Introduction

In 1968, four guerrilla fighters, Thomas Mutete Makoni, Jonathan Maradza, Amidio Chingura and Joseph Muyambo, were tried in the Salisbury High Court for possession of arms of war.[1] The four had entered Rhodesia from Zambia with rifles, pistols, landmines, hand grenades and TNT, and hid them at a homestead in Mrewa district. However, the arms were discovered by the police, and the men were subsequently arrested and prosecuted. When the matter came to trial, Makoni and his colleagues refused to secure the services of a lawyer to represent them or to call any witnesses to speak in their defence. Instead, they chose to stage a moral defence. When they took the stand, they did not deny that they had brought the weapons into the country. What they did reject, however, was the state's efforts to frame their actions within a discourse of crime and terrorism. They articulated their political grievances as Africans living under colonial rule, and asserted the legitimacy of their decision to take up arms against the repressive Rhodesian settler state. Their position was summed up in the following terms by Muyambo when he entered his plea: 'I disagree with the suggestion that I committed a crime by entering this country with arms because I came into this country to release our country from bondage.'

For his part, Justice Lewis, who presided over the case, was at pains to limit their testimony to matters deemed relevant by the court. He repeatedly rebuked them for their 'long political harangue', pointing out 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'. However, throughout the trial, the guerrillas rejected these efforts to constrain their testimony. Despite Lewis's

[1] National Archives of Zimbabwe (hereafter NAZ), S3385, Salisbury High Court Criminal Cases 11496–11502, *Regina v. Thomas Mutete Makoni et al.* The four were part of the Zimbabwe African National Liberation Army (ZANLA), the armed wing of the nationalist party Zimbabwe African National Union (ZANU).

best efforts, Makoni and his colleagues were able to make use of the dock as a platform from which to articulate critiques of the Rhodesian government and, in effect, place it on trial. The four men eloquently enumerated the oppressive policies of the Rhodesian government, and refused to recognise the legitimacy of the legal proceedings they were being subjected to, which, they argued, sought to preserve racial domination. It was on these grounds that Chingura declared: 'I strongly dispute the rights of this court to sentence me to death.' In his final words to the court, Makoni echoed Chingura's sentiments in asserting: '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.'

A number of things are notable about the exchanges during this legal encounter between the four guerrilla fighters and the Rhodesian judge. The first is their deployment of the idea of law for diametrically opposed purposes. Although Justice Lewis invoked the law in order to enforce the settler state's efforts to suppress African political demands, Makoni invoked it in order to assert them. The statements by the judge and the defendants also indicated a fundamental disagreement about what made law 'lawful', and underlying them were contrasting understandings about law and justice. On the one hand, Justice Lewis adopted a rigidly formalist stance, and sought to apply the strict letter of the law without regard to the political and moral arguments articulated by the four guerrilla fighters. On the other, Makoni and his colleagues' position was informed by a substantive understanding of justice, one that was concerned with the fairness of the outcomes of trials, and the morality of the laws that the courts enforced.

The exchanges between Makoni and his colleagues, and Justice Lewis were by no means unique. From the 1950s, law increasingly 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.[2] As settler rule was challenged by the rise of African nationalism, successive colonial governments increasingly resorted to employing the law to quell political dissent. At the same time, African men and women from different walks of life mobilised the law instrumentally and discursively in their struggles with the state and with each other. In numerous instances, they made use of legal spaces in order to articulate

[2] S. Engle Merry, 'Resistance and the Cultural Power of Law', *Law and Society Review*, 29 (1995), 14.

their alternative visions of the social and political order in the country, and legal ideas came to play a significant role in shaping African political imaginaries. At the heart of this book is an analysis of these multiple ways that law was used to constitute and contest state power in Zimbabwe between 1950 and 2008. In doing so, this book provides a social and political history of law in Zimbabwe, and takes forward key debates about how scholars have sought to understand the relationship between law, state power and agency in African history.

Law and the Constitution of State Power

Studies of the role of law in asserting state power in African history have adopted two main approaches. The first emphasises the coercive uses of the law, and this was a central feature of 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, law figures as one of the key instruments by which the colonial state undercut African agrarian livelihoods. Through legal measures, colonial governments effected land dispossession, imposed a range of taxes 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 provided cheap African labour for the 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 the sub-economic wages and the poor living and working conditions.

[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).

[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); and A. Clayton and D. C. Savage, *Government and Labour in Kenya 1895–1963* (London, 1974).

What emerges clearly from the agrarian and labour history literatures is the way that law enabled, rather than constrained, the power of colonial states over the African populations they ruled.

The coercive operation of the law has also been captured fairly graphically in the literature on colonial violence, which demonstrates the intimate connection between law and violence. Studies of corporal punishment, in particular, reveal the ways that violence and ideas about racial difference were embedded in colonial legal systems.[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] Equally, the histories of the turbulent period of decolonisation have 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 sanctioned brutal operations to quell African political opposition.[7] These studies have also shown how the courts were frequently enlisted to punish African opposition to colonial rule, all too often through the use of the capital sentence. This comes out clearly in David Anderson's work on the last years of colonial rule in Kenya. 'British Justice in 1950s Kenya', he notes, 'was a blunt, brutal and unsophisticated instrument of oppression.'[8]

From the 1990s, however, a new approach had begun to emerge in the literature, one that paid more attention to the subtler ways that law was employed by colonial authorities. These studies dwelt

[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(JSAS)*, 31 (2005); D. Anderson, 'Punishment, Race, and "The Raw Native": Settler Society and Kenya's Flogging Scandals, 1895–1930', *JSAS*, 37 (2011); D. Killingray, 'The "Rod of Empire": The Debate over Corporal Punishment in the British African Forces, 1888–1946', *Journal of African History (JAH)*, 35 (1994); and S. Pierce, 'Punishment and the Political Body: Flogging and Colonialism in Northern Nigeria', *Interventions*, 3 (2001).

[6] Rao and Pierce, 'Discipline and the Other Body', 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); O. J. M. Kalinga, 'The 1959 Nyasaland State of Emergency in Old Karonga District', *JSAS*, 36 (2010); and M. Munochiveyi, *Prisoners of Rhodesia: Inmates and Detainees in the Struggle for Zimbabwean Liberation, 1960–1980* (New York, 2014).

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

on the symbolic, legitimating and 'productive' functions of the law, and drew inspiration from the works of scholars such as Antonio Gramsci, Michel Foucault and Pierre Bourdieu. Although Gramsci and Foucault did not devote much attention to the subject of the law, their insights into the nature and exercise of power 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 useful. For Gramsci, domination was not achieved solely by coercion.[9] Rather, ruling classes strove to elicit the consent of the ruled to their subordination, and 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. However, historians of Africa, for the most part, agreed that colonial states were not hegemonic, not least because the colonial experience was characterised by a significant amount of violence.[10] In addition, as Diana Jeater points out, 'colonial rulers [we]re 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]

As a consequence, there has been a move away from Gramsci's original idea of an overarching hegemony, towards the idea of a 'fragmented hegemony'.[12] This reformulation of the concept of hegemony has been effectively applied to law by Sally Engle Merry who contends that:

> 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, and parts which offer liberation to the subordinate. Law cannot be viewed as either hegemonic or

[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* (Cambridge, MA, 1997).
[11] D. Jeater, *Law, Language and Science: The Invention of the "Native Mind" in Southern Rhodesia, 1890–1930* (Portsmouth, 2007), 4.
[12] Litowitz, 'Gramsci, Hegemony and the Law', 536.

not as a whole, but instead as incorporating contradictory discourses about equality, justice and persons.[13]

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.'[14] He further points out that: 'While colonial law acquired a degree of acceptance and even had a strong influence on the sensibilities of the modern elite, that acceptance was partial and conditional.'[15] The value of this concept of fragmented hegemony, especially for the study of African legal history, lies in the way it draws us to redirect our efforts towards the search for instances where law has been used to authorise social and political hierarchies, or to generate consent, while remaining attentive to the unstable and incomplete influence of law. It is this thinking that informs part of the analysis of the law within this book.

Notwithstanding the valuable insights that these two different approaches to understanding the role of law in African history proffer, the picture they each provide is incomplete in important respects. By downplaying the repressive nature of law in favour of its symbolic and constitutive power, we risk missing intimate relationship between law and violence in colonial Africa. By the same token, studies that focus on physical coercion alone miss (or dismiss) other important aspects about the law that can be just as consequential. These include the ways it is deployed discursively, or the ways that courts are used as sites for performances whose reach and impact can be extended and amplified by the media. Significantly, the operation of law in colonial Africa was often simultaneously repressive and productive, coercive and constitutive. This book, therefore, attends to the ways that law was used

[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), 54. See also D. Anderson, 'Policing the Settler State: Colonial Hegemony in Kenya, 1900–1952', in Engels and Marks, *Contesting Colonial Hegemony*, 263.

[14] R. Rathbone, 'Law, Lawyers and Politics in Ghana', in Engels and Marks, *Contesting Colonial Hegemony*, 246–47.

[15] Ibid., 247.

to command and to demand, as well as constitute and legitimise the social and political order in Zimbabwe between 1950 and 2008.

The balance in the use of law for coercion or legitimation, and the level of success that the state achieved, varied over time. As such, the approach I take is not simply to merge two ways of thinking about the law, but rather to examine this shifting balance between coercion and legitimation over time. In addition to rendering a more nuanced picture of the role of law in colonial and post-colonial Zimbabwe, this approach presents a further analytical advantage. It offers a useful window onto the continuous process of making and remaking the state. Thinking about how, when and why the balance in the use of the law shifted over time casts a light onto the shifting and often fragmented nature of colonial states. Law was not simply a tool in the hands of the state, it was also central to the constitution of the state itself. The establishment of legal institutions in the early colonial period was part of the process of state construction, and these institutions were central to the projection of state authority across space. In addition, the effort to establish colonial courts as the final arbiters of justice in African colonies was part of the effort to establish the state 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 authorize'.[16]

Although law was important in the constitution of states, it was often the source of division within them. 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'.[17] This book demonstrates that law was one source of this internal tension. Different branches of the state in colonial and post-colonial Zimbabwe were constantly at loggerheads over the content and administration of the law. For much of the colonial period, the tension was concentrated between officials of the Native Affairs Department who sought to cultivate personalised forms of authority

[16] 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), 7.

[17] Cited in J. Alexander, *The Unsettled Land: State-making and the Politics of Land in Zimbabwe, 1893–2003* (Oxford, 2006), 11.

over Africans, and those of the Justice Department who insisted on rule-bound conduct. However, after independence, the key tensions were between senior members of the executive and the judiciary. These tensions, I argue, were rooted in their divergent views about the relationship between law and the legitimate exercise of state power.

Colonial States and Indigenous Legal Systems

In reflecting on the role of law in the making of state power, it is important to consider the place of indigenous legal systems, as colonial and post-colonial officials often sought to draw them into the service of the state. Martin Chanock's study of 'customary law' in Northern Rhodesia and Nyasaland was important in driving the debate on this subject.[18] Chanock challenged the prevailing view amongst anthropologists in the 1970s that 'customary law' was a carry-over from the pre-colonial African past. He argued, instead, that it was a fabrication of the colonial period that arose out of a coincidence of interests between colonial officials and male African elders. On the one hand, colonial officials were concerned about the breakdown of law and order that followed the undermining of 'traditional' leaders, as well as the need to mobilise African labour. On the other, male elders were anxious to regain their control over women and youth. This had been eroded by colonial laws that enabled young women to resist patriarchal control, as well as the new avenues for wealth accumulation created by the colonial economy which gave young men greater independence from their elders. The result of the alliance between colonial officials and male elders, 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'. Chanock's arguments about the invention of 'customary law' were very influential in shaping subsequent studies, and were later applied to Southern Rhodesia by Elizabeth Schmidt in her pioneering work on the history of Shona women in Mashonaland Province.[19] Like Chanock, she argues that

[18] M. Chanock, *Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia* (Cambridge, UK: 1985). See also F. G. Snyder, 'Colonialism and Legal Form: The Creation of "Customary Law" in Senegal', *Journal of Legal Pluralism*, 49 (1981).

[19] E. Schmidt, *Peasants, Traders and Wives: Shona Women in the History of Zimbabwe, 1870–1939* (London, 1992), 104–13.

there was a window of emancipation for African women as a result of the application of the 'repugnancy clause' by colonial officials. However, this window closed due to the 'creation' of 'customary law' and the reassertion of patriarchal control.

An important shortcoming of the work by Chanock and Schmidt is that they allocate too much power to colonial administrations, and see 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 codification did not necessarily rigidify 'customary law'. Although it 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 unused. But as labelled, it was an entity which was conceived as static.'[20] Sarah Berry has similarly questioned the view that the attempts to invent 'customary law' were successful.[21] In her study of access to land in the Gold Coast, 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.'[22]

Brett Shadle's research on the codification of 'customary law' in colonial Kenya is particularly instructive. He shows that administrative officials in Kenya were in fact opposed to codification, for fear that a 'crystallized, unalterable customary law would allow them little room to adjust the law in order to control local African courts and, by extension, African societies.'[23] His detailed analysis of the proceedings in African courts in Gusii reveals that even after codification, court elders

[20] S. Falk, Moore, *Social Facts and Fabrication: Customary Law on Kilimanjaro* (Cambridge, 1986), 317.
[21] S. Berry, 'Hegemony on A Shoestring: Indirect Rule and Access to Agricultural Land', *Africa*, 62 (1992).
[22] Ibid., 328.
[23] B. L. Shadle, '"Changing Traditions to Meet Current Altering Conditions": Customary Law, African Courts and the Rejection of Codification in Kenya, 1930', *JAH*, 40 (1999), 413.

'followed a much more nuanced customary law in the courts than the one spelled out in colonial texts.'[24] He thus concludes 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.'[25] Given that the Southern Rhodesian state had greater capacity than its Kenyan counterpart, I would not go so far as to conclude, as Shadle does, that customary law and African courts were 'largely outside the purview of the state'. However, his broader observations are relevant to Southern Rhodesia, where Law Department officials were opposed to the idea of chiefs being accorded judicial powers. As a consequence, contrary to Schmidt's claims, there was no codification of 'customary law'. In addition, when the Rhodesian Front government did try to actively make use of chiefs' courts during the late 1960s and 1970s, it was but one of many actors vying to shape what actually happened in those courts. Chiefs, their followers, and nationalist parties all had their own agendas. As a consequence, the state often lost the struggle to influence chiefs' courts.

A second shortcoming in the approach taken by Chanock is the underlying 'legal centralist' perspective that views the colonial legal system as a single entity, incorporating statute law and invented 'customary law', both of which are tied to the state. This perspective not only tends to overstate the success of 'invention', it also underplays the distinct nature of the legal systems involved, as well as the complex, and at times antagonistic, relationships which developed between them over time. This is especially the case in Southern Rhodesia where neither 'Indirect Rule' nor codification was implemented. As Diana Jeater's work on the early colonial period in Southern Rhodesia has shown, there existed distinct African legal systems with their own legal procedures, concepts, and jurisprudential foundations, all of which proved to be resilient in the face of colonial incursion.[26]

It is therefore necessary to rethink the idea of the invention of 'customary law', as well as the legal centralist assumptions that undergird the work by Chanock and others.[27] As such, I adopt the alternative

[24] Ibid, 414.
[25] Ibid, 430.
[26] Jeater, *Law, Language and Science . . .*
[27] See also K. Mann and R. Roberts, 'Introduction', in Mann and Roberts (eds), *Law in Colonial Africa* (London, 1991), 8–9.