upper class women. The rise in the number of maintenance suits was influenced by the fact that the Legal Age of Majority Act enabled women to sue without the assistance of a legal guardian. An additional factor was the publicity campaigns around the legal provisions relating to maintenance by the government, women's rights groups and organisations such as the Legal Resources Foundation.[597] The fact that these suits were generally successful also contributed to the increase in cases. In cases where men did not attend the hearings a ruling was handed down against them in default and deductions were made on their salaries. However, as I highlight below, these rulings were not always successfully implemented.

By the mid-1980s several districts were convening separate maintenance courts in order to deal with the volume of cases. Such was the case in Zaka and Bikita districts where maintenance cases came to constitute a significant fraction of the civil cases heard by Community Courts. As shown in the tables below, the number of maintenance cases in some years equalled or exceeded the number of all other types of civil cases put together.[598] An examination of the court records for maintenance litigation reveals that two main categories of women made use of these courts. The first were young women whose erstwhile lovers had deserted them and were refusing to take responsibility for a child.[599] For these women the

[597] W. T. Manase 'Grassroots Education in Zimbabwe: Successes and Problems Encountered in Implementation by the Legal Resources Foundation of Zimbabwe', *Journal of African Law*, 36 (1992).
[598] A study carried out by a University of Zimbabwe research team in the mid-1980s showed that, on average, around a quarter of all cases heard in the 19 Community Courts surveyed were maintenance suits. See Kazembe, 'The Women Issue', p. 388.
[599] For an example see the case between Shylet Gondo and Philip Tapfuma below.

courts were a help in ensuring that such men provided for their welfare and that of their children. This was particularly valuable in instances where the parents of the young mother refused to support their daughter.

The second category consisted of women who had been married for a number of years and had children but were faced with husbands who were not meeting their responsibilities of providing for the family. These husbands were often migrant workers and had usually taken up with a new partner in their place of work. Often the women involved first sought arbitration within the family before turning to the courts. For the most part, the institution of the suit was an attempt to rebalance the marital relationship and negotiate the distribution of household resources. This was evident in the case of Sylvia Mujaya who sued her husband, Wellington Madzimure, for maintenance in the Zaka Community Court in 1985. During the pre-trial conference she informed the court that, 'I made these maintenance summons to respondent because I was not aware of his whereabouts so I am asking the court to withdraw the claim so that we go and discuss the whole issue at home. If he declines to maintain his child I will come back and cause maintenance summons against him.'[600]

[600] NAZ Masvingo, Zaka Community Court Maintenance Cases 1985, Loc. 10-6-6R, Box 3567, S. Mujaya v W. Madzimure.

Table 2: Bikita District Statistics for Civil Cases[601]

Year	No. of Maintenance Cases	No. of Civil cases
1980	No Records	2
1981	NR	70
1982	NR	218
1983	NR	187
1984	NR	276
1985	300	191 plus
1986	360	394
1987	179	215
1988	127	160
1989	91 plus	182
1990	122	147

Table 3: Zaka District Statistics for Civil Cases

Year	No. of Maintenance Cases	No. of Civil cases
1980	No Records (NR)	Records Missing (RM)
1981	NR	RM
1982	NR	RM
1983	33	RM
1984	100	RM
1985	148	411
1986	266	264
1987	306	229
1988	219	293
1989	RM	203
1990	194	167

[601] These statistics were put together using court records from the Magistrate's and Community Courts in the two districts which I consulted at the Masvingo office of the National Archive of Zimbabwe. Until 1984 in the case of Bikita, and 1983 in the case of Zaka, the statistics for civil cases included maintenance cases. This changed after this as separate maintenance courts began to be convened.

As in other districts, the courts in Bikita and Zaka were sympathetic to the women who brought their cases to them.[602] The rulings handed down in the maintenance case brought by Shylet Gondo against her erstwhile lover Philip Tapfuma provides an example of the tone taken by presiding officers. In giving his reasons for ruling against Tapfuma, the PO, T. Kwenda, made the following observations:

> Assuming that the respondent never fell in love with the applicant let alone to have sexual intercourse with her then why would the applicant had [sic] the audacity to falsely implicate him. The applicant gave her evidence well to the satisfaction of the court neither did she contradict herself under cross examination. The respondent did not adduce any evidence that the applicant was having affairs with other men besides him. It is highly improbable for a woman to falsely implicate a man she never had an opportunity to have sex with for having impregnated her. The child is similar to the respondent in every respect particularly the facial structures and the complexion. Although the court cannot rely on this phenomenon in paternity dispute but the probative value of this evidence combined with other factual issues relevant to a particular case cannot be completely ignored. In actual words the respondent is being falsely implicated for fathering a child whom by coincidence bears a striking resemblance to him despite the fact that he never had any sexual intercourse with the applicant. It came to light during the proceedings that the respondent was in possession of the applicant's skirt which he was given as a love token. The respondent's assertion that he is being falsely implicated by the applicant because he was in love with her friend who subsequently eloped to another man is not plausible at all and the court shall not attach any due weight to it.[603]

In some cases, filing a maintenance suit was sufficient to pressure the errant husband to agree to support his children. In such instances, the husband concerned signed a consent order which was ratified by the court. The wording of these consent orders captured the role played by the Community Courts in enforcing the practice of maintenance payment. In the case of Loveness Mbetu vs Servias Gwenhure the consent order read: 'I Gwenhure Servias have freely and voluntarily without influence entered a consent agreement with applicant (LOVENESS MBETU) whereby I will pay to her $60-00 per month as maintenance for three

[602] Kazembe makes a similar observation about Community Court rulings in custody cases. 'The Women Issue', p. 389.
[603] NAZ Masvingo, Bikita Magistrates Court Maintenance cases 1990, Shylet Gondo v Philip Tapfuma M108/09.

children namely Callisto, Elizabeth and Memory. That I shall purchase clothing for the children every month the amount of which is not included in the aforesaid maintenance fees. This agreement shall be effective as from the 30th of December 1985 and thereafter payments shall be made on the 31st of each succeeding month.' [604]

While maintenance suits were useful resources in domestic struggles, things did not always turn out the way the women who initiated these suits hoped for. Unsurprisingly, there was significant resistance from some men. Male resentment of the maintenance courts was evident in the widely prevalent story amongst men that the provision for maintenance was being abused by women who were claiming maintenance from several men for one child.[605] Often maintenance suits were the first in a series of legal disputes between estranged partners. A common strategy adopted by men who had had a maintenance order made against them was to claim custody of the child or children in order to evade paying maintenance. This strategy was adopted by Munetsi who followed the maintenance suit against him by suing his estranged wife, Tsitsi Mercy Maduku, for the custody of their three-and-a-half year old child. He explained the reasons for the law suit as follows:

> I want to have custody of my child Charity who is with defendant. The reasons of me claiming the custody of this child is this that, defendant sued me for maintenance of this child. It means that she is being pressed hard by the child's custody. I feel if this burden can be ... off her I being the legitimate father should shoulder this burden. All the money being paid to the defendant should be credited to my child's social welfare activities. The child therefore should be with my own family so that they can feed together. That's all.'[606]

[604] NAZ Masvingo, Zaka Community Court Loc 10-6-6R, Box 3567, Loveness Mbetu vs Servias Gwenhure case M139/85. See also Emmaculate Chirombedze v Francis Chirombedze case M36/85; Tendai Makovera vs Marron Kujere case M35/85; Franscisca Tapudzayi vs Jabson Tapudzayi case M125/85.
[605] Group interview with Ndanga village heads.
[606] NAZ Masvingo, Zaka Community Court Civil Records, Loc 7-1-8F, Box 3563. Munetsi vs Tsitsi Mercy Maduku, case 332/88. See also NAZ Masvingo, Bikita Magistrates Court Civil Records 1-90, Loc 9-5-3R, Box 5251, Stanley Musiiwa vs Betty Nechakozha, case 67/90.

The ensuing exchange between him and his estranged wife as she cross-examined him illustrated another possible outcome of filing a maintenance suit: they could lead to the irretrievable deterioration of marital relations.

Plaintiff cross-examined by defendant: -

Q. You claim custody of child does it mean that you have rejected me?

A. That sounds quite true. If you knew we are still wife and husband you would not have brought this case to the court.

Q. Since 1982 when you told me to go to my parents' home I had not claimed maintenance for your child. You didn't claim custody of your child. Why today – is it not because of the children maintenance I am receiving from you?

A. I did not claim custody of the child because I thought we were still lovers but when you sued me first, all my faith and love was disrupted. I then felt it proper to have my child.

Q. Does it mean that if a wife sues the husband for maintenance, they are divorced?

A. It's quite apparent that they will be people whose relationship is quite broken because it is the couple's duty to abide by the rules of matrimonial subsistence.

In other cases, men who feared being sued for maintenance took pre-emptive steps by taking legal action against their estranged wives alleging adultery. This strategy was based on the knowledge that the courts would not award maintenance payments to women against whom the allegation of adultery was proven. This appears to have been the intention behind the suit brought by Widze Chingwara against his wife Reya Chingono in the Zaka Community Court in 1985. In his law suit Chingwara accused his wife of adultery and made an application for the courts to compel her to reveal her supposed lover. However, N. Chitsama, the senior presiding officer who heard the case, was unconvinced by Chingwara's claims and dismissed his suit with costs. Chitsama made the following observations: 'Plaintiff did not see his wife sleeping with anybody. He after returning from Mozambique had intercourse with his wife – as a result the woman got pregnant. It has appeared to me because of the validity of marriage

they have, plaintiff felt guilty conscious [sic] that he would be sued for maintenance by defendant. He then resorted to institute this claim which does not hold any material facts that his wife committed adultery.'[607] Other men exaggerated their monthly expenses in order to lower the amount that the courts would award as maintenance. Such was the case with Pinto Mutyebere who had been sued for maintenance by Pamela Nhapi. Mutyebere, a student teacher, claimed to have very high monthly expenses which included accounts with two departmental stores amounting to $100-00, a grocery bill of $200-00 and a clothes budget of $147-67.[608]

An important aspect of legal reform in the 1980s was the efforts that were made to remove the barriers to full citizenship for women. Notwithstanding the resistance of conservative sectors of society, many of the reforms introduced in the 1980s remained in place after 1990. The courts also served as importance avenues of introducing new social norms and rebalancing the power relations between men and women. The maintenance cases discussed above illustrate how the courts were used by women to ensure that their estranged partners fulfilled their responsibilities to provide for their families. While the law provided a means of enforcing these new norms, it also provided avenues for their resistance. As we have seen, men who were faced with maintenance suits or payments tried to use whatever means they could to evade them.

[607] NAZ Masvingo, Zaka Community Court Civil Records, Loc. 7-1-8F, Box 3563, Widze Chingwara vs Reya Chingono case 284/85.
[608] NAZ Masvingo, Bikita Maintenance Court 1990, Box 5256, Pamela Nhapi vs Pinto Mutyebere.

Conclusion

The 1980s were a period of substantial transformation in the legal system in Zimbabwe. Under the banner of building a modern socialist society and removing the legacies of colonial rule, the new government proceeded to take significant steps to change the racial composition of the personnel in the legal system and the legal provisions regarding the status and rights of women. There were also efforts to replace the system of chiefs and headmen's courts with the primary courts system. These reforms were progressive in as far as they democratised the legal system and removed the racial and gender barriers to full citizenship that were embedded in it. However, the reforms were also connected to the new government's state-making project. Africanisation allowed for the new government to staff legal institutions with its own appointees, and the creation of primary courts was in part about ensuring the state's monopoly over the exercise of judicial authority. Importantly, transformation was abandoned when it was viewed as threatening the governments hold on power or standing in the way of specific political objectives. Such was the case with the abandonment of the primary court system in 1990. The moves by the state to 'modernise' the administration of 'customary law' also represented an important development with respect to the interaction between the legal systems in the country. It led to an increased degree of interpenetration between state and 'customary law'. This was evident in the curriculum offered to Community Court POs and the increasing incorporation of the symbols, concepts and procedures of state law into primary courts. This process was to some extent reversed by the Customary Law and Courts Act of 1990 and the attendant resurgence of 'traditional' leaders. However, the fact that social disputes were placed outside chiefs' jurisdiction ensured that the gains, with respect to women's rights, were not reversed.

CHAPTER VII

Continuity and Consolidation: Law and Politics in Zimbabwe, 1980-1990

Introduction

The previous chapter examined the progressive, if contested, efforts to transform the legal system in Zimbabwe during the first decade after independence. In this chapter I turn to an area in which the working of the law that was characterized by continuity and consolidation. The chapter makes three main arguments. Firstly, I argue that in the area of politics the new government followed in the footsteps of its predecessors and mobilised a discourse of law and order in order criminalize political opposition. It drew on the same institutions and practices, and invoked the same justifications in order to silence political dissent. However, these continuities were not solely about the legacies of settler rule. They were partly a product of the authoritarian tendencies that had begun to emerge within the nationalist movement from the mid-1970s, especially within the military camps.[609] Secondly, I argue that while the legal system had become one of the few available avenues of challenging political persecution in the 1980s, the law proved to be unequal to the task of shielding government opponents from political persecution.

[609] See J. Alexander, 'View from the Liberation Movement Camps in Zambia', paper presented at the Britain Zimbabwe Research Day, June 2012 and G. C. Mazarire, 'Discipline and Punishment in ZANLA: 1964-1979', *Journal of Southern African Studies*, 37 (2011). See also F. Chung, *Reliving the Second Chimurenga: Memories from the Liberation Struggle in Zimbabwe* (Harare, 2006).

Lastly, I examine the growing tensions between the executive and senior members of the judiciary and challenge the argument advanced by legal scholars which maintains that the actions of the judiciary in the 1980s were shaped solely by its commitment to the rule of law.[610] Instead I factor politics into an understanding of the decisions made by the judiciary. The chapter is divided into three sections. In the first section I trace the process by which the new government reverted to the repressive use of the law in deal with political opposition. In the second section I examine the efforts by those accused of political offences to engage the state in the courts. The last section analyses the growing tensions between the executive and the upper echelons of the judiciary during the 1980s.

The Slide Back to Political Repression

The general elections of 1980 saw ZANU (PF) win 57 of the 80 common roll seats while ZAPU won 20 seats. The remaining three seats went to the Muzorewa-led United African National Council. The Rhodesian Front won all 20 parliamentary seats that were reserved for white Zimbabweans and as a result Ian Smith and some of his close associates from the 1970s continued to be involved in politics during the 1980s. In a much celebrated speech made on the eve of independence, Mugabe announced a policy of reconciliation declaring: "If yesterday I fought you as an enemy, today you have become a friend and ally with the same national interest, loyalty, rights and duties as myself. If yesterday you hated me, today you cannot avoid the love that binds you to me and me to you. The wrongs of the past must now

[610] See J. Hatchard, *Individual Liberties and State Security in the African Context: The Case of Zimbabwe* (Harare, 1993 and T. Biti, 'The Judiciary, the Executive and the Rule of Law in Zimbabwe', in S. Kayizzi-Mugerwa, A. O. Olukoshi, L. Wohlgemuth (eds), *Towards a New Partnership with Africa: Challenges and Opportunities* (Uppsala, 1998).

stand forgiven and forgotten."[611] This language of reconciliation was followed by a laudable gesture in which Mugabe included five ZAPU and three Rhodesian Front officials in his cabinet. These developments signalled the possibility that the country could make a break with its long history of political turmoil and state repression of political dissent. However, these positive steps were outweighed by a number of historical and contingent factors that ultimately pulled the country back into the violence and intolerance that had characterised its politics for the last three decades. From 1980 the government repeatedly renewed the nationwide state of emergency that had been in place since 1965 for the next ten years. During this period thousands of citizens were abducted, tortured, maimed and killed by government forces. Like its predecessors, the government used law and legal discourse to facilitate and justify its repression of political dissent.

One of the factors behind this continuity in the political sphere was the authoritarian tradition of maintaining law and order that had emerged within ZANU (PF) during the 1970s especially the military camps. As Gerald Mazarire shows, internal dissent in the ZANLA camps in Lusaka was met with severe corporeal punishment, and this became part of the military command's standard approach to maintaining discipline within the camps.[612] As we have seen in chapters three to five, there was another tradition which was reflected in the critiques of the Rhodesian legal system which were articulated by nationalists, lawyers and guerrillas. This tradition held justice, rule of law and the respect for human rights, as important ideals. However, in the 1980s it was the more authoritarian tradition that asserted itself in the political sphere.

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[611] R. Mugabe, 'Long Live our Freedom', 17 April 1980, http://www.kubatana.net/html/archive/demgg/070221rm.asp?sector=OPIN&year=2007&range_start=31, retrieved, 14 December 2012.

[612] Mazarire, 'Discipline and Punishment in ZANLA', pp. 579-582.

The second important factor was the institutional legacy of the settler state. The new government inherited a security apparatus that had increasingly been oriented towards crushing political dissent for the last two decades of settler rule. It also inherited repressive laws like the infamous Law and Order (Maintenance) Act. The new Constitution agreed to at Lancaster House had a number of provisions that could theoretically be used to check state repression. For example, Chapter Three of the Constitution consisted of a Bill of Rights which provided for a range of justiciable individual rights and freedoms which were applicable to all Zimbabweans regardless of race or gender. These included freedom of speech, association and movement as well as the freedom from arbitrary search or entry and from discrimination.[613] The Supreme Court Act also provided that anyone who felt that the Declaration of Rights had been violated could appeal directly to the Supreme Court for a hearing.

However, these progressive legal provisions could easily be invalidated by the provision relating to emergency powers. The new Constitution empowered the President to declare a state of emergency for a maximum of six months. The declaration was subject to approval by a simple majority of Parliament within 14 days, and could be renewed by means of a vote in Parliament. The fact that ZANU (PF) enjoyed a majority in Parliament meant that there were few obstacles in its way should it choose to make use of this legislation. Under emergency powers the executive could effectively make law without reference to Parliament. In addition, it could take actions that violated the provisions of the Declaration of Rights. For example, the emergency powers legislation included wide provisions for the use of detention which were similar to those that had existed under settler rule.

[613] Constitution of Zimbabwe, Chapter Three - Declaration of Rights.

A third challenge was the fact that, behind the euphoria of the independence celebrations and the rhetoric of reconciliation were simmering tensions that rendered the country's peace and unity precarious. One of the serious challenges was related to the integration of the three armies – ZIPRA, ZANLA and the Rhodesian Security Forces - that had only recently been enemies on the battlefield. The two guerrilla armies had a history of tense relations and had clashed on a number of occasions during the 1970s. This antipathy was worsened by the negative propaganda that was spread in their respective camps during the 1970s. At the same time, the transition from war to peace was impeded by indiscipline amongst ex-combatants, the provocative actions of the Rhodesian Security Forces, as well as armed criminals that were terrorising the countryside.

Initially, the law and order problems in the country were not understood in a partisan manner. Instead, they were seen as being part of the aftermath of a long and bitter war. When Herbert Ushewokunze, the Minister of Home Affairs, approached Parliament to request the renewal of the state of emergency in July 1980, he presented the security problems as being due, among other things, to interparty rivalry, frustration and boredom within the assembly points, as well as the 'possession of firearms and grenades by unauthorised persons'.[614] Regarding the problem of dissidents, he explained: 'I am not talking here of persons who have temporarily left assembly places. I am talking about people who have no loyalty to any political party or to Government. They use their weapons to force innocent civilians to hand

[614] *Zimbabwe Parliamentary Debates*, 23 July 1980, col. 1097.

over food and money. They commit robbery, rape and generally harass the population in rural areas.'[615]

Ushewokunze was also anxious to see key institutions of the state, such as the police, gain legitimacy in the eyes of the political leaders and the public so as to help in restoring law and order. He thus observed:

> Another source of security problem [sic] is the hostility shown to Government agencies, particularly the Police as a body. The Police can only operate effectively if they have the backing and the confidence of the majority of the population. Of course it must be admitted there are a few elements within the Police Force whose behaviour and actions are deplorable. This does not apply to the Force as a body. This is why it is important that the Police, as a body, must be supported if the present situation is to be overcome. Disparaging statements by some party officials and others about the Police and other lawful authorities can only erode the public confidence in these authorities. The power of the Police and of the courts and of other Government agencies, must be protected so that they are not usurped.[616]

He also tried to allay any concerns about his request for the renewal of the state of emergency by assuring the House that many aspects of the security legislation which had been passed in the 1970s would be repealed. These included the power of the police to seize, destroy or confiscate property, to order movement of people, and to impose curfews. Censorship through the 'D' notice, as well as the censorship of all information relating to security forces was also abolished. In addition to this, legislation providing for the imposition of collective fines and the establishment of special courts would also be repealed.

The second reason he gave for the renewal of the state of emergency was that, without it, many important regulations which had not yet been transferred to the statute books would fall

[615] *Ibid*, col. 1096.
[616] *Ibid*, col. 1097-98.

away, thus creating a regulatory vacuum.[617] While this argument seemed plausible in 1980, it continued to be used throughout the 1980s and became one of the government's pretexts for perpetuating the state of emergency.[618] The government increasingly resorted to using emergency powers in matters that had little to do with the security situation. Of the 73 Statutory Instruments introduced under Emergency powers during the 1980s, less than 15 were related to security. The rest dealt with issues such as changing of names of towns and cities, and the revision of liquor prices, taxes and minimum wages.[619] The Minister's request was met with discomfort by many MPs who felt that the measure bore too strong a resemblance with the practices of the Smith Regime. The sentiments expressed by Swithun Mombeshora, a ZANU (PF) MP and the Deputy Minister of Agriculture, were shared by several legislators. He observed: 'I would like to say that I support the State of Emergency as proposed but also sincerely hope it will be the last time we sit in this House asking for the renewal of the State of Emergency.'[620] Notwithstanding these reservations, the renewal of the State of Emergency was supported by all 80 ZANU (PF) and ZAPU MPs.

This unanimity around the state of emergency was short lived. An important incident that contributed to reshaping opinion in Parliament was the armed clashes between ZANLA and ZIPRA ex-combatants in the Bulawayo township of Entumbane in November 1980. The clashes had been triggered by inflammatory comments made by Enos Nkala, the ZANU (PF) Minister of Finance, in a speech to party supporters at the White City Stadium in Bulawayo during which he threatened ZAPU members with violence and declared 'I will crush Joshua

[617] *Ibid*, col. 1100.
[618] Hatchard, *Individual Liberties and State Security*, p. 23.
[619] *Ibid*, pp. 187-88.
[620] *Zimbabwe Parliamentary Debates*, 23 July 1980, col. 1120.

Nkomo'.[621] ZANU (PF) members later claimed that they had been provoked by ZAPU members who were throwing stones at them during their rally.[622] However, what is clear is that it was Nkala's inflammatory language and his public call for retaliation that led to the clashes between supporters of the two parties. The ex-combatants from both sides, who had by then been moved from the assembly points and settled in Entumbane Township, joined the clashes in support of their party members. The result was two days of fighting which constituted 'the first ripple of the post-independence clashes that ultimately gave rise to the dissident problem in Matabeleland.'[623] The clashes were followed by selective arrests and prosecutions which targeted ZIPRA ex-combatants only.

When Herbert Ushewokunze came back to Parliament in January 1981 to request a further renewal of the state of emergency the opinions in Parliament had shifted considerably. ZANU (PF) MPs increasingly blamed the law and order problems on ZAPU. ZAPU officials and their supporters began to be discursively constructed as outside the nation and posing a threat to it.[624] Through this process they were rendered legitimate targets of government directed violence and, by extension, the rights of citizenship enshrined in the country's new Constitution were seen as not applicable to them. While the ZANU (PF) MPs were convinced that the state of emergency was necessary to deal with the threat to law and order, they were at pains to distinguish their actions from those of the Rhodesian Front. One such example was Senator George Chinengundu, who was a lawyer and the Deputy Minister of Local Government. He claimed that: 'The State of emergency in the past was primarily

[621] *Zimbabwe: Wages of War, A Report on Human Rights*, Lawyers Committee for Human Rights (New York, 1986) p. 51.
[622] *Zimbabwe Parliamentary Debates*, 21 January 1981, col. 1316.
[623] *Zimbabwe: Wages of War*, p. 51.
[624] R. Werbner, 'Smoke from the Barrel of a Gun: Postwars of the Dead, Memory and Reinscription in Zimbabwe', in R. Werbner (ed), *Memory and the Postcolony: African Anthropology and the Critique of Power* (London, 1998), pp. 92-93.

directed at muzzling all political opposition, imprisoning all politicians, and such like things. The State of Emergency at the moment is directed at violent sections [sic] by dissidents, and it is not directed at any particular party.'[625]

Contrary to Chinengundu's claim, the government was in fact 'muzzling all political opposition' as the RF had done. In addition, its justifications were reminiscent of those used by the RF. Chinengundu went on to defend the actions of the government on the grounds that they were necessary to protect the rights of citizens:

> Indeed we need to protect the rights of the individuals and the state of emergency should not unnecessarily derogate from those rights of individuals. But if the State of Emergency is not strong enough to protect the rights of individuals, those rights will become useless because the State itself cannot protect them. The state needs to strengthen itself in order to be able to protect the rights of the individual and this is what the Minister is seeking to do.[626]

His statements closely resembled the arguments by the hardliners in the Southern Rhodesian Parliament from the 1950s in their attempts to justify the repressive legal measures that were being passed in order to quell nationalist agitation. Moreover, they contradicted the critiques of the law that had been forcefully articulated by nationalists, guerrillas and African lawyers during the 1960s and 1970s.

In contrast, ZAPU MPs were no longer convinced of the suitability of the state of emergency as a solution to the country's security problems. The essence of the arguments by ZAPU MPs was summed up by Edward Ndlovu, the MP for Matabeleland South, who pointed out that 'Peace and unity cannot be achieved by State of Emergency.'[627] Amidst heckling from

[625] *Zimbabwe Parliamentary Debates*, 21 January 1981, col. 1308.
[626] *Ibid*, col. 1307.
[627] *Ibid*, col. 1305-06.

ZANU members, including the Minister of Home Affairs, Ndlovu expressed his suspicions about the intentions of ZANU PF:

> I tend to agree with some people who may claim that too much power can be dangerous, and by the way there is a danger of misusing the State of Emergency. – [AN HON MEMBER: Anybody who is not subversive, has nothing to fear.] – [HON MEMBERS: Hear, hear.] This interrupting has let the cat out of the bag because we demand peace and unity, and certain people fail on how to approach this particularly important problem of peace and unity. Then when they are criticised they say some people are subversive.[628]

The ZAPU leader, Joshua Nkomo, called for dialogue pointing out that it was unnecessary to resort to such extreme measures and proposed that the matter be referred to the party caucuses to devise more effective solutions. The suspicions of ZAPU legislators were shared by members of the Rhodesian Front. An example was Mr Goddard, the MP for Lundi, who argued that 'the government is seeking to renew a State of Emergency not because there is a threat to national security but rather that the Government wants to continue to abuse the powers that it is afforded under a State of Emergency for its own party.'[629]

In February 1981, directly following the renewal of the state of emergency, serious armed clashes between ZANLA and ZIPRA ex-combatants erupted again in Entumbane and other areas in the Midlands Province, resulting in the deaths of over 300 people.[630] After these clashes many ZIPRA ex-combatants in the army began to defect from the army out of fear for their safety. Some deserters took to the bush as 'dissidents' and perpetrated robberies, murders, rapes and acts of sabotage in the provinces of Matabeleland, Midlands and Masvingo.[631] The relationship between ZANU (PF) and ZAPU was worsened by several

[628] *Ibid*, col. 1306.
[629] *Ibid*, col. 1332.
[630] Catholic Commission for Justice and Peace (CCJP) and Legal Resources Foundation (LRF), *Breaking the Silence, Building True Peace: A Report on the Disturbances in Matabeleland and the Midlands, 1980-1988, A Summary*, (Harare, 1999), p. 5.
[631] *Breaking the Silence*, p. 8.

incidents that occurred in 1981 and 1982. A key incident was the discovery of arms caches in February 1982 on properties owned by the ZAPU company Nitram, and in areas close to ZAPU assembly points. The properties in question were confiscated and ZAPU cabinet ministers, including Joshua Nkomo, were dismissed. At the same time, senior ZIPRA commanders, such as Dumiso Dabengwa and Lookout Masuku, were charged with treason.[632] While the arms caches were treated as irrefutable evidence of a treasonous plot, in reality both ZANLA and ZIPRA ex-combatants had stashed arms during the 1970s and in the aftermath of the Entumbane clashes.[633] In addition, some of these caches had been planted by Central Intelligence Organisation (CIO) agents who were paid by the apartheid government to foment tension between ZANU (PF) and ZAPU. The attack on the Prime Minister's residence in June 1982 and the killing of six tourists in Matabeleland North by ZIPRA ex-combatants further worsened relations and strengthened the government's resolve to crack down on ZAPU.

The security situation was also compounded by the efforts of the apartheid government in South Africa to destabilise Zimbabwe. The South African authorities recruited CIO officers as double agents whose assignments included engaging in a disinformation campaign that was designed to increase the tensions between ZANU (PF) and ZAPU. Among other things, these agents disseminated false allegations that ZAPU was planning to overthrow the government. South African agents also sabotaged several key sites in Zimbabwe thereby increasing the sense of siege on the part of the Zimbabwean government.[634] In August 1981 they attacked a munitions store at Inkomo Barracks on the outskirts of Harare and destroyed

[632] J. Alexander, J. McGregor and T. Ranger, *Violence and Memory: One Hundred Years in the 'Dark Forests of Matabeleland* (Oxford, 2000), p. 188.
[633] *Ibid*.
[634] *Breaking the Silence*, p. 7.

Z$50 million worth of ammunition. In December 1981 they bombed the ZANU (PF) headquarters in Harare and almost killed many senior leaders including Mugabe. This was followed by the bombing of Thornhill Airbase in July 1982, which destroyed 13 military planes. The following month, three white South African soldiers were killed in Zimbabwe during fighting.[635]

South African agents also launched attacks on several exiled members of South Africa's African National Congress who were living in Zimbabwe. Another aspect of the apartheid government's destabilisation efforts was Operation Drama which was launched in late 1982. The operation involved the training of approximately 100 armed dissidents who came to be known as 'Super ZAPU' and who operated in Zimbabwe in 1983 and 1984. South African destabilisation efforts in Mozambique through the Renamo rebels also had an indirect impact on Zimbabwe. Owing to Zimbabwe's close relations with Mozambique, Renamo began launching attacks on Zimbabwe especially in the eastern province of Manicaland which shared a border with Mozambique.

There can be no denying that the new government was faced with a complicated security situation in the 1980s. However, John Hatchard is correct in pointing out that the problems the government faced did not necessitate a nationwide state of emergency.[636] The attacks by South African agents could have been dealt with as criminal offences under existing legislation, while the disturbances in particular areas in the countries such as Manicaland could have been dealt with by means of a localised state of emergency. What is more, the 'dissident problem' was at its core a political problem which required solutions of the sort

[635] Alexander *et al*, *Violence and Memory*, p. 189.
[636] Hatchard, *Individual Freedoms and State Security*, p. 24.

that ZAPU MPs were suggesting. However, by choosing to see the problem as one of law and order which required the extraordinary powers provided for under the emergency powers legislation, the government not only foreclosed more appropriate solutions but in many ways it worsened things.

The brutal crackdown on citizens in Matabeleland by the Fifth Brigade and other state agencies pushed ex-combatants and youth into the ranks of the dissidents and led to increased attacks by dissidents. While Mugabe publicly approved of the massacres and asserted that there would be no effort to distinguish the dissidents from their supporters in Matabeleland, in reality the dissidents enjoyed little popular support. As Alexander, McGregor and Ranger note, the residents of Matabeleland did not identify with this new war in the way they had done with the liberation struggle.[637] The demands made by dissidents placed a burden on their food supplies during the extended drought of the early 1980s. Moreover, the violence and robberies perpetrated by the dissidents, and the fact that their presence exposed civilians to attacks by government forces, also made the residents of Matabeleland less inclined to support the dissidents. The attacks on the residents of Matabeleland by state forces had more to do with crushing ZAPU than with dealing with the 'dissident problem'. They should also be seen in the light of ZANU (PF) aspirations of creating a one party state.[638] At the root of the government directed violence was an intolerance of political dissent.

The state of emergency enabled the executive to by-pass the Parliament in making legislation and allowed for the deployment of the army and other security forces. Emergency powers

[637] Alexander *et al*, *Violence and Memory*, pp. 210-217.
[638] A motion on the one party state had been tabled and debated in Parliament in September 1984. See *Zimbabwe Parliamentary Debates*, 5 September 1984, col. 1568-1595.

also enabled the government to indefinitely detain its political opponents. However, the most serious abuses that were perpetrated in the 1980s, such as the abductions, rapes, brutal assaults and murders, were not sanctioned by the state of emergency. The state of emergency did not suspend the juridical order, but rather it enabled the government to create zones that were relatively closed to scrutiny where security forces were given free reign. As a consequence, one of the first moves taken by the President the war was over was to grant blanket amnesty to all of the government forces and 'dissidents' who had been involved in it.

The most notorious of the state bodies which were actively involved in terrorising ZAPU supporters, was the Fifth Brigade. The Brigade consisted of ex-ZANLA combatants selected from Tongogara Assembly Point, and was trained near Nyanga in Manicaland province. Whereas the rest of the army had been trained by British Instructors, the Fifth Brigade was trained by North Korean instructors. Unlike other brigades in the army, it reported directly to the Prime Minister who was also the Minister of Defence, the Commander-in-Chief and the chairman of the Joint Operational Command. In the areas where the Brigade was deployed, it was a law unto itself and it wantonly killed, wounded, raped and destroyed the property of residents.[639]

The Catholic Commission for Justice and Peace (CCJP), which was closely involved in investigating and lobbying government on the violence in Matabeleland, produced a joint report with the Legal Resources Fund (LRF) which noted that in the early weeks of its deployment in Matabeleland North:

[639] Agamben, *State of Exception* (Chicago, 2005), p. 6.

> …5 Brigade behaved in a way that shows it had clearly been trained to target civilians. Wherever troops went they would routinely round up dozens, or even hundreds, of civilians and march them at gunpoint to a central place, like a school or a borehole. There they would be forced to sing Shona songs praising ZANU-PF, at the same time being beaten with sticks. These gatherings usually ended with public executions. Those killed could be ex-ZIPRAs, ZAPU officials, or anybody chosen at random, including women. Large numbers of soldiers were involved in these events, sometimes as many as two hundred, and often forty or more.[640]

The killings by the Fifth Brigade were systematic and the dead were ferried by government vehicles and disposed of in mass graves and abandoned mines. An important aspect of the violence was that its enactment took on an ethnic character. The soldiers, who were predominantly Shona speakers, brutalised Ndebele and Kalanga-speaking villagers and forced them to sing Shona songs. In 1984 the brigade was deployed in Matabeleland South alongside a three month curfew which included a restriction on food movements. This restriction on food movement was devastating as the region was in the middle of a severe drought.[641]

In the run up to the 1985 general elections the government began to adopt a new strategy in its attempt to crush ZAPU.[642] More emphasis began to be placed on targeting the ZAPU leadership at all levels in order to cripple the party's organisational structure. These leaders were targeted by state agents by legal and illegal means. In the first four months of 1985 dozens of local ZAPU officials were taken from their homes at night by armed men. The ZAPU victory in all 15 Parliamentary seats in Matabeleland was interpreted by ZANU (PF) as evidence that the party was still strong. As a result, the crackdown on ZAPU officials was

[640] *Breaking the Silence*, p. 10. See also Alexander *et al*, *Violence and Memory*, chapters 9 and R. Werbner, *Tears of the Dead: The Social Biography of an African Family* (Edinburgh, 1991).
[641] There is strong evidence to suggest that senior government officials were aware of these massacres very early on. The government launched two enquiries into the political violence in Matabeleland, chaired by Justice Dumbutshena and Simplisius Chihambakwe respectively. However, the findings of both enquiries were never made public.
[642] *Zimbabwe: Wages of War*, p. 30.

stepped up in the aftermath of the general elections. These efforts were directed by the new Minister of Home Affairs, Enos Nkala. While Nkala was originally from Matabeleland he took to the task of cracking down on ZAPU with fervour, and announced to the Senate in September 1985 that 'the policy of reconciliation toward ZAPU has been withdrawn.' In his characteristically inflammatory language he declared: 'We want to wipe out the Zapu leadership. You've only seen the warning lights. We haven't yet reached full blast. I don't want to hear pleas for mercy. I only want encouragement to deal with this dissident organisation… the murderous organisation and its murderous leadership must be hit so hard that it doesn't feel obliged to do the things that it has been doing.'[643]

From 1985 the number of abductions by the CIO and the Police Internal Security Intelligence Unit (PISI), two institutions with roots in the period of settler rule, rose significantly. Following the elections, all the African councillors on the Bulawayo City Council were detained. Five ZAPU MPs, Sidney Malunga, Kembo Mohadi, Stephen Nkomo, Edward Ndlovu and Welshman Mabhena, were also detained. Malunga, who was the ZAPU Chief Whip and had been vocal in Parliament about the massacres in Matabeleland, was later tried for treason in 1986. Eight senior members of the army who were ZIPRA ex-combatants were also detained in 1985. Alongside this crackdown on ZAPU, negotiations were initiated between ZANU (PF) and ZAPU in 1985.[644] Throughout 1986 the talks failed to reach a breakthrough and ultimately collapsed in April 1987. Nkala responded by banning ZAPU public meetings and rallies, closing all ZAPU offices around the country and dissolving six ZAPU-dominated local authorities in Matabeleland North. The negotiations resumed later in

[643] Cited in *Zimbabwe: Wages of War*, p. 52.
[644] Alexander *et al*, *Violence and Memory*, p. 229.

the year and culminated in the December 1987 Unity Accord which brought an end to the violence of the 1980s and saw ZAPU absorbed into ZANU (PF).

In the period immediately after Zimbabwean independence there were some indications that law and order would be restored, that politics would be conducted in a more tolerant way and that the new Bill of Rights would protect all citizens against political persecution. However, these hopes were dashed. The combination of ZANU (PF)'s authoritarian traits, the repressive state institutions and practices inherited from the RF, and the political rivalry between ZAPU and ZANU (PF) ultimately led the new government revert to the practices of its predecessors. The state of emergency which had initially been renewed on reasonable grounds came to be used as a means of targeting and persecuting political opponents and their supporters. The new government embraced the institutions and the laws established by the Smith regime, and in some cases even the personnel that had served that regime. Political dissent was considered 'subversive' and the security of the establishment was placed above the rights of citizens. In the next section I turn to the efforts by citizens to use the law as a shield against political persecution.

Engaging the Government in the Courts

While the legal arena in the 1970s was one of many sites of struggle with the settler state, and was certainly secondary to the armed struggle, in the 1980s it was one of the few potential sources of protection for individuals facing political persecution. The vast majority of these individuals were neither engaged in nor supportive of an armed struggle. However, the extent to which the law could be used as a shield was limited by several factors. The first

was that in the area of politics, the new government had made a deliberate choice not to adhere to legalism partly because it did not want the restrictions that came with it. This unwillingness to be bound by the law was evident in the fact that new institutions that were created to ensure the accountability of state officials, such as the Ombudsman's Office, were not granted oversight over the security forces.[645] All of the state bodies which were central to the repression of political opposition in the 1980s such as the army, the police, the prison service and the CIO, where excluded from the Ombudsman's oversight.

Statements by senior government officials also revealed the new government's unwillingness to be hindered by the law from taking any actions they deemed to be necessary in the political sphere. In an address to Parliament in 1982 Mugabe made it clear that his government was willing to take what he described as 'extra-legal' measures to deal with the security problems in the country.[646] Responding to the Report of the Lawyers Committee for Human Rights on the gross abuses in Matabeleland, the Deputy Prime Minister, Simon Muzenda, made an argument that was reminiscent of the RF:

> Human rights are not *per se* legal questions but also inextricably part and parcel of the POLITICAL fabric and stability of any Nation state. While you have observed the near complete disappearance of human rights in Matabeleland (1st paragraph page 33 of your draft report), you do not seem to have drawn the correspondingly necessary conclusion, namely that there comes a time when a government has to assert its authority in the name of, and for the sake of the majority when a recalcitrant tiny minority is persistently violating the human rights of the majority. It takes such action in ORDER TO RESTORE AND UPHOLD HUMAN RIGHTS. This is precisely what is taking place in Western Zimbabwe.[647]

[645] G. Feltoe, 'A Survey of Major Legislation in the Period 1980-1984', *Zimbabwe Law Review*, 1 & 2 (1983-84), p. 278.
[646] *Zimbabwe Parliamentary Debates*, 29 July 1982.
[647] Letter from Deputy Prime Minister S. V. Muzenda to Michael Posner, 30 April 1986. Cited in *Zimbabwe: Wages of War*, p. 164. (Emphasis in original).

The utility of the law as a source of protection for citizens was also undermined by weak capacity of institutions such as the police and the Attorney General's office. The long term state of emergency and the subsequent exodus of experienced police and prosecutors had undermined the respect for, and ability to follow due process in these institutions.[648] This was compounded by the fact that the new personnel were being trained in an environment where proper legal procedure was regularly subordinated to the goal of quelling political dissent.

The dock also had limited value as a platform from which to articulate critiques of the state as the local and international audience for courtroom oratory in the 1980s was very small and often lacked influence. In addition, earlier critiques from the dock had drawn their power from being wedded to the broader nationalist struggle. In the 1980s there was no broader struggle for the victims of government-directed violence to tap into. Another problem in the 1980s was the limited access to legal representation for those accused of political offences. Whereas in the 1970s organisations such as the International Defence and Aid Fund, Christian Care, Amnesty international and CCJP had provided funding for the legal representation of political prisoners, during the 1980s there were limited external funds for this purpose. Simplisius Chihambakwe, who chaired the Detainee's Review Tribunal, pointed out that only a third of those who appeared before the tribunal were legally represented.[649] Ultimately all these factors combined to undermine the effectiveness of the law as a shield for citizens.

[648] Interview with Bryant Elliot, Harare, 4 April 2011. See also *Zimbabwe: Wages of War*.
[649] *Zimbabwe: Wages of War*, p.154.

Due to the costs involved in instituting legal action, many of the prominent cases involving citizens suing the state for violation of their rights were filed by white Zimbabweans.[650] One of the early cases brought against the state involved Wally Stuttaford, a Rhodesian Front MP who was charged in December 1981 with plotting to overthrow the government. He was held for a month without access to legal representation during which time he was tortured.[651] After he was acquitted of the criminal charges against him, Stuttaford instituted legal action against the government. In order to avoid negative publicity, the Minister of Justice, Simbi Mubako, resorted to a tactic used by his predecessors in the 1970s and ordered the trial to be conducted *in camera*. However, it later emerged that Stuttaford had been awarded the equivalent of US$ 4 500 in damages by the High Court.[652]

Following the ruling in the Stuttaford case, the government introduced the Emergency Powers (Security Forces Indemnity) Regulations in 1983, which protected state officials from civil or criminal action if they were acting 'in good faith' for the protection of state security. This was essentially the same legislation that had been passed by the Rhodesian Parliament in 1976. However, the new regulations came under judicial scrutiny in a Supreme Court case brought by Dennis Granger, a lawyer who had been detained and tortured by the CIO on suspicion that he was a foreign spy. These CIO's suspicions had been aroused by the fact that he had been seen taking photographs on the road. Granger was in fact photographing the scene of an accident. He won his case and the Supreme Court awarded him Z$1 200-00 in damages. An important outcome of the trial was that the Supreme Court ruled that the 'good

[650] See the following High Court cases J. S. V. Hickman and P. T. McDonald vs Minister of Home Affairs and the Chairman of the Detainee Review Tribunal; A. F. York and N. E. York vs Minister of Home Affairs and the Director of Prisons, R. H. Wood vs Minister of Home Affairs; C. J. van der Walt vs The State; C. D. Evans and P. E. Hartlebury vs The Chairman of the Review Tribunal and the Minister of Home Affairs; J. V. Austin and K. N. Harper vs The Minister of State (Security) and the Commissioner of the Zimbabwe Republic Police.
[651] *Zimbabwe: Wages of War*, pp. 99-100
[652] *Breaking the Silence*, p. 109.

faith' provision of the Emergency Powers (Security Forces Indemnity) Regulations was 'void by reasons of inconsistency with the Constitution.'[653] While the Supreme Court awarded damages for abuses by the government, the practical implications of its rulings in this and other cases were limited. This was partly because the rulings were not publicised consequently, there was limited knowledge of the protection that the law provided in such instances. In addition, the government refused to pay the damages and there were no legal means of enforcing payment.

Amongst the most prominent cases of the period were the series of suits brought on behalf of the ex-ZIPRA commanders, Dumiso Dabengwa and Lookout Masuku. In one suit the wives of the two men sought a court order to enable them to have access to lawyers.[654] In another suit they challenged the legality of Dabengwa's continued detention without being brought before the Detainees Review Tribunal every six months as stipulated in the law. In a different case, Dabengwa applied to the High Court for permission to attend the funeral of Lookout Masuku.[655] In most of these cases Dabengwa was unsuccessful. While the court found in his favour during his treason case of 1982, he was immediately served with a detention order and was only released in 1986. Notwithstanding their gruelling experiences, in some regards senior ZIPRA members such as Dabengwa and Masuku were more fortunate than local party officials and supporters and rank and file ex-combatants. For the most part they were not subjected to torture and they had access to lawyers and the courts.

[653] SPA File, Sledge Muradzikwa and 8 other vs The Honourable Emerson Mnangagwa.
[654] See Z. Dabengwa and G. Masuku vs Minister of Home Affairs, The Protecting Authority Harare North Province and The Commissioner of the Zimbabwe Republic Police as well as D. Dabengwa vs Minister of Home Affairs and the Director of Prisons.
[655] D. Dabengwa vs Minister of Home Affairs.

The lower level ZAPU officials and ZIPRA ex-combatants were much more vulnerable. Many were simply abducted in the night and were never heard from again, while others were detained under emergency powers. Detention was effected either under Section 21, which allowed the police to detain anyone for up to 30 days if they thought there were grounds for their indefinite detention, or Section 53 (1), which provided for detention for up to 30 days regardless of whether there were grounds for indefinite detention via Ministerial order. Regarding the experiences of individuals detained under these two clauses, the LCHR observed that:

> Many individuals initially detained under Section 21 or 53 (1) remain in detention for periods exceeding 30 days, in some cases significantly longer. These individuals receive the fewest possible protections because their detentions are technically illegal. The vast majority of these individuals are not prominent enough to attract public attention. They are likely to have limited financial resources and thus cannot afford legal representation, and so they simply languish in detention until the authorities decide to release them.[656]

It went on to note that: 'The few who do have legal counsel often are advised not to assert the illegality of their continued detention. Attorneys fear that a successful challenge would not lead to the release of the detainee but would instead provoke retaliation against the detainee in the form of a Section 17 Ministerial Order permitting indefinite detention.'[657]

As a lawyer based in Bulawayo, SKM Sibanda dealt with numerous cases involving people accused of political offences by the government. However, because of the strained relations between him and some members of the ZAPU leadership, Sibanda was not called upon by the party to represent senior ZAPU officials.[658] The one senior member Sibanda did represent was Swazini Ndlovu, whose wife had insisted that he personally handle the case. Ndlovu had been taken into custody in March 1982 on suspicion of being connected to the ZIPRA arms

[656] *Zimbabwe: Wages of War*, p. 151.
[657] *Ibid*.
[658] Interview with Sibanda, 28 November 2010.

caches. He was initially detained in Khami Prison outside Bulawayo, before being transferred to Chikurubi Prison in Harare. Despite being cleared of any involvement with the arms caches, he was kept in detention as new investigations over his involvement in the murder of Stanislus Marembo, a ZAPU official, were being carried out. Later enquiries by Sibanda revealed that Ndlovu was being investigated for yet another case involving the shooting at the Prime Minister's residence in June 1982.[659]

What was troubling about Ndlovu's case was that, not only had the said shooting happened after he had been detained, but when he was brought before the magistrate during the bi-weekly remand hearings at Chikurubi Prison he was repeatedly told that there was no official record of his detention. After eight months in custody without being formally remanded or issued with a detention order, Ndlovu wrote to Sibanda in desperation seeking his help. Ndlovu's letter revealed his persistence in seeking legal recourse and his self-identification as a rights-bearing citizen. The letter read as follows:

> Dear Sir
>
> I am certain that if the magistrate fulfilled his promise he will have contacted you by the time you receive this letter. All the same I have decided to write you because this is the only means of contact provided by the authorities of this place. Sincere apologies for writing you c/o Stephen Mbizo. This has been necessitated by the fact that I do not have your address.
>
> Well the first point that has necessitated my writing you is that the magistrate does not seem to have my name under those people he is remanding. If I am right, therefore, technically I have not been appearing before him.
>
> There are a number of issues I had thought to raise with you including a direct appeal to the Chief Justice which I have not done up to now because I anticipated your arrival here. I would therefore want to know what the position is *vis* a *vis* the development in this case. What is my position as regards the investigating officer? Do I give them any statement in your absence or demand your presence?

[659] SPA File, State vs Swazini Ndlovu, Sibanda to Senior Public Prosecutor, 1 December 1982.

> I believe some movement is absolutely necessary so that I know if I am merely a political detainee rather than remaining a secret detainee camouflaged under spurious reasons. My rights as a citizen have been curtailed and I am not told why?
>
> I am getting concerned very seriously about my 8 months detention with no reasons given at any time and I think that if it is impossible for any reason, on your side, to make any move, do inform me. I have nothing more to lose than my life
>
> In anticipation
>
> I remain
>
> Swazini Ndlovu[660]

After receiving the letter, Sibanda entered into correspondence with the Attorney General's office in order to try and secure Ndlovu's release. In a letter to the Senior Public Prosecutor, Sibanda highlighted the plight of his client and indicated that 'the interest of the state should surely be balanced against the rights of the individual'.[661] However, repeated exchanges between Sibanda and the prosecutor were unsuccessful in securing Ndlovu's release. He was ultimately released in February 1983 after a year in detention without any charge having been made against him.

In another case, Sibanda defended Elias Mejo Sakana and Timothy Dube who had been arrested in 1982 under the Law and Order (Maintenance) Act for distributing subversive material. In this case it was not the vindictiveness of the government that worked against Sakana and Dube but the repressive provisions of the legislation under which they had been charged, which criminalised what would otherwise be viewed as legitimate political activity. This in turn made it difficult for the two to offer an effective defence in the courts. The charges against the two men were based on a pamphlet that Timothy Dube had picked up on

[660] *Ibid*, Swazini Ndlovu to Sibanda, 3 November 1982.
[661] *Ibid*, Sibanda to Senior Public Prosecutor, 28 January 1983.

the roadside in the Plumtree area. After reading it Dube decided to pass it on to his friend Sakana, who was a ZAPU member and the Vice Chairman of the District Council. The pamphlet in question was addressed to 'All Patriots in Zimbabwe' and made a comprehensive critique of the new government's policies and challenged its Socialist claims.[662] The pamphlet proceeded to highlight the government's betrayal of the goals of the liberation struggle as well as its divisive politics and ended with a call for unity.

In his statement to his lawyer, Sakana recounted his actions upon receiving the pamphlet:

> After reading the paper, I got interested in it, in that it contained news which were [sic] criticizing the government and we (ZAPU) could use it for campaigning purposes, to avert people voting once again for the ruling party. On my own opinion, I viewed the newsprint to be very educative and would act as a mind opener to some people who didn't know what the government was doing to them. I then decided to print more copies and I requested Maxwell Dube a clerk-Typist with the Bulalima-Mangwe District Council to make duplicate copies. He produced 100 copies, I took all the copies and had intended to circulate them.[663]

He distributed some copies amongst his friends in Plumtree and a few days later he was informed that the police were looking for him. He reported to the police station where he was arrested and charged with printing and circulating subversive material. The two men secured the legal services of Sibanda but were ultimately convicted of printing and circulating subversive material. Dube was sentenced to 18 months in prison, 12 of which were suspended while Sakana was sentenced to two years in prison with 14 months suspended.

It was not only ZAPU and ZIPRA members that Sibanda defended in the 1980s. He also represented nine ZANU (PF) provincial officials who sued the Minister of State in the Prime

[662] SPA File, State vs Timothy Dube and Elias Sakana, Statement by Sakana to Sibanda, (undated but likely to have been recorded around 23 June 1982).
[663] *Ibid*.

Minister's Office responsible for Security, Emerson Mnangagwa, for their torture at the hands of state agents in 1983. This case is important in that it shows that ZANU (PF) members were not exempt from the brutality visited upon members of ZAPU and other opposition parties. It also underscores the intolerance of political dissent on the part of the new government. Sledge Muradzikwa, an ex-combatant, and eight other local ZANU (PF) officials in Gweru had been targeted for resisting the efforts by the party's Central Committee to dismiss Patrick Kombayi from his post as the mayor of Gweru. In March 1983 Benson Ndemera, the party's Deputy Chairperson for Midlands Province, called an emergency meeting in order to communicate this instruction. However, the meeting descended into chaos when Ndemera failed to give a satisfactory reason for Kombayi's dismissal.[664]

The following day local members of the ZANU (PF) Women's League staged a protest against the efforts by the Central Committee to impose its wishes on them. The protest was violently broken up by the police and several local ZANU (PF) leaders were arrested. Their charges were later dismissed. However, the nine, who were considered to be at the forefront of this 'revolt', were later picked up at night by the CIO. They were taken to Inyathi Police Station where they were subjected to severe torture and accused of planning to overthrow the government. Adrin Chinyama, the Deputy Chairperson of the Midlands Women's League, was amongst the nine. Despite the fact that she was pregnant, Chinyama was severely assaulted, subjected to water boarding and kept in a cage during her time in custody. She ultimately had to be taken to hospital by the police on account of the torture.

[664] SPA File, Sledge Muradzikwa and 8 others vs The Honourable Emerson Mnangagwa, Statement by Adrin Chinyama.

Picture 11: Emerson Mnangagwa, Minister of State in the Prime Minister's office responsible for Security [Source- National Archives of Zimbabwe]

After their release, Chinyama and the other eight filed a law suit claiming damages for their torture at the hands of state agents. However, their efforts to pursue the matter were repeatedly frustrated. Medical reports documenting the torture went missing under suspicious circumstances. In addition, the Prime Minister issued a certificate under section 4 (2) of the Emergency Powers (Security Forces Indemnity) Regulations of 1983 which provided full indemnity for the security agents involved. The certificate read: 'I, ROBERT GABRIEL MUGABE in my capacity as the Minister of defence do hereby certify that any matter or thing referred to in this case as done by either the officers or members of the

Central Intelligence Organisation of the Minister of State was done in good faith for the purpose of or in connexion with the preservation of the security of Zimbabwe.'[665] Sibanda filed the suit on behalf of the nine once the ruling in the Granger case, which dealt with the constitutionality of the Security Forces Indemnity regulations, was handed down. The case was scheduled to be heard on the 24th to the 27th of February in 1987 and, given the Supreme Court's ruling in the Granger case, the nine stood a good chance of winning their case. However, the case does not appear in the records for High Court judgments and seems to have been withdrawn in the end.

While some victims of government persecution sought legal recourse, there were others who no longer believed that the law held any remedial value. Their faith in the legal system had often collapsed in the face of the brutalisation they experienced at the hands of state agents. Such was the case in Silobela where nine local ZAPU members were picked up in the night by suspected state agents in January 1985 and were never heard from again. The villagers involved did not report the case to the police. The failure of the villagers to take the matter up with the police is likely to have been related to a number of factors. These included the increasing violence perpetrated by ZANU (PF) Youth Brigade and the Youth Wing before and after the 1985 elections in the Midlands including Silobela and which continued while police turned the other way.[666] In addition, there were changes in the leadership at local police stations which saw Shona-speaking officers being placed in supervisory positions. This led to a change in the relationship between police and villagers. While they had previously relied on the police to warn them about the Fifth Brigade they could no longer do so. It was over a year later that the CCJP found out about the incident and initiated legal

[665] *Ibid*, Prime Minister's Certificate 8 February 1984. (Emphasis in original)
[666] *Zimbabwe: Wages of War*, pp. 129-134.

action against the government for the abduction.[667] The legal action was based on the fact that the abduction was a well-known practice of the state and the CCJP had located 25 other abductees in a Kwekwe jail in 1985.[668] When the matter came to trial the government's attorney adopted a cynical defence which challenged the allegations by arguing that the kidnappings could also have been carried out by ZANU (PF). In the end it could not be proven beyond reasonable doubt that the government was behind the abductions and the suit was unsuccessful.[669]

Accounts by lawyers about the operation of the legal system in the 1980s tend to emphasize the point that the experiences of those accused of political offences became considerably worse than they had been in earlier decades. Bryant Elliot, who defended political prisoners during the 1970s and 1980s, noted the deterioration in the adherence to due process on the part of the new government. Requirements such as the presentation of detainees before the Detainee Review Tribunal were followed less and less.[670] Elliot's observation was echoed by a lawyer interviewed by the Lawyers Committee for Human Rights (LCHR). The lawyer, who had been defending nationalists since the 1950s, observed that:

> For the lawyers it is more difficult now than it was before. When it was whites arresting blacks, it wasn't all that easy. But when a woman called the office, and said the Special Branch had picked up her husband at 4 a.m., you would say "do you know their names?" and she would say, "No." But through the sort of networks that existed then, it wasn't easy, but within a fairly short time, at least within a matter of hours, it was possible, on the phone, to find out where the bloke was. Now, it is simply impossible.
>
> And when the Special Branch knew that the relatives had contacted a lawyer, we believe that whatever else they might have done to him, they might at least think twice about doing it to him [again]. Our belief was that the sooner we could get

[667] Interview with Elliot. See also *Breaking the Silence*, p. 16.
[668] *Zimbabwe: Wages of War*, p. 45.
[669] Interview with Elliot.
[670] *Ibid*.

> to the individual responsible, the more we could do for the protection of the person irrespective of whatever legal proceedings might follow.[671]

Other lawyers interviewed by the LCHR spoke of the 'pattern of lies' told by authorities to mislead lawyers who were searching for their clients.

Notwithstanding the above points, it is important not to overemphasize the differences, especially when one considers the extent of government abuses during the late 1970s. As demonstrated in chapter four, the experience of arrest under the Rhodesian Front was extremely brutal and re-detention after acquittal was a common practice. Furthermore, the right to legal representation was significantly undermined as Special Courts Martial began to operate around the country. In addition, African lawyers like Sibanda and Chidyausiku were regularly frustrated by police. Part of what the statement by the lawyers interviewed by the LCHR reflected was the reconfiguration of personal networks in the legal system that occurred with the coming of independence and the Africanisation of the legal system. In the 1980s, black lawyers like Sibanda had fewer problems in this regard, given their close relationships with senior politicians and civil servants. These networks proved to be important to securing the release of Joshua Nkomo's lawyer, Bruce Longhurst, who had been detained at the Plumtree border post on his way back from consulting with his client in Botswana.[672] Sibanda met with the Minister of Home Affairs to explain that Longhurst 'had only been acting in the interests of his client and was not party to any illegal act.'[673] Chihambakwe also contacted several Ministers as well as the army official in charge of

[671] *Zimbabwe: Wages of War*, p. 71.
[672] Joshua Nkomo had fled the country to Botswana in fear of being arrested on politically motivated charges.
[673] SPA File, Law Society 1983, Law Society Minutes, 15 March 1983

military and security operations in Matabeleland and was ultimately able to secure Longhurst's release.[674]

The 1980s witnessed several continuities in the government's use of the law in order to pursue its enemies. The wide provisions of the Law and Order (Maintenance) Act were used to arrest and prosecute opposition activists while emergency powers were used to effect detentions. Unlike the 1960s and 1970s, the relative importance of the legal arena as a site of resistance had increased. However, in the 1980s it was more difficult to use the law as a shield against government persecution. The new government deliberately chose not to be bound by legal procedures and regulations, and in some cases, judicial rulings. The targets of government persecution also had limited access to legal representation. In addition, their legal struggles could not draw strength from a broader political struggle as had been the case in the 1960s and 1970s.

Growing Tensions between the Executive and the Judiciary

An important development in the legal arena during the 1980s was the increasing tensions between the executive and the upper echelons of the judiciary. As previous chapters have shown, there had always been tensions within the state regarding the content of law and its administration. This was especially the case between the NAD and officials in the Ministry of Justice. However, in the 1980s key tensions were between the executive and senior members of the judiciary. While Rhodesian judges had supported the Smith Administration, after 1980 the High Court and the Supreme Court - which were composed of many of the judges appointed by the Smith administration - repeatedly ruled against the government in

[674] *Ibid.*

several important political cases. This friction was in part a reflection of the political changes in the country. However, it gradually came to reflect a divergence in the thinking of the officials in the two arms of the state about the relationship between law and state power.

One of the early cases that brought these tensions to the fore was that of the York brothers. The two brothers were arrested in January 1982 after the discovery of a substantial amount of arms and ammunition on one of their farms. During their trial the state's case was weakened by the fact that the judge disallowed the defendants' statements of admission on the grounds that they had been acquired through torture. In addition, the government's key witness disappeared to South Africa before giving his testimony. As a result the two brothers were acquitted. Having lost the case, the Minister of Home Affairs resorted to issuing a detention order against the two brothers on the sixth of May. The order was successfully challenged in the High Court. However, the Minister responded by issuing another detention order on the first of July. This order was again set aside by the High Court on the eighth of July and the brothers were released only to be re-detained on the same day, on a third detention order which the courts finally accepted as legal.

These repeated 'clashes' between the High Court and the Ministry of Home Affairs, led the Ministry of Home Affairs, Ushewokunze, to issue a statement severely criticising the court and the lawyers of the two brothers in Parliament. It read: 'The manner in which our law courts dispense justice is gravely frustrating and undermining the work of law enforcement

agencies like the police. The security of the state is sacrificed at the altar of individual liberties.'[675] He went on:

> But even after this, recalcitrant and reactionary members of the so-called Benches still remain masquerading under our hard-won independence as dispensers of justice or, shall I say, injustice by handing down pieces of judgement which smack of subverting the people's government. We inherited in toto the Rhodesian statues which these self-same magistrates and judges used to avidly and viciously interpret against the guerrillas. What is so different now apart from it being majority rule? Our posture during constitutional negotiations with the British… that the judiciary must be disbanded, can now be understood with a lot of hindsight. We are aware that certain private legal practitioners are in receipt of moneys as paid hirelings, from governments hostile to our own order, in the process of seeking to destabilise us, to create a state of anarchy through the inherited legal apparatus. We promise to handle such lawyers using the appropriate technology that exists in our law and order section. This should succeed in breaking up the unholy alliance between the negative Bench, the reactionary legal practitioners and government's hostile to us, some of whose representatives are in this country.[676]

In writing about the conflicts between the bench and the executive in the 1980s, Tendai Biti has explained these clashes in terms of the judiciary's commitment to the rule of law and protecting individual rights.[677] However, such an explanation leaves the fact that many of the same judges had supported the Rhodesian Front in applying the same repressive laws unaccounted for. In trying to understand what shaped the decisions of the judiciary in the early 1980s it is necessary to locate them within the political context of the period and the real tensions between the new regime and the remnants of the old regime discussed in the previous chapter. Chanock's observations about the friction between the South African judiciary and the government following the National Party's victory in 1948 are instructive. These tensions, he argues, were in large part because the judges 'were not part of the same

[675] Cited in Hatchard, *Individual Freedoms and State Security*, p. 133.
[676] *Ibid*.
[677] Biti, 'The Judiciary, the Executive and the Rule of Law in Zimbabwe', p. 69.

political elite as the regime'.[678] They did not necessarily arise from a staunch commitment to liberal ideals.

That said, it should be pointed out that the unfortunate logic behind Ushewokunze's tirade was that, since the judges had supported the Smith regime in repressing its political opponents under the same legal framework, they should do the same for the new government. During his tenure as Minister of Home Affairs, Ushewokunze repeatedly attacked judges who ruled against the state and issued detention orders that in effect disregarded such rulings. After the acquittal of Dabengwa and his co-accused in the treason trial, Ushewokunze dismissed Justice Squires' ruling as 'stranger than fiction' and issued a detention order against Dabengwa and Masuku.[679] Ushewokunze also condemned Justice Dumbutshena's decision to acquit the six Air Force officers accused of assisting South African agents to bomb the Thornhill Airbase in 1982 as showing 'class bias'. It is not surprising that Ushewokunze's conduct was one of the key concerns raised by the Law Society Council during their meeting with the Minister of Justice in December 1983.[680]

The argument about the judiciary's commitment to rights becomes much more relevant after 1984 when the government appointed a new batch of judges. In an address to the army in 1984, Simbi Mubako offered his reflections on the early tensions between the executive and the judiciary and expressed optimism that with the recent new appointment such clashes would become less likely:

[678] M. Chanock, 'Writing South African Legal History: A Prospectus', *Journal of African History*, 30 (1989), p. 272.
[679] *Zimbabwe: Wages of War*, pp. 158-159.
[680] SPA File, Law Society Minutes, 12 December 1983.

> In the ideal situation where the judges and the ministers are from the same social background no conflict occurs for both realise that they are part of the same government and that in order for them to serve the people they must work together each doing his constitutional role.
>
> In the first two years of our independence the class and ideological unity between the judiciary and the executive had disappeared. A new revolutionary Government had won the war and the elections, but was forced to inherit both the laws and the judiciary from the old regime. Many people expected clashes between units of the different armies which were merged together.
>
> However, by judicians [sic] management and following correct policies no major crisis eventuated. We now have a situation in which all the present judges of the Supreme Court and High Court, ninety per cent of the magistrates and all the presiding officers have been appointed by this Government. In that sense a revolution has occurred in the composition of the judiciary which is more complete than that of the civil service or of the Parliament itself. Clashes may still occur but they are much less likely.[681]

However, even with the appointment of a new set of judges the clashes between the executive and the bench continued. While the state insisted on using the law to pursue its political opponents, a shift was discernible within the decisions of senior members of the judiciary. Many judges were increasingly shifting from a rigid commitment to formalism and orienting themselves towards human rights. In an article written for the popular magazine *Parade* Chief Justice Dumbutshena argued that 'the High Court and the Supreme Court of Zimbabwe have developed a human rights jurisprudence that is the envy of other countries. In the interpretation of human rights provisions in our constitution, we have applied to good effect international human rights norms.'[682] These divergent paths charted by the bench and the executive led to growing dissonance between the two arms of the state in the late 1980s.

A key source of tension was a series of judicial rulings that drew attention to the incompatibility between certain punishments prescribed by law and the country's Bill of Rights. In 1989 Ncube & Others filed a case against the State in which they challenged the

[681] S. Mubako, 'The Law and the Judiciary in Zimbabwe', Address given at the Zimbabwe National Army Staff College, August 16 1984, Department of Information Press Statement, 20 August 1984.
[682] E. Dumbutshena, 'Justice - the People's Right', *Legal Forum*, 2 (1990), p. 6.

constitutionality of judicial whipping for adults. The Supreme Court found in their favour and ruled that the punishment breached Section 15 (1) of the Declaration of Rights which stipulated that 'No person shall be subjected to torture or to inhuman or degrading punishment or other such treatment.'[683] The ruling read, in part:

> By its very nature [corporal punishment] treats members of the human race as non-humans. Irrespective of the offence he has committed, the vilest criminal remains a human being possessed of common human dignity. Whipping does not accord him human status. No matter the extent of regulatory safeguards, it is a procedure easily subject to abuse in the hands of a sadistic and unscrupulous prison officer who is called upon to administer it. It is degrading to both the punished and the punisher alike. It causes the executioner, and through him society, to stoop to the level of the criminal. It is likely to generate hatred against the prison regime in particular and the system of justice in general.[684]

In another case the Supreme Court ruled that judicial whipping for juveniles was also unconstitutional.[685] As a result of these rulings the government repealed sections 329 to 333 of the Criminal Evidence and Procedure Act which provided for corporal punishment. In October 1990 Justice Korsah presided over the case of Wilson Masitere and ruled that the punishment of solitary confinement and spare diet, which had been handed down in the magistrate's court, was unconstitutional on the grounds that it too violated Section 15 (1) of the Declaration of Rights.[686]

Following this case, the Supreme Court was asked to rule on cases involving the constitutionality of hanging as a form of execution. The new Chief Justice, Antony Gubbay, instructed the lawyers on both sides to prepare arguments on the matter. However, the government pre-empted the hearing by passing Constitutional Amendment 11 which, among other things, amended Section 15 of the Constitution in order to ensure that male corporal

[683] Constitution of Zimbabwe, Chapter 3, Section 15 (1).
[684] Cited in Dumbutshena, 'Justice - the People's Right', p. 7.
[685] *Ibid*.
[686] *The Herald*, 9 October 1990.

punishment for juveniles as well as execution by hanging were not construed as inhuman and degrading punishments. In presenting the Bill to Parliament the Minister of Justice, Emerson Mnangagwa, argued that: 'Government will not and cannot countenance a situation where the death penalty is *de facto* abolished through the back door by a declaration by the courts that the manner of executing the death sentence by hanging constitutes inhuman and degrading punishment."[687] With respect to the reintroduction of juvenile corporal punishment, the Minister explained that it was meant to deal with the rise of juvenile offenders in the prisons and that the government felt that it was 'undesirable that young offenders should be brought into contact with adult offenders.'

On the one hand, the amendment reflected the government's views on punishment; on the other, there was a clear underlying message that the executive was not willing to see the judiciary expand its influence through judicial activism, and in the process curb its powers. This was clear in the other part of the amendment which gave the government powers to compulsorily acquire land and withdrew the authority previously granted to the courts to determine how much should be paid for expropriated land and how soon. Chief Justice Gubbay used the occasion of the opening of the High Court in 1991 to criticise the amendment and assert the role of judges:

> Judges are the custodians of the Constitution of Zimbabwe. This means that at this moment in time the courts have the power and the duty to ensure that all the provisions of the Constitution – which is the supreme and overriding law of the land – are observed by all instrumentalities of the Government, and to declare invalid any excess of power or Act of Parliament or Presidential or Ministerial Regulation, which contravenes any of the prohibitions contained in the Constitution.[688]

[687] *The Herald*, 7 December 1990.
[688] Justice A. R. Gubbay, 'Speech delivered by the Chief Justice, The Honourable Mr Justice A. R. Gubbay at the Opening of the 1991 Legal year, Harare on 14 January 1991, *Legal Forum*, 3 (1991), p. 7. Justice Gubbay had been appointed by the RF in 1977. In the 1980s he was kept on by the ZANU (PF) government and he was

In response the President, Robert Mugabe, argued that 'The work of judges is to interpret the law and not to make it.' He added: 'If certain laws are revulsive [sic] to the conscience of a judge, then that judge and conscience should not sit as a judge. Pure and simple.'[689]

Conclusion

In July 1990 the new Minister of Home Affairs, Moven Mahachi, announced to Parliament that he would not be seeking the renewal of the state of emergency. This was no cause for optimism as it was clear from Mahachi's speech that the government was willing to use emergency powers in the future should they be deemed necessary. He expressed no regret at the gross abuses that were committed under the pretext of carrying out anti-dissident operations: 'Yes, some fellow Zimbabweans were bruised in the process because of the State of Emergency during the period. Such fellow Zimbabweans are to blame, because in the majority of cases, they were willing to be used by counter-revolutionary elements for monetary gains, and/or were trying to de-stabilise a properly elected democratic government.'[690] The sense of impunity was reinforced by the general amnesty which was declared on the tenth anniversary of the country's independence by Robert Mugabe who was by then the executive president.[691] Couched in the language of reconciliation, the President extended amnesty to 'dissidents and their collaborators,' as well as 'former PF ZAPU fugitives from justice'. However, the real beneficiaries of the amnesty were the members of the security forces who had brutalised and killed thousands of Zimbabweans. The amnesty also provided legal cover for those who had committed politically motivated crimes during the elections of 1990. By all indications, it was clear that the ZANU (PF) government would

later appointed Chief Justice after the retirement of Enoch Dumbutshena. During the 1980s and 1990s he gained an international reputation of being a human rights judge.

[689] *The Herald*, 18 January 1991.

[690] 'State of Emergency to go-Mahachi', Department of Information Press Statement, 23 July 1990.

[691] 'President Announces General Amnesty,' Department of Information Press Statements, 1 August 1990.

be willing and able to bring the might of the state down upon its perceived enemies should this be deemed necessary in the future.

The LCHR aptly noted of the 1980s that: 'While the balance of power had shifted, the rules of the game remained the same.'[692] The ZANU (PF) government had embraced the repressive laws, institutions and practices that had been used by the settler governments to quell political opposition. As I have shown, this continuity was the product of both the institutional legacies of settler rule and the authoritarian tendencies that the ruling party brought with it into the government. In the 1980s the relative importance of the legal arena as a site in which to challenge government repression was greater given that there were few other effective sites in which to engage the state for members of opposition parties. However, the law proved to be of limited use as a shield against government persecution. While many people who were accused of political offences or had been abused by state agents turned to the courts to assert their rights as citizens, they found little remedy in them given the repressive nature of laws like the Law and Order (Maintenance) Act and the vindictiveness of the state. Whereas it had been possible to at least use the dock as a platform in the 1960s and 1970s, in the 1980s this strategy was largely ineffective. There was a small local and international audience for courtroom performances and those accused of political offences lacked a broader political struggle from which to draw strength. An important development during this period was the increasing tension between the executive and the judiciary. These tensions were initially a reflection the mutual antipathy between the remnants of the old regime and the officials of the new one. However, they soon came to reflect the divergent thinking between the two arms of the state about the relationship between law and state power.

[692] *Zimbabwe: Wages of War*, p. 4.

CONCLUSION

This study set out to investigate the role played by law in the constitution and contestation of state power in African history. It focused on the case of Zimbabwe between 1950 and 1990, and examined legal struggles between Africans and the state, and amongst Africans themselves. These legal encounters were used as a means of exploring the shifting roles that the law played. In the process, it intervened in a number of key debates amongst historians and anthropologists of Africa regarding the connections between law, state power and agency. In this conclusion, I will summarise the main arguments that I have made and offer some reflections on the implications of my findings for scholarly debates about contemporary legal struggles in Africa.

Law, States and Power

In investigating the role of the law in constituting state power, I have focused on the ways in which the law created and authorised the social categories on which rule was based, and how it legitimated state actions. My arguments are founded on two key observations. The first is that there was a central tension in the relationship between law, states and power: law was central in constituting the state itself, at the same time it was also a source of division within the state. This explains its centrality in the generation and assertion of state power, as well as its role in opening up fissures within the state which could be taken advantage of by citizens. Secondly, while the post-modern turn has led to greater appreciation of the symbolic, discursive and productive functions of law, sight should not be lost of its repressive capacity. In trying to understand role of law in the constitution of state power I have therefore focused

on the interplay between the repressive and constitutive functions of law. I have also used the shifting balance between these two functions as a means of exploring the changing strategies of state construction and legitimation used by different governments in Zimbabwean history.

From the early years of colonial occupation, law was an important means by which the state was established and through which its influence was projected across space. The efforts by early colonial officials in the 1890s to set up legal institutions, and to ensure that all inhabitants of the colony recognised these structures, was a key part of constituting the colonial state. When state sovereignty was challenged, it was often through the courts that it was re-asserted. As we have seen, the trials of nationalists were meant to authorize the government's narrative of African nationalism which cast nationalists as criminals and terrorists. At the height of the guerrilla war, Special Courts were convened in areas where state sovereignty faced increasing threats from guerrillas. Similarly, the ZANU (PF) government that assumed power in the 1980s used the 'primary courts' in its attempts to re-establish state monopoly over the exercise of judicial authority after the liberation war. While it was a key means of constituting and asserting state power, law was also a constant source of friction within the state. During the period of settler rule the Native Affairs and the Justice Departments were perpetually at loggerheads over the content and the administration of the law. In the 1980s the friction within the state was evident at a higher level: between senior members of the judiciary and the executive. In the early 1980s this friction reflected the political loyalties of the officials in question. However, they came to reflect the divergence in the views of the judiciary and the executive over the appropriate relationship between law and state power.

Law was also enlisted in the creation and authorisation of a colonial social order which was founded on racial difference and patriarchal ideas. In addition to defining social categories and apportioning them with rights and duties, the law sanctioned the use of violence in enforcing that social order. For example, from the 1960s the settler government discursively constructed Africans as cultural others and used this as a way to justify denying them the full rights of citizenship. A similar process was underway in the political sphere where members of the settler parliament drew on racial tropes to deny Africans the right to political participation. Africans who engaged in nationalist politics were initially characterised as children in need of a firm disciplining hand. Over time they came to be described as 'wild animals' that deserved to be killed. There was a corresponding shift in the punishments provided for by the laws governing politics, and the mandatory death sentence came to be applied to a wide range of 'crimes' of commission and omission. This increasing shift in the balance of laws function away from legitimation towards repression was the hall mark of the UDI period.

Whereas successive settler administrations had used legalism as a way of legitimating state power, the ZANU (PF) government's primary means of legitimation was not the law in and of itself. The new government's claims to legitimacy lay in its promises to eliminate the socio-economic legacies of colonial rule and to bring about modernisation and development. Law was one of the key instruments used to fulfil these promises. Among the important changes of the period was the removal of the racial and gender-related barriers to full citizenship that had existed under settler rule. There was, however, a darker side to the use of the law during this period, one that had its roots in the turbulent last decades of settler rule.

The armoury of repressive legislation inherited from the settler state, the new government's own authoritarian tendencies, and the simmering tensions of the 1970s came together to produce a toxic mix. Those who were considered to be political enemies by the ruling party were discursively constructed as being outside the nation and were thus rendered legitimate targets of state-directed violence. These individuals were denied the protection that the law and the new Bill of Rights were supposed to afford all citizens. The victims of this violence were, for the most part, officials and supporters of ZAPU. However, dissenters within ZANU (PF) were not exempt from this treatment, as the case of Sledge Muradzikwa and his colleagues discussed in chapter seven showed.

Unpacking African Legal Agency

An important task of this study has also been to explore the multiple dimensions of African legal agency. It has tried to get take the debate on African legal agency in new directions by demonstrating that Africans' use of the law reflected more than just its utility in the particular social, economic or political struggles. It also gave expression to emergent political imaginaries, shifting ideas of personhood and alternative visions of the social and political order. I have argued that African legal agency took several forms. Firstly, Africans used the law as a resource in their struggles with state officials. Instead of complying with repressive or onerous orders issued by state officials a significant number of Africans chose to seek legal recourse. Doing so meant incurring substantial financial costs, and there was often a price to be paid in the form of retribution from state officials. Such legal action was not limited to members of the political and social elite. Villagers in the rural areas around the country also sought recourse in the law and combined their resources in order to consult lawyers about aspects of government policy they disagreed with.

Africans also deployed the language of the law in their engagements with the government. From the early 1960s, multiple critiques of the Rhodesian legal system were articulated by nationalists, guerrillas and African lawyers. These critiques drew on alternative ideas about law and justice and unmasked the repressive nature of the legalism of the Rhodesian state. There was also a performative dimension to African legal agency. From the early 1960s nationalists and guerrillas usurped courtrooms and used them as spaces for personal performances. Politicians like Joshua Nkomo engaged in behaviour that disrupted courtroom procedures and undermined the colonial authorities' efforts to use these trials as performances of state power. The nationalist cultural symbols that politicians and their supporters brought into the court also challenged the state's own symbols and rituals. As we saw in chapter four, guerrillas who were tried in Rhodesian courts refused to be bound by the conventions of the courts and rejected their procedures as a parody of justice. Instead they used the dock as a platform from which to assert their political convictions and put the settler state on trial. The impact of these performances was not limited to the small audience that witnessed the trials. Local and international newspapers and nationalist newsletters amplified the impact of these performances by reporting them to a much broader audience.

These instances of African legal agency should not solely be read in terms of the calculated use of the law in the pursuit of specific outcomes. They were also assertions of rights-bearing citizenship. The villagers of Mrewa, discussed in chapter two, who pooled their money in order to seek legal advice and persisted on this path even after being threatened with arrest and knowing that they would incur the wrath of the DC, were clearly not taking the easiest path available. They were acting on the basis of an understanding that the law

should constrain state intrusions in their lives and the power of its officials. These actions also reflected a particular conception of themselves in relation to the state and their desired status in the polity. Such actions are especially significant when viewed in light of the efforts by the government in the 1960s and 1970s to define Africans as ethnicised, custom-bound subjects. These individuals were behaving like rights-bearing citizens, even if the state did not recognise them as such. This political imaginary remained important in the 1980s and was clearly articulated by Swazini Ndlovu, whom we encountered in chapter seven, who remonstrated: 'My rights as a citizen have been curtailed and I am not told why.'

I have argued that these emerging political imaginaries and ideas about personhood had their roots in long term social and economic processes which were triggered or accelerated by colonisation. These included the spread of Christianity, rural-urban migration, education, entry into wage labour, and membership in African associations of various descriptions. These processes had an important influence on how Africans conceived of themselves in relation to each other and to the state. The political currents of the post-World War Two period, which included ideas around national self-determination, universal human rights, socialism and pan-Africanism, also influenced African political aspirations and imaginaries. These emergent political imaginaries and ideas of personhood in turn found expression through the legal encounters analysed herein.

Evolving Legal Pluralism

This study has taken issue with the legal centralist approach which assumes the existence of a single colonial legal system consisting of colonial law and invented 'customary law', all

serving the interests of the state and its African allies. It has demonstrated that there is no satisfactory evidence in African colonies under British rule that 'customary law' was successfully invented or that a single legal system emerged, least of all in Southern Rhodesia. I have instead adopted the concept of legal pluralism as a lens through which to examine the developments within the legal sphere. I argue that the experience of Zimbabwe might usefully be thought of as a process of evolving legal pluralism.

For the first five decades of colonial rule, indigenous legal systems in Southern Rhodesia enjoyed a measure of autonomy. Formal efforts to draw local legal systems into the service of the colonial state were initiated through the Native Law and Courts Act of 1937. However, these initial moves were tentative, partly because of the opposition from Justice Ministry officials. Chiefs' jurisdiction was therefore limited to civil disputes and there was no effort to codify 'customary law'. As chapter two demonstrates, from the 1950s there was growing consensus between chiefs and NAD officials on the question of chiefs being accorded more judicial powers. What was significant about this consensus was the fact that it reflected a desire by both parties to appropriate the symbols and forms of the legal system represented by the other. Chiefs were well aware of their waning prestige and authority and were therefore eager to appropriate the features of state law. They thus demanded written texts defining their powers, law books that were written in local languages, courthouses and jails. At the same time the state looked to customary authorities in its effort to deal with the crisis of legitimacy that had been caused by the Native Land Husbandry Act. This concern was often concealed by senior officials' speeches that extolled the virtues of African legal systems. The product of this marriage of convenience was the 1969 African Law and Tribal Courts Act. However, the intentions of the legislation were ultimately frustrated by the pressure exerted by guerrilla fighters and the resistance from chiefs and their followers.

The most significant efforts to bridge the two legal systems were undertaken by the ZANU (PF) government after independence, through the Customary and Primary Courts Act of 1981. Under the banner of modernising 'customary law', headmen's and chiefs' courts were replaced by a system of 'primary courts', and many of the forms, symbols and concepts of state law were introduced into these courts. Judicial authority in these new courts was exercised by Presiding Officers (POs). In the case of Village Courts these new POs were elected, while those in Community Courts were trained and appointed by the government. However, these ambitious efforts to overhaul the administration of 'customary law' were reversed by the Customary Law and Courts Act of 1990 which returned some, though not all, judicial powers to 'traditional' leaders. In sum, the period under study witnessed a process of evolving legal pluralism that was characterised by mutual appropriation of symbols, forms and concepts between the 'customary' and state law. This was driven by the desire by state officials and traditional leaders to borrow legitimacy from the alternative legal system. At the same time, the respective legal systems were also evolving as a result of internal contestation and the impact of the broader social, economic and political changes in the country. While there was a process of increasing interpenetration between the legal systems during the period under study, there had also been moments of reversal.

'The Past as Prologue'

This study also allows for some reflection on scholarly debates on contemporary legal struggles in Zimbabwe and in Africa more generally. A perspective that is becoming increasingly popular in analysing legal struggles in post-colonial Africa is that of the

'judicialisation of politics'.[693] Jean Comaroff and John Comaroff, for example, have argued that political questions in postcolonial Africa (and elsewhere) are increasingly being brought to the courts for resolution to such an extent that: 'Politics itself is migrating to the courts – or to their popular, even criminal, replicas.' They further argue that authoritarian governments are increasingly resorting to the law to achieve their designs. Among other cases, they cite the example of the Zimbabwean government's frequent use of the law to facilitate its repressive actions during the post-2000 period.[694]

While there are certainly new dimensions to legal struggles that deserve scholarly attention, a number of studies on contemporary legal struggles in Zimbabwe have questioned the applicability of the 'judicialisation of politics' thesis. Susanne Verheul's courtroom ethnography suggests that the legal action instituted by citizens in post-2000 Zimbabwe cannot simply be reduced to a 'fetishisation' of the law.[695] She shows that the courtroom performances were important 'mechanisms of resistance' and they were underlain by multiple, and at times contradictory understandings of the law. Jocelyn Alexander's work on political prisoners has also indicated the importance of ideas such as the 'rule of law' and 'rights-bearing citizenship' for recent political activists, as well as those of the nationalist struggle.[696] These scholars have proposed that, in the case of Zimbabwe, it would be more

[693] See J. Comaroff and J. Comaroff, 'Law and Disorder in the Postcolony: An Introduction', in J. Comaroff and J. Comaroff (eds), *Law and Disorder in the Post-colony* (Chicago, 2006). For variations on this idea see F. E. Kanyongolo, 'The Rhetoric of Human Rights in Malawi: Individualization and Judicialization', in H. Englund and F Nyamjoh (eds), *Rights and the Politics of Recognition in Africa* (London, 2004) and J. Gould, 'Strong Bar, Weak State? Lawyers, Liberalism and State Formation in Zambia', *Development and Change*, 37 (2006).
[694] Comaroff and Comaroff, 'Law and Disorder', p. 24.
[695] S. Verheul, 'Performing the Law: Plays of Power in Harare's Magistrates Court Zimbabwe,' (M. Phil. Thesis, University of Oxford, 2011).
[696] J. Alexander, 'The Political Imaginaries and Social Lives of Political Prisoners in Post 2000 Zimbabwe', *Journal of Southern African Studies*, 36 (2010) and J. Alexander, 'Nationalism and Self-government in Rhodesian Detention: Gonakudzingwa, 1964-1974', *Journal of Southern African Studies*, 37 (2011).

appropriate to reformulate the concept and think in terms of the 'politicisation of the judiciary'.

The findings presented here caution against being drawn in by the apparent novelty of contemporary legal struggles. I have shown that the questions vexing the body politic have been debated within the legal arena since the 1950s, and that citizens and successive governments have long enlisted the law in the pursuit of their respective goals. The role that law played for citizens as a resource in political struggles and its effectiveness in this regard, varied across time depending on the existence of other avenues of engaging the state, the ability to access legal services, the strategies adopted by the state as well as the existence of a broader political struggle and a local and international audience. It should be underscored that the law has never been the only route by which citizens engaged in politics. I have also shown that the reliance on the law by the state in Zimbabwe has a long history. The uses of the law by citizens and the Zimbabwean government during the post-2000 period are best understood within this longer historical context.

This study also allows for a contribution to the efforts by scholars to proffer ways that human rights might be reinvigorated as a basis for making claims in post-colonial Africa. A growing disenchantment has come to surround the subject of human rights in contemporary Africa and with good reason. Richard Falk, for example, has pointed out how the discourse of human rights has often been appropriated by powerful states in order to 'validate non-defensive uses of force'.[697] Harri Englund has also shown how a narrow understanding of human rights that limits them to political rights has undermined their utility as a basis for making social and

[697] R. Falk, 'The Power of Rights and the Rights of Power: What Future for Human Rights?', *Ethics and Global Politics*, 1-2 (2008).

economic claims by the poor.[698] What is more, this limited conception of human rights fails to challenge the global neoliberal economic orthodoxy that is partly responsible for inequality and poverty in Africa. Michael Neocosmos has argued that contemporary human rights discourse tends to encourage political passivity and the delegation of the struggle for rights to non-governmental organisations.[699]

The increasing incidence of authoritarian governments appropriating scholarly critiques of human rights in order to justify their repressive actions, underscores the need for scholars engaging in this debate to move beyond offering critiques to offering solutions. The Zimbabwean government has been particularly vocal in articulating these critiques, while at the same time meting out violence to its political opponents. In the post-2000 period the ZANU (PF) government accused countries and international agencies that criticised its human rights record of pursuing a 'regime change agenda', and regularly cited the case of the Iraqi invasion on the basis of concocted evidence. It further argued that it was being 'demonised' for championing the economic rights of Zimbabweans through its efforts to achieve a more equitable access to land. The answer does not necessarily lie in abandoning the idea of rights in favour of a new concept which might just as easily be impoverished or appropriated. A more useful approach, as Englund suggests, is 'to offer the intellectual resources for thinking beyond the particular human rights discourse' that has become dominant among activists, donors and non-governmental organisations in many African countries.[700]

[698] H. Englund, *Prisoners of Freedom: Human Rights and the African Poor*, (Berkeley, 2006).
[699] M. Neocosmos, 'Can a Human Rights Culture Enable Emancipation? Clearing Some Theoretical Ground for the Renewal of a Critical Sociology', *South African Review of Sociology*, 37 (2006).
[700] Englund, *Prisoners of Freedom*, p. 200.

For Neocosmos the answer lies in a 'politics which prescribes rights and entitlements and demands them from the state'. In illustrating this, he points to the 1955 Freedom Charter adopted by South Africa's African National Congress. He argues that it 'was not a human rights document which passively enjoined people to petition the state for the rights due to them by virtue of simply being alive; it was and still is a document which calls on people to engage in politics to fight for their rights….'[701] Neocosmos' central argument is about the need for an active political struggle for rights. However, there is a second point which is implicit in his argument, and to which this study speaks. Briefly stated, the *struggle* for rights in Africa has a much longer history than is often acknowledged. As we have seen, the history of the struggle for rights in Zimbabwe goes far beyond the post-cold war moment. The demands for rights-bearing citizenship were articulated individually and collectively, and were very much a part of the nationalist struggle. One way of reinvigorating the contemporary struggles for rights is to sever the tie with the post-cold war neo-liberal orthodoxy, and re-contextualise them in this longer history of political struggles in Africa.

[701] Neocosmos, 'Can a Human Rights Culture Enable Emancipation?', p. 376.

BIBLIOGRAPHY

INTERVIEWS

Anderson Chris, Harare, 14 April 2011.

Austin Reg, Harare, 29 April 2011.

Chakona J., Jerera, 4 February 2011.

Chidyausiku Godfrey, Harare, 14 March 2011.

Chief Ndanga, Ndanga, 6 February 2011.

Chihambakwe Simplisius, Harare, 15 March 2009.

Chihambakwe Simplisius, Harare, 16 March 2011.

Chimuka N., Zaka, 31 March 2009.

Chin'ozho S., Chiredzi, 31 March 2009.

Dhlula Agnes, Bulawayo, 29 November 2010.

Dzoro Lovemore, Zaka, 30 March 2009.

Dzoro P., Chiredzi, 30 March 2009.

Elliot Bryant, Harare, 4 April 2011.

Gubbay Antony, Harare, 14 April 2009.

Kanter Harry, Harare, 15 April 2011.

Kunodziya C. M., Zaka, 31 March 2009.

Mabusela Constance, Bulawayo, 29 November 2010.

Magora M., Ndanga, 2 February 2011.

Mahlangu Polyanna, Bulawayo, November 2011.

Mapuranga C. M., Jerera, 6 February 2011.

Masterson Alex, Harare, 28 April 2011.

Mberi Kudakwashe, Zaka, 31 March 2009.

Mbuya Machakata, Jerera, 5 February 2011.

Mbuya Muyocha, Jerera, 4 February 2011.

Mbuya Tazvivinga, Jerera, 5 February 2011.

Mkushi Honour, Harare, 23 March 2011.

Mr Chikwanda, Jerera, 4 February 2011.

Mr Hama, Jerera, 5 February 2011.

Mr Matara, Zaka, 31 March 2009.

Mrs Charinda, Ndanga, 6 February 2011.

Mubako Simbi, Harare, 26 April 2011.

Mufuka Moffat, Jerera, 4 February 2011.

Mutambanengwe Simpson, Harare, 13 April 2011.

Mutape F., Ndanga, 2 February 2011.

Mutero Betty, Harare, 22 March 2011.

Muteti B. M., Zaka, 31 March 2009.

Ndanga Reuben, Ndanga, 6 February 2011.

Ndanga Rueben, Ndanga, 18 April 2011.

Ndume Celestine, Ndanga, 2 February 2011.

Ngwaru J. B., Ndanga, 2 February 2011.

Pichanick Alwyn, Harare, 8 April 2009.

Ranger Terence, Oxford, 27 September 2011.

Reagan Ken, Harare, 13 April 2011.

Regedzayi William, Jerera, 4 February 2011.

Rukwava V., Zaka, 1 April 2009.

Sekuru Mbizi, Chiredzi, 31 March 2009.

Shamunyarira Nathan, Harare, 24 March 2011.

Sibanda Kennedy, Bulawayo, 28 November 2010.

Sibanda Kennedy, Bulawayo, 30 November 2010.

Simpson Harry, Harare, 16 April 2009.

Smith George, Harare, 16 April 2009.

Stewart Julie, Harare, 12 April 2011.

MANUSCRIPTS AND ARCHIVAL SOURCES

1. National Archives of Zimbabwe

NAZ MS587/4, Untitled File.

NAZ MS589/7/3 Kurehwandada Muzheri vs The State.

NAZ MS590/15 Political Trials.

NAZ MS591, Ian Smith's Hostages.

NAZ MS591/2/4, Legal Sheridan.

NAZ MS591/2/7 Ian Smith's Hostages, Geneva Press Conference October 1976.

NAZ MS591/4 Political Prisoners Box.

NAZ S2796/2/1, Assemblies of Chiefs General.

NAZ S2796/2/4, Assemblies of Chiefs Matabeleland 1951 June- 1958 December.

NAZ S2824/11, Minutes of the Working Party 'C'.

NAZ S2827/1/19 Report of the Working Party 'C' Chiefs Courts.

NAZ S2930, Vol. 1 African Law and Tribal Courts.

NAZ S3385 Salisbury High Court Criminal Cases 11496 – 11502.

NAZ S3642/2, Sipolilo Magistrate's court: Cases appealed by Africans 81/58 -111/58.

NAZ S3700/103/1, African Law and tribal Courts Act: Policy: Procedure Vol. V.

NAZ S3700/103/2, Tribal Courts: Court Clerks, Training: Allowances.

NAZ S3700/103/4/2, District Commissioner's Court Rules.

NAZ S3700/40 Tribal Land Authorities.

NAZ S3700/43, TTL Authorities: Disputes 1973 May-1976 April.

NAZ ORAL/239 Leo Baron.

NAZ S3700/14, Legal Status of African Women, L. de Bruijn to the Minister of Internal Affairs, 17 October 1975.

NAZ S3700/15 Legal Status of African Women.

NAZ-Bulawayo, Box 28926, Location 29/6/3R, Local Government District Nkai, Chief Dakamela's Court.

NAZ-Masvingo, File: Local Government District Administration Chiefs and Headmen: CHK & HM 14 1975-1982.

NAZ-Masvingo, Zaka Community Court Civil Records, Loc 7-1-8F, Box 3563.

NAZ-Masvingo, Bikita Magistrates Court Civil Records 1-90, Loc 9-5-3R, Box 5251.

NAZ-Masvingo, Zaka Community Court Maintenance Cases 1985, Loc 10-6-6R, Box 3567.

NAZ-Masvingo, Bikita Magistrates Court Maintenance cases 1990.

2. Sibanda Private Archives

SPA File, Sledge Muradzikwa and 8 other vs The Honourable Emerson Mnangagwa.

SPA File, State vs Swazini Ndlovu.

SPA File, State vs Timothy Dube and Elias Sakana.

SPA File, Law Society 1983.

3. British National Archives

BNA FCO36/741, Tangwena Dispute.

BNA FCO 36/1273 Commutation of Death Sentences in Southern Rhodesia.

BNA FCO 36/1273 Commutation of Death Sentences in Southern Rhodesia

4. Online Sources

Nelson R. Mandela, Statement to the court during the Rivonia Trial, April 20 1964, http://www.aluka.org/action/showMetadata?doi=10.5555/AL.SFF.DOCUMENT.rivon0001, accessed 10/6/2012.

5. Rhodes House Library

Terence Ranger Papers, Trial of Michael Mawema, 1960.

PRINTED PRIMARY SOURCES

1. Newspapers

African Daily News

Rhodesia Herald

Zimbabwe Review

Zimbabwe Review

The Herald

2. Government Documents

Southern Rhodesia Parliamentary Debates

Rhodesia Parliamentary Debates

Zimbabwe Parliamentary Debates

Zimbabwe Senate Debates

African Law and Tribal Courts Act, Statute Law of Rhodesia 1969, Salisbury, 1970.

Report of the Courts Inquiry Commission, Government of Rhodesia, Salisbury, 1971.

The Training of Community Court Presiding Officers and Clerks, Ministry of Justice, Harare, 1982.

'Judges Impartial and Independent say Mubako', Department of Information Press Statement, 20 August 1984.

'Chiefs Trial Courts not legal yet', Department of Information Press Statement, July 6 1990.

'State of Emergency to go - Mahachi', Department of Information Press Statement, 23 July 1990.

'President Announces General Amnesty,' Department of Information Press Statements, 1 August 1990.

3. Printed Reports and Collections of Primary Documents

Breaking the Silence, Building True Peace: A Report on the Disturbances in Matabeleland and the Midlands 1980-1988, Catholic Commission for Justice and Peace and Legal Resources Foundation (Harare 1999).

Lawyers' Committee for Human Rights, *Zimbabwe: Wages of War, A Report on Human Rights* (New York, 1986).

Nyangoni C. and G. Nyandoro (eds), *Zimbabwe Independence Movements: Select Documents*, (London, 1979).

PRINTED SECONDARY WORKS

Abel R., *Politics by Other Means: Law in the Struggle against Apartheid, 1980-1994* (New York, 1995).

Adewoye A., *The Legal Profession in Nigeria 1865-1962* (Nigeria, 1977).

Agamben G., *State of Exception* (Chicago, 2005).

Alexander J., J. McGregor and T Ranger, *Violence and Memory: One Hundred Years in the 'Dark Forests' of Matabeleland* (Oxford, 2000).

Alexander J. and J. McGregor, 'War Stories: Guerrilla Narratives of Zimbabwe's Liberation War, *History Workshop Journal*, 57 (2004), pp. 79-100.

Alexander J., *The Unsettled Land: State-making and the Politics of Land in Zimbabwe, 1893-2003* (Oxford, 2006), p. 44.

Alexander J, ‘Political Prisoner’s Memoirs in Zimbabwe: Narratives of Self and Nation’, *Cultural and Social History*, 5 (2008), pp. 395-409.

Alexander J., ‘The Political Imaginaries and Social Lives of Political Prisoners in Post 2000 Zimbabwe’, *Journal of Southern African Studies*, 36 (2010), pp. 483-503.

Alexander J., ‘Nationalism and Self-government in Rhodesian Detention: Gonakudzingwa, 1964-1974, *Journal of Southern African Studies*, 37 (2011), pp. 551-569.

Alexander J, ‘View from the Liberation Movement Camps in Zambia’, paper presented at the Britain Zimbabwe Research Day, June 2012.

Amutabi, M. N., ‘Power and Influence of African Court Clerks and Translators in Colonial Kenya: The Case of Khwisero Native (African) Court, 1946-1956’, in B. N. Lawrence, E. L. Osborn and R. L. Roberts, *Intermediaries, Interpreters and Clerks: African Employees in the Making of Colonial Africa (*Madison, 2006), pp. 202-219.

Anderson D., ‘Policing the Settler State: Colonial Hegemony in Kenya, 1900-1952’, in D. Engels and S. Marks (eds), *Contesting Colonial Hegemony: State and Society in Africa and India* (London, 1994), pp. 248-266.

Anderson D., *Histories of the Hanged: Britain’s Dirty War in Kenya and the End of Empire* (London, 2005).

Anderson D., ‘Punishment, Race, and “The Raw Native”: Settler Society and Kenya’s Flogging Scandals, 1895-1930’, *Journal of Southern African Studies*, 37 (2011), pp. 479-497.

Arrighi G., ‘Labour Supplies in Historical Perspective: A Study of the Proletarianization of the African Peasantry in Rhodesia’, *Journal of Development*, 6 (1970), pp. 197-234.

Austin, R. 'Access to Legal Education and the Legal Profession in Zimbabwe', *Zimbabwe Law Review,* 5 (1987) pp. 172-188.

Barnes T., 'The Fight for the Control of African Women's Mobility in Colonial Zimbabwe, 1900-1939', *Signs*, 17 (1992), pp. 586-608.

Batezat E., M. Mwalo and K. Truscott, 'Women and Independence: the Heritage and the Struggle' in C. Stoneman (ed), *Zimbabwe's Prospects: Issues of Race, Class, State and Capital in Southern Africa* (London, 1988), pp. 153-173.

Benton L., *Law and Colonial Cultures: Legal Regimes in World History 1400-1900* (Cambridge, 2002).

Bernault F., 'The Shadow of Rule: Colonial Power and Modern Punishment in Africa, in F. Dikotter (ed), Cultures of Confinement: A History of the Prison in Africa Asia and Latin America (New York, 2007), pp. 55-94.

Berry S., 'Hegemony on A Shoestring: Indirect Rule and Access to Agricultural Land', *Africa*, 62 (1992), pp. 327-355.

Biti T., 'The Judiciary, the Executive and the rule of law in Zimbabwe', in S. Kayizzi-Mugerwa, A. O. Olukoshi, L. Wohlgemuth (eds), *Towards a New Partnership with Africa: Challenges and Opportunities* (Uppsala, 1998), pp. 66-81.

Bond P., *Uneven Zimbabwe: A Study of Finance, Development and Underdevelopment* (Asmara, 1998).

Bourdieu P., 'The Force of Law: Towards a Sociology of the Juridical Field', *Hastings Law Journal*, 38 (1987), pp. 805-853.

Bozzoli, B. with Mantho Nkotsoe, *Women of Phokeng: Consciousness, Life Strategy, and Migrancy in South Africa, 1900 – 1983* (London, 1991).

Branch D., 'Imprisonment and Colonialism in Kenya, c.1930-1952: Escaping the Carceral Archipelago', *The International Journal of Historical Studies*, 38 (2005), pp. 239-266.

Broun K., *Black Lawyers, White Courts: The Soul of South African Law* (Athens, 2000).

Bundy C., *The Rise and Fall of the South African Peasantry* (London, 1979).

Chanock M., *Law Custom and Social Order: The Colonial Experience in Malawi and Zambia* (Cambridge, 1985).

Chanock M., 'Writing South African Legal History: A Prospectus', *Journal of African History*, 30 (1989), pp. 265-288.

Chanock M, 'The Lawyer's Self: Sketches on Establishing a Professional Identity in South Africa, 1900-1925', *Law in Context Special Issue*, 16 (1999), pp. 59-79.

Chanock, *The Making of South African Legal Culture 1902-1936: Fear Favour and Prejudice*, (Cambridge, 2001).

Chidyausiku G., 'The Quality of Administration of Justice in Zimbabwe', *Legal Forum*, 2 (1988), pp. 3-5.

Chung F., *Reliving the Second Chimurenga: Memories from the Liberation Struggle of Zimbabwe* (Stockholm, 2006).

Clayton A. and D. C. Savage, *Government and Labour in Kenya 1895-1963* (London, 1974).

Cohen D. W., '"A Case for the Basoga": Lloyd Fallers and the Construction of an African Legal System', in K. Mann and R. Roberts (eds), *Law in Colonial Africa* (London, 1991), pp. 239-253.

Cohen D. W. and E. S. Atieno Odhiambo, *Burying SM: The Politics of knowledge and the Sociology of Power in Africa* (Portsmouth, 1992).

Comaroff J. L., 'Colonialism, Culture and the Law: A Foreword', *Law and Social Enquiry*, 26 (2001), pp. 305-314.

Comaroff J., 'Governmentality, Materiality, Legality, Modernity: On the Colonial State in Africa', in J. Deutsch, H. Schmidt and P. Probst (eds), *African Modernities: Entangled Meanings in Current Debate* (Oxford, 2002), pp. 107-134.

Comaroff J. and J. Comaroff, 'Law and Disorder in the Postcolony: An Introduction', in J. Comaroff and J. Comaroff (eds), *Law and Disorder in the Postcolony* (Chicago, 2006), pp. 1-56.

Cooper F. and A. L. Stoler, 'Introduction: Tensions of Empire: Colonial Control and Visions of Rule', *American Ethnologist*, 16 (1989), pp. 609-621.

Cooper F., *Colonialism in Question: Theory, Knowledge, History* (Berkeley, 2005).

Crisp J., *The Story of an African Working Class: Ghanaian Miners' Struggles, 1870-1980* (London, 1984).

Darwin J., 'The Central African Emergency', *Journal of Imperial and Commonwealth History*, 21 (1993), pp. 217-234.

Deutsch J-G., 'State of Normalcy', Paper presented at the Violence in Colonial and Post-colonial Africa workshop, 1 June 2012.

Deutsch J-G., 'Celebrating Power in Everyday Life: The Administration of Law and the Public Sphere in Colonial Tanzania, 1890-1914', *Journal of Cultural Studies*, 15 (2002), pp. 93-103.

Drinkwater M., *The State and Agrarian Change in Zimbabwe's Communal Areas* (New York, 1991).

Dumbutshena E., ‘Justice the People’s Rights’, *Legal Forum*, 2 (1990), pp. 5-8.

Ehrlich E., ‘The Sociology of Law’, *Harvard Law Review*, 36 (1922), pp. 130-145.

Elkins C., *Britain’s Gulag: The Brutal End of Empire in Kenya* (London, 2005).

Ellman S., ‘Law and Legitimacy in South Africa’, *Law and Social Inquiry,* 20 (1995), pp. 407-478.

Engels D. and S. Marks, ‘Introduction: Hegemony in a Colonial Context’, in D. Engels and S. Marks (eds), *Contesting Colonial Hegemony: State and Society in Africa and India* (London, 1994), pp. 5-15.

Kanyongolo F. E., ‘The Rhetoric of Human Rights in Malawi: Individualization and Judicialization’, in H. Englund and F. Nyamjoh (eds), *Rights and the Politics of Recognition in Africa*, (London, 2004).

Merry S. E, ‘Resistance and the Cultural Power of Law’, *Law and Society Review*, 29 (1996), pp. 11-26.

Moore S. F., *Social Facts and Fabrication: Customary Law on Kilimanjaro, 1880-1900* (Cambridge, 1986).

Feltoe G., ‘A Survey of Major Legislation in the period 1980-1984, *Zimbabwe Law Review*, 1 & 2 (1983-84), pp. 278-285.

Fields K., *Revival and Rebellion in Colonial Central Africa* (Princeton, 1985).

Foucault M., *Discipline and Punish: The Birth of the Prison* (London, 1975).

Ginzburg C., *The Cheese and the Worms: The Cosmos of a Sixteenth-Century Miller* (London, 1976).

Gluckman M., *The Judicial Process among the Barotse of Northern Rhodesia* (Manchester, 1955).

Godwin P. and I. Hancock, *'Rhodesians Never Die': The Impact of War and Political Change on White Rhodesia c. 1970-1980* (Oxford, 1993).

Gready P., 'Autobiography and the "Power of Writing": Political Prison Writing in the Apartheid Era', *Journal of Southern African Studies*, 19 (1993), pp. 489-523.

Gubbay A. R., 'Speech delivered at the Opening of the 1991 Legal Year', *Legal Forum*, 3 (1991), pp. 5-9.

Guha R., *Dominance Without Hegemony: History and Power in Colonial India* (Massachusetts, 1997).

Gupta A. and A Sharma, 'Rethinking Theories about the State in an Age of Globalisation', in A. Gupta and A. Sharma (eds), *The Anthropology of the State: A Reader* (Oxford, 2006), pp. 1-41.

Hansen T. B. and F. Stepputat, 'Introduction: States of Imagination', in T. B. Hansen and F. Stepputat (eds), *States of Imagination: Ethnographic Explorations of the Postcolonial State* (London, 2001), pp. 1-38.

Hatchard J., *Individual Liberties and State Security in the African Context: The case of Zimbabwe* (Harare, 1993).

Hay D., 'Property, Authority and the Criminal Trial', in D Hay *et al* (eds), *Albion's Fatal Tree: Crime and Society in Eighteenth Century England* (Middlesex, 1975), pp. 17-63.

Herbst J., *State Politics in Zimbabwe* (Harare, 1990).

Hirsch S., 'Khadi Courts as Complex Sites of Resistance: The State, Islam and Gender in Post-colonial Kenya', in M. Lazarus-Black and S. F. Hirsch (eds), *Contested States: Law, Hegemony, and Resistance* (New York, 1994), pp. 207-230.

Holleman J. F., *Chief, Council and Commissioner* (London, 1969).

Hynd S., 'Killing the Condemned: The Practice and Process of Capital Punishment in British Africa, 1900-1950s', *Journal of African History*, 49 (2000), pp. 403-418.

Jeater D., *Marriage, Power and Perversion: The Construction of a Moral Discourse in Southern Rhodesia, 1894-1930* (Oxford, 1993).

Jeater D., '"Their Idea of Justice is so Peculiar": Southern Rhodesia, 1890-1910', in P. Coss (ed.), *The Moral World of the Law* (Cambridge, 2000), pp. 178-195.

Jeater D., *Law, Language and Science: The invention of the "Native Mind" in Southern Rhodesia, 1890-1930* (Portsmouth, 2007).

Kalinga O. J. M., 'The 1959 Nyasaland State of Emergency in Old Karonga District', *Journal of Southern African Studies*, 36 (2010), pp. 743-763.

Karekwaivanane G. H., 'It shall be the duty of every African to obey and comply promptly': Negotiating State Authority in the Legal Arena, 1965-1980', *Journal of Southern African Studies*, 37 (2011), pp. 333-349.

Kazembe J. L., 'The Women Issue', in I. Mandaza (ed), *Zimbabwe: The Political Economy of Transition 1980-1986* (Harare, 1986), pp. 377-404.

Killingray D., 'The "Rod of Empire": The Debate over Corporal Punishment in the British African Forces, 1888 – 1946', *Journal of African History*, 35 (1994), pp. 411-437.

Kostal R. W., A Jurisprudence of Power – Victorian Empire and the Rule of Law (Oxford, 2005).

Kratz, C. A. 'Conversations and Lives', in L. White, S. F. Miescher and D. W. Cohen (eds), *African Words, African Voices; critical practices in oral history* (Bloomington, 2001).

Kriger N. J., *Zimbabwe's Guerrilla War: Peasant Voices* (Cambridge, 1992).

Kriger N., 'The Politics of Creating National Heroes: The Search for Political Legitimacy and National Identity' in N. Bhebe and T. Ranger (eds), *Soldiers in Zimbabwe's Liberation War* (Oxford, 1995), pp.139-162.

Ladley A., 'Changing Courts in Zimbabwe: The Customary Law and Primary Courts Act', *Journal of African Law*, 26 (1982), pp. 95-114.

Lardner-Burke D., *Rhodesia: The Story of Crisis* (London, 1966).

Litowitz D., 'Gramsci, Hegemony and the Law,' *Brigham Young University Law Review*, 515 (2000), pp. 515-551.

Lonsdale J., 'Kenyatta's Trials: Breaking and Making and African Nationalist', in P. Coss (ed), *The Moral World of Law* (Cambridge, 2000), pp. 196-239.

Mamdani M., *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton, 1996).

Manase W. T., 'Grassroots Education in Zimbabwe: Successes and Problems Encountered in Implementation by the Legal Resources Foundation of Zimbabwe', *Journal of African Law*, 36 (1992), pp. 11-18.

Mandela N., *Long Walk to Freedom* (London, 1995).

Mann K. and R. Roberts, 'Introduction', in Mann and Roberts (eds), *Law in Colonial Africa* (London, 1991), pp. 3-58.

Mazarire G. C., 'Discipline and Punishment in ZANLA: 1964-1979', *Journal of Southern African Studies*, 37 (2011), pp. 571-591.

McCracken J., 'In the Shadow of Mau Mau: Detainees and Detention Camps during Nyasaland's State of Emergency', *Journal of Southern African Studies*, 37 (2011), pp. 535-550.

Meierhenrich J., *The Legacies of Law: Long-run Consequences of Legal Development in South Africa 1652 – 2000* (Cambridge, 2008).

Merry S. E., 'Legal Pluralism', *Law and Society Review*, 22 (1988), pp. 869-896.

Merry S. E., 'Anthropology, Law and Transnational Processes', *Annual Review of Anthropology*, 21 (1991), pp. 357-379.

Merry S. E, 'Law and Colonialism', *Law and Society Review*, 25 (1991), pp. 889-922.

Merry S. E., 'Courts as Performances: Domestic Violence Hearings in a Hawai'i Family Court', in M. Lazarus-Black and S. F. Hirsch (eds), *Contested States: Law, Hegemony, and Resistance* (New York, 1994), pp. 35-58.

Merry S. E., 'Resistance and the Cultural Power of Law', *Law and Society Review*, 29 (1995), pp. 11-25.

Merry S. E., 'Transnational Human Rights and Local Activism: Mapping the Middle', *American Anthropologist,* 108 (2006), pp. 38-51.

Miescher S. F. 'The Life Histories of Boakye Yiadom (Akasease Kofi of Abetifi, Kwawu): Exploring the Subjectivity and "Voices" of a Teacher-Catechist in Colonial Ghana', in L. White, S. F. Miescher and D. W. Cohen (eds), *African Words, African Voices; critical practices in oral history* (Bloomington, 2001), pp. 162-193.

Mlambo A. S., 'From the Second World War to UDI, 1940-1965', in B. Raftopoulos and A. Mlambo (eds), *Becoming Zimbabwe: A History from the Pre-colonial Period to 2008* (Harare, 2009), pp. 75-114.

Mlambo E., *Rhodesia: Struggle for a Birthright* (London, 1972).

Moore S. Falk, ‘Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study’, *Law and Society Review*, 4 (1973), pp. 719-746.

Moore S. Falk, *Social Facts and Fabrication: Customary Law on Kilimanjaro* (Cambridge, 1986).

Munro W., *The Moral Economy of the State: Conservation, Community Development and State Making in Zimbabwe* (Ohio, 1998)

Ncube W., ‘The Decision in Katekwe v Muchabaiwa: A Critique’, *Zimbabwe Law Review*, 1 & 2 (1983-84), pp. 217-228.

Ncube W., ‘Customary Law Courts Restructured’, *Zimbabwe Law Review*, 7 (1989-1990), pp. 9-17.

Ndhlovu-Gatsheni S. and W. Willems, 'Making Sense of Cultural Nationalism and the Politics of Commemoration under the Third Chimurenga in Zimbabwe', *Journal of Southern African Studies*, 35 (2009), pp. 191-208.

Neocosmos M., ‘Can a Human Rights Culture Enable Emancipation? Clearing Some Theoretical Ground for the Renewal of a Critical Sociology’, *South African Review of Sociology*, 37 (2006), pp. 356-379.

Nkomo J., *Nkomo: The Story of My Life* (London, 1984).

Nyagumbo M., *With the People: An Autobiography from the Zimbabwean Struggle* (London, 1980).

Oguamanam, C. and W. Wesley Pue, ‘Lawyers’, Colonialism, State Formation and National Life in Nigeria, 1900-1960: “the fighting brigade of the people”’, *Social Identities: Journal for the Study of Race, Nation and Culture*, 13 (2006), pp. 769-785.

Oomen B., *Chiefs in South Africa: Law, Power and Culture in the Post-Apartheid Era* (Oxford, 2005).

Palley C., 'The Judicial Process: UDI and the Southern Rhodesian Judiciary', *The Modern Law Review*, 1 (1967), pp. 263-287.

Palley C., 'Law and the Unequal Society: Discriminatory Legislation in Rhodesia under the Rhodesian Front from 1963 to 1969, Part 1,' *Race and Class*, 12 (1970), pp. 15-47.

Palley C., 'Law and the Unequal Society: Discriminatory Legislation in Rhodesia under the Rhodesian Front from 1963 to 1969, Part 2,' *Race and Class*, 12 (1970), pp. 139-167.

Palmer R. and N. Parsons (eds), *The Roots of Rural Poverty in Central and Southern Africa* (Berkeley, 1977).

Passmore G. C., *The National Policy of Community Development in Rhodesia: With Special Reference to Local Government in the African Rural Areas* (Salisbury, 1972).

Peck A. J. A., *Rhodesia Accuses* (Salisbury, 1966).

Pete S. and A. Devenish, 'Flogging, Fear and Food: Punishment and Race in Colonial Natal, *Journal of Southern African Studies*, 31 (2005), pp. 3-21.

Peterson D. R., 'Morality Plays: Marriage, Church, and Colonial Agency in Central Tanganyika, ca.1876-1928', *American Historical Review*, 111 (2006), pp. 983-1010.

Pierce S., 'Punishment and the Political Body: Flogging and Colonialism in Northern Nigeria', *Interventions*, 3 (2001), pp. 206-221.

Raftopoulos B., 'Nationalism and Labour in Salisbury, 1953-1965', *Journal of Southern African Studies*, 21 (1995), pp.79-93.

Raftopoulos B. and L. Sachikonye (eds), *Striking Back: The Labour Movement and the Post-Colonial State in Zimbabwe, 1980-2000* (Harare, 2001).

Ranger T., 'The Invention of Tradition revisited: The Case of Colonial Africa', in T. Ranger and O. Vaughan (eds), *Legitimacy and the State in Twentieth Century Africa: Essays in Honour of A. H. M. Kirk-Greene* (London, 1993), pp. 62-111.

Ranger T., *Are we not also Men? The Samkange Family and African Politics in Zimbabwe 1920-1964* (London, 1995).

Ranger T., *Voices From the Rocks: Nature, Culture and History in the Matopos Hills of Zimbabwe* (Oxford, 1999).

Rao A. and S. Pierce, 'Discipline and the Other Body: Correction Corporeality and Colonial Rule', *Interventions*, 3 (2001), pp. 159-168.

Rathbone R., 'Law, Lawyers and Politics in Ghana', in D. Engels and S. Marks (eds), *Contesting Colonial Hegemony: State and Society in Africa and India* (London, 1994), pp. 227-247.

Richardson P. and J. van Helten, 'Labour in the South African Gold Mining Industry, 1886-1914', in S. Marks and R. Rathbone (eds), *Industrialisation and Social Change in South Africa: African Class Formation, Culture and Consciousness, 1870-1930* (Essex, 1982), pp. 77-98.

Roberts R., 'Text and Testimony in the Tribunal de Premiere Instance, Dakar, during the early Twentieth Century', *Journal of African History*, 31 (1990), pp. 447-463.

Sachs A., *Justice in South Africa* (London, 1973).

Scarnecchia T., *The Urban Roots of Democracy and Political Violence in Zimbabwe: Harare and Highfield, 1940-1964* (Rochester, 2008).

Schmidt E., 'Negotiated Space and Contested Terrain: Men, Women, and the Law in Colonial Zimbabwe, 1890-1939', *Journal of Southern African Studies,* 16 (1990), pp. 622-648.

Scott D., 'Colonial Governmentality', *Social Text,* 43 (1995), pp. 191-220.

Shadle B. L., '"Changing Traditions to Meet Current Altering Conditions": Customary Law, African Courts and the Rejection of Codification in Kenya, 1930', *Journal of African History,* 40 (1999), pp. 411-431.

Sharafi, M. 'A New History of Colonial Lawyering: Likhovsky and Legal Identities in the British Empire', *Law and Social Inquiry,* 32 (2007), pp. 1059-1094.

Sherman T. C., 'Tensions of Colonial Punishment: Perspectives on Recent Developments in the Study of Coercive Networks in Asia, Africa and the Caribbean', *History Compass,* 7 (2009), pp. 659-677.

Shutt A. K., '"The Natives are Getting Out of Hand": Legislating Manners, Insolence and Contemptuous Behaviour in Southern Rhodesia, c.1910-1963', *Journal of Southern African Studies,* 33 (2007), pp. 653-672.

Smith R., "'Money Breaks Blood Ties': Chiefs' Courts and the Transition from Lineage Debt to Commercial Debt in Sipolilo District." *Journal of Southern African Studies,* 24 (1998), pp. 509-526.

Snyder F. G., 'Colonialism and Legal Form: The Creation of "Customary Law" in Senegal', *Journal of Legal Pluralism,* 49 (1981), pp. 49-90.

Spear T., 'Neo-Traditionalism and the Limits of Invention in British Colonial Africa,' *Journal of African History,* 44 (2003), pp. 3-27.

Stewart J., 'Legal Age of Majority Act Strikes Again: Chihowa v Mangwende SC 84.87', *Zimbabwe Law Review,* 4 (1986), pp. 168-172.

Stoler A. L., 'Colonial Archives and the Arts of Governance', *Archival Science,* 2 (2002), pp. 87-109.

Stoneman C. (ed), *Zimbabwe's Inheritance* (New York, 1982).

Sylvester C., *Zimbabwe: The Terrain of Contradictory Development* (Boulder, 1992).

Tamanaha B., 'The Folly of the Social "Scientific" Concept of Legal Pluralism,' *Journal of Law and Society,* 20 (1993), pp. 192-217.

Tamanaha B., 'A Non-essentialist Version of Legal Pluralism', *Journal of Law and Society,* 27 (2000), pp. 296-321.

Thompson E. P., *Whigs and Hunters: The Origins of the Black Act* (New York, 1975).

Tredgold T., *The Rhodesia that was my life* (London, 1968).

Trubek, D. M., 'Max Weber on Law and the Rise of Capitalism', *Wisconsin Law Review*, 720 (1972), pp. 720-753.

Tsanga A., 'Reconceptualizing the Role of Legal Information Dissemination in the Context of Legal Pluralism in African Settings', in A. Hellum *et al* (eds), *Human Rights, Plural Legalities and Gendered Realities: Paths are Made by Walking* (Harare, 2007), p. 437-458.

Tsunga A., 'The Professional Trajectory of a Human Rights Lawyer in Zimbabwe between 2000 and 2008', *Journal of Southern African Studies,* 35 (2009), pp. 977-991.

Turrell R., ‘Kimberly: Labour and Compounds, 1871-1888’, in S. Marks and R. Rathbone (eds), *Industrialisation and Social Change in South Africa: African Class Formation, Culture and Consciousness, 1870-1930* (Essex, 1982), pp. 45-76.

van Onselen C., *Chibaro: African Mine labour in Southern Rhodesia 1900-1933* (London, 1976).

Vaughan M., *Curing their Ills: Colonial Power and African Illness* (Palo Alto, 1991).

Werbner R., ‘Smoke from the Barrel of a Gun: Postwars of the Dead, Memory and Reinscription in Zimbabwe’, in R. Werbner (ed), *Memory and the Postcolony: African Anthropology and the Critique of Power* (London, 1998).

Werbner R., *Tears of the Dead: The Social Biography of an African Family* (Edinburgh, 1991)

West M., *The Rise of the African Middle Class: Colonial Zimbabwe* (Indianapolis, 2002)

Wiener M., *An Empire on Trial: Race, Murder and Justice under British Rule, 1870-1935* (Cambridge, 2009).

Wilson R. A., ‘Reconciliation and Revenge in Post-Apartheid South Africa: Rethinking Legal Pluralism and Human Rights,’ *Current Anthropology*, 41 (2000), pp. 75-98.

Windrich E., ‘Rhodesian Censorship: The Role of the Media in the Making of a One-party State’, *African Affairs,* 78 (1979), pp. 523-534.

Yarrow, T. ‘Life/History: Personal Narratives of Development amongst NGO workers and Activists in Ghana’, *Africa,* 78 (2008), pp. 334-338.

Zimudzi T., ‘African Women, Violent Crime and the Criminal Law in Colonial Zimbabwe, 1900-1952’, *Journal of Southern African Studies,* 30 (2004), pp. 499-517.

‘Notes on Cases: Smith N. O. and Lardner Burke N. O. vs. Wonesayi’, *Rhodesian Law Journal,* 12 (1972).

UNPUBLISHED THESES

Verheul S., ‘Performing the Law: Plays of Power in Harare’s Magistrates Court Zimbabwe,’ (M. Phil. Thesis, University of Oxford, 2011).

Feltoe G. ‘Law, Ideology and Coercion in Southern Rhodesia’ (M. Phil Thesis, University of Kent, 1978).

Edsman B., ‘Lawyers in Gold Coasts Politics c. 1900 – 1945’ (Ph.D. Dissertation, University of Uppsala, 1979).

Munochiveyi M., ‘“It was Difficult in Zimbabwe”: A History of Imprisonment, Detention and Confinement during Zimbabwe’s Liberation Struggle, 1960-1980’ (Ph.D. Thesis, University of Minnesota, 2008).