Introduction

Law, State Authority and the Courts

If you are going to be fair in your analysis of the Zimbabwean judiciary, you need to look at it from that perspective. Where it all crumbled. Why an executive, which in itself is a creature of law, decides then to say 'ignore law', because that is risky for any government. Because once you say that you yourself do not respect law, what it means is that you yourself are attacking the very legitimacy that you've got. Government itself is a legal fiction.[1]

In September 2001, a month after resigning from the bench, Zimbabwe High Court Judge Michael Gillespie published his review of a case involving a supporter of the country's ruling party, the Zimbabwe African National Union-Patriotic Front (ZANU-PF), who was convicted of attempting to extort $3,000 from his former employer, a white Zimbabwean, but had, in Justice Gillespie's opinion, received an unjustifiably lenient sentence in the Magistrates' Courts. In his review, Justice Gillespie tied his commentary on the man's sentence to his reasons for leaving the bench. The political and judicial context in which this sentence was passed, he argued, posed a 'challenge to his conscience'.[2] As a result of partisan packing of the bench, selective prosecution and the manipulation of court rolls, he could no longer consider himself 'an independent Judge in an impartial Court'. Instead, he found 'himself in the position where he is called upon to administer the law only as against political opponents of the government and not against government supporters'.[3] In the state media, Professor Jonathan Moyo, then minister of information for ZANU-PF, dismissed Justice Gillespie's remarks as those of 'an unrepentant racist', whose

[1] Interview, Tawanda Zhuwarara, human rights lawyer, Harare, 7 September 2010.
[2] From Judgment HH 148-2001, at pp. 5–6 (issued on 26 September 2001 by Justice Gillespie in *State v. Humbarume*).
[3] Ibid.

resignation from the bench and departure from Zimbabwe were 'really good riddance to bad rubbish'.[4]

A multitude of national and international human rights reports published on the state of the judiciary in Zimbabwe echoed Justice Gillespie's conclusion that the ruling party had mastered the 'techniques which provide a government determined to do so with the opportunity to subvert the law while at the same time appearing to respects its institutions'.[5] These reports drew particular attention to the seemingly paradoxical manner in which the government maintained a rhetorical commitment to judicial due process while relying on the Zimbabwe Republic Police (ZRP) force and the courts to harass and intimidate political opponents through violent arrests, physical and psychological abuse in custody, prolonged detentions often in inhumane conditions and artificially drawn-out trials.

In Zimbabwe, legal processes appeared to be simply a façade to mask the violence of ZANU-PF's rule. In this book, I argue that this approach obfuscates myriad ways that state authority, and the notions of citizenship that are tied to this authority, can be consistently negotiated and (per)formed through law. Both Justice Gillespie's reasoning and Jonathan Moyo's response suggest that judicial institutions and practitioners, as well as ideas about the law, occupied a more complex position in Zimbabwe's political debates. Jonathan Moyo's attack on Justice Gillespie as 'the unrepentant racist', for instance, turned not to

[4] 'Top Former Judge Says Mugabe "Engineered Lawlessness"', *Deutsche Presse-Agentur*, 6 October 2011, accessed on 5 December 2015 at www.iol.co.za/news/africa/mugabe-engineered-lawlessness-says-top-judge-74776.

[5] From Judgment HH 148-2001, at pp. 5–6 (issued on 26 September 2001 by Justice Gillespie in *State v. Humbarume*). Key human rights reports include: International Bar Association (IBA), *Report of IBA Zimbabwe Mission 2001* (London, IBA, 2001); Solidarity Peace Trust (SPT), *'Subverting Justice': The Role of the Judiciary in Denying the Will of the Zimbabwean Electorate since 2000* (Johannesburg, SPT, March 2005); IBA Human Rights Institute, *Partisan Policing: An Obstacle to Human Rights and Democracy in Zimbabwe* (London, IBA, October 2007); Human Rights Watch (HRW), *'Our Hands Are Tied': Erosion of the Rule of Law in Zimbabwe* (New York, HRW, November 2008); Bar Human Rights Committee (BHRC), *'A Place in the Sun', Zimbabwe: A Report of the State of the Rule of Law in Zimbabwe after the Global Political Agreement of September 2008* (London, BHRC, June 2008); HRW, *False Dawn: The Zimbabwe Power-Sharing Government's Failure to Deliver Human Rights Improvements* (New York, HRW, August 2009); and SPT, *Walking a Thin Line: The Political and Humanitarian Challenges Facing Zimbabwe's GPA Leadership – and Its Ordinary Citizens* (Johannesburg, SPT, June 2009).

the language of law, but to the country's history of colonial domination to dismiss Justice Gillespie's critique of ZANU-PF's governance as illegitimate. In turn, Justice Gillespie's reference to the ways his work conditions challenged his 'conscience' tied his decision to leave the bench to a commonly shared interpretation of his profession, and of the law, as ethical, procedural and proper only when these were not infringed upon by politics. His judgement and resignation, and Moyo's response, suggest that there were cracks in the regime's control over its judicial institutions, and the normative understanding of law that the members of these institutions should propound.

This book expands the study of the law beyond the idea of a façade or a mask for political repression by focusing on the trials, highlighted in human rights reports, of individuals accused of political offences in Harare and Bulawayo's Magistrates' Courts between 2000 and 2012. I ask: Why is the judiciary a central site of contestation in post-independence Zimbabwe? How is this contestation performed in political trials? And what does this contestation tell us about the making of political power? In posing these questions, the book places particular emphasis on the work courtroom performances do, foregrounding law's potential to reproduce or transform social and political power through the narrative, material and sensory dimensions of these performances. Contrary to studies which examine appeals to law as acts of resistance by marginalised orders for inclusion in dominant modes of rule, I argue that it was not recognition *by* but *of* this formal, rule-bound ordering, and the form of citizenship it stood for, that was at stake in performative legal engagements. In this manner, law was much more than a mere instrument. Law was a site in which competing conceptions of political authority were given expression, and in which people's understandings of themselves as citizens were formed and performed.

In this introduction, I situate the book within the conceptual framework that it expands on. I then briefly state why Zimbabwe offers an important case study to examine the questions raised by this framework, and describe the methodologies used to conduct the study. Finally, I set out the structure of the book's remaining chapters.

Law's Legitimacy and State Authority

The relationships between law, state and society are long-standing areas of examination for historians, anthropologists and socio-legal

studies scholars. Although each discipline varies in its approach to the study of law, they are compatible in their conceptualisation of law as both a set of institutions and an idea(l) through which the power and authority of states and their citizens can be constructed, negotiated or undermined.[6] This approach enables scholars to distinguish between the practice of law within the state's judicial institutions, and the role of law within the political imaginations of a diverse range of actors. It further allows them to highlight the law's 'Janus-faced' workings.[7] Law, they argue, works as a double-edged sword that both legitimises the legal categories and rules through which states control their populations, and aids those marginalised by this form of state control to resist it.

Through this interplay between repression and resistance, law simultaneously reproduces social hierarchies and constitutes new categorisations.[8] The historian E. P. Thompson's examination of the Black Act in eighteenth-century England was influential in recognising that, through this dynamic, a government's reliance on legal processes as a mechanism for repression need not undermine the law's legitimacy.[9] Conceptualising of the law as both an ideology and a set of social norms that can be studied 'in terms of its own logic, rules, and procedures',[10] Thompson concludes that law's legitimacy stems from the possibility of justice:

[6] Kamari Maxine Clarke and Mark Goodale (eds), *Mirrors of Justice: Law and Power in the Post-Cold War Era* (Cambridge, Cambridge University Press, 2010); Mark Goodale, *Anthropology and Law: A Critical Introduction* (New York, New York University Press, 2017).

[7] John L. Comaroff, 'Colonialism, Culture and the Law: A Foreword', *Law and Social Inquiry*, 26, 2, 2001, p. 306. The understanding of law as a double-edged sword was further developed in the study of colonial governance and resistance: Martin Chanock, *Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia* (Cambridge, Cambridge University Press, 1985); Sally Falk Moore, *Social Facts and Fabrications: Customary Law on Kilimanjaro, 1880–1980* (Cambridge, Cambridge University Press, 1986); Kirsten Mann and Richard Roberts (eds), *Law in Colonial Africa* (London, James Currey, 1991); Sally Engle Merry, 'Legal Pluralism', *Law and Society Review*, 22, 5, 1988, pp. 869–96.

[8] Mindie Lazarus-Black and Susan F. Hirsch (eds), *Contested States: Law, Hegemony and Resistance* (London, Routledge, 1994).

[9] E. P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (New York, Pantheon Books, 1975).

[10] Ibid., p. 260.

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.[11]

Arguing for the law's propensity for justice, Thompson recognises that all members of society may relate to multiple, at times contradictory understandings of law. By locating the legitimacy of law primarily in its ability to bring about occasional 'just' outcomes, however, he limits the practical and ideological degree to which those repressed by law may invoke it.

In her ambitious historical analysis of law and colonial rule, Lauren Benton moves beyond the focus on law's outcomes to foreground citizens' expectations of the law.[12] She demonstrates how those repressed under the law in colonial states had no expectations of its equal application, but granted it legitimacy because it provided a forum through which they could engage with, or challenge, the political, economic and social agendas promoted by the state. While the law's outcomes featured in determining its legitimacy, it was the process through which law was understood, defined and related to that mattered more. Susan Hirsch and Mindie Lazarus-Black similarly suggest that, when examining the place of law in 'contested' colonial and postcolonial states, we should ask not whether citizens' engagement with the law yielded successful outcomes, but rather how and why law was invoked and to what effect.[13]

Through its invocations law can work hegemonically, as a mode of governance that shapes, and is shaped through, interactions in all spheres of society and encompasses both coercion and consent. By turning to law, it becomes 'naturalised', normalised and firmly rooted as a legitimate form of governance in the imagination of states and their citizens. This process of naturalisation obscures the fact that law's legitimacy is in fact 'the consequence of particular historical actors,

[11] Ibid., p. 263.
[12] Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900* (Cambridge, Cambridge University Press, 2002).
[13] Susan F. Hirsch and Mindie Lazarus-Black, 'Introduction – Performance and Paradox: Exploring Law's Role in Hegemony and Resistance', in Mindie Lazarus-Black and Susan F. Hirsch (eds), *Contested States: Law, Hegemony and Resistance* (London, Routledge, 1994), pp. 1–34.

classes, and events'.[14] Moreover, law's power frequently does remain debated, rather than naturalised. Law's hegemony may thus be fragmented, as Sally Engle Merry contends in her study on domestic conflict mediation in Hawaii's lower courts.[15]

When citizens invoke law as a form of resistance against the state, this works through consciousness of precisely this fragmented hegemony, and of the plurality of orders that can be invoked. By incorporating the notion of consciousness, law works ideologically rather than hegemonically. Distinguishing between hegemony and ideology, Jean Comaroff and John L. Comaroff observe that '[w]hereas the first consists of constructs and conventions that have come to be shared and naturalized throughout a political community, the second is the expression and ultimately the possession of a particular social group ... Hegemony homogenizes, ideology articulates.'[16] To capture the role of consciousness in creating spaces for resistance through the articulation of the law, Merry speaks of 'legal consciousness'.[17] In her account of legal consciousness among working-class Americans, she argues that law has the 'capacity to construct authoritative images of social relationships and actions'.[18] The legal ideology of those who may be repressed through it is therefore 'a negotiated, constructed reality developed in local social settings through repeated interactions, not a faithful replica of the dominant ideology'.[19]

Merry concludes, however, that the outcomes of citizens' legal consciousness remained marked by a paradox: in their attempt to break free from the dominant ideology through their legal engagements, citizens increased their reliance on the ways law ordered and

[14] Hirsch and Lazarus-Black, 'Introduction', p. 7.
[15] Sally Engle Merry, 'Courts as Performances: Domestic Violence Hearings in a Hawai'i Family Court', in Mindie Lazarus-Black and Susan Hirsch (eds), *Contested States: Law, Hegemony, and Resistance* (London, Routledge, 1994), p. 54.
[16] Jean Comaroff and John L. Comaroff, *Of Revelation and Revolution: Christianity, Colonialism and Consciousness in South Africa* (London, University of Chicago Press, 1991), p. 24.
[17] Sally Engle Merry, *Getting Justice and Getting Even: Legal Consciousness among Working-Class Americans* (London, University of Chicago Press, 1990); Sally Engle Merry, 'Everyday Understandings of the Law in Working-Class America', *American Ethnologist*, 13, 2, 1986, pp. 253–70.
[18] Merry, *Getting Justice and Getting Even*, p. 8.
[19] Merry, 'Everyday Understandings of the Law', p. 255.

categorised them.[20] More recently, particular attention has been paid to how this paradox plays out in claims to citizenship by populations excluded from, or on the margins of, the modern state and its normative structures of accountability, such as stateless populations, migrants and refugees, who often have to turn to the language of human rights to be 'heard' and so remain bound to the state categories that marginalise them.[21] Mobilisations of law within citizenship struggles remain highly diverse, however, reflecting a range of ideas about citizenship itself.[22] Citizenship, Catherine Neveu argues, 'is a socially and politically constructed, and thus arbitrary, notion' which has very real practical, political, legal and institutional effects.[23]

'Legal consciousness' and the understanding of law as ideology that shapes state and society relations push us to examine the creation, circulation and impact of multiple articulations of, and claims made on, the law. Throughout this book, I argue that the recognition of a variety of engagements with law, and the study of their interactions and effects, is essential for examining the judiciary as a site for political contestation, and for identifying the productive place of law in manufacturing state authority and notions of citizenship. In doing so, I challenge the manner in which scholars of authoritarian or postcolonial states continue to frame the use of law as a paradox of repression and resistance.

The binary of repression and resistance is evident in the work of scholars studying the role of courts and judicial activism in semi-democratic and authoritarian regimes,[24] and scholars examining the place of law within postcolonial contexts. They caution that, despite the persistence of discourses of rights within postcolonial society, law

[20] Merry, *Getting Justice and Getting Even*.
[21] See, for example: Ilana Feldman, 'Difficult Distinctions: Refugee Law, Humanitarian Practice, and Political Identification in Gaza', *Cultural Anthropology*, 22, 1, 2007, pp. 129–69; Ramah McKay, 'Afterlives: Humanitarian Histories and Critical Subjects in Mozambique', *Cultural Anthropology*, 27, 2, 2012, pp. 286–309.
[22] Nandini Sundar, 'The Rule of Law and Citizenship in Central India: Postcolonial Dilemmas', *Citizenship Studies* 15, 3–4, 2011, p. 422.
[23] Catherine Neveu, 'Discussion: Anthropology and Citizenship', *Social Anthropology*, 13, 2, 2005, p. 200.
[24] Tamir Moustafa and Tom Ginsburg, 'Introduction: The Function of Courts in Authoritarian Politics', in Tom Ginsburg and Tamir Moustafa (eds), *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge, Cambridge University Press, 2008), p. 2.

remains a conservative force, reproducing rather than reforming existing power relations and modes of governance. Comaroff and Comaroff, for example, argue that the postcolonial polity is marked by a paradox of increased crime, violence and disorder on the one hand, and growing democratisation and a commitment to the law on the other.[25] Within, and as a result of, this dynamic, the law is 'fetishized'. Almost all dimensions of the postcolony, they contend, 'exist . . . in the shadow of the law'.[26] The prevailing, almost religious, adoration for the law, the Comaroffs argue, turns it into the central framework around which communities, including the state, are formed.[27] Within the postcolony, they further argue that this 'fetishization of law', and the underlying interaction between law and disorder, gives rise to 'lawfare' as a primary mode of governance, defined as 'the resort to legal instruments, to the violence inherent in the law, to commit acts of political coercion, even erasure'.[28] 'Lawfare' may be mobilised as a 'weapon of the weak'; however, the Comaroffs observe that 'ultimately it is neither the weak nor the meek nor the marginal who predominate in such things. It is those equipped to play most potently inside the dialectic of law and disorder.'[29]

While the Comaroffs argue that 'lawfare' is not the most effective mode for resistance within the postcolonial polity, anthropological accounts of African politics have highlighted that those best equipped to play with the law's power need not be located within the state's institutions. Ethnographies of governance within the postcolony argue for the workings of multiple, complementary or competing centres of power. The existence of this multitude of actors both contributes to the disorder that characterises the postcolony, and ensures that the forms and functions of the law may be appropriated and mobilised by forces beyond the state.[30]

[25] John L. Comaroff and Jean Comaroff, 'Law and Disorder in the Postcolony: An Introduction', in Jean Comaroff and John L. Comaroff (eds), *Law and Disorder in the Postcolony* (London, University of Chicago Press, 2006), pp. 1–56.
[26] Comaroff and Comaroff, 'Law and Disorder in the Postcolony', p. 34.
[27] Ibid. See also, Jean Comaroff and John L. Comaroff, 'Criminal Justice, Cultural Justice: The Limits of Liberalism and the Pragmatics of Difference in the New South Africa', *American Ethnologist*, 31, 2, 2004, pp. 188–204.
[28] Comaroff and Comaroff, 'Law and Disorder in the Postcolony', p. 30.
[29] Ibid., p. 31.
[30] Thomas Bierschenk and Jean-Pierre Olivier de Sardan (eds), *States at Work: Dynamics of African Bureaucracies* (Boston, Brill, 2014); Christian Lund,

As important as it is to recognise the workings of multiple forms of governance, and to study the relationship between law's legitimacy, state authority and society, through the production and circulation of legal consciousness 'from the margins', I argue throughout this book that we should return to the idea of the state as tied to its institutions and actors to explain the persistence of the authority of law. In essence, I combine E. P. Thompson's understanding of the effect of occasional 'just' outcomes in legal institutions on the legitimacy of states[31] with Lauren Benton's recognition of law as a language and practice through which citizens can express their expectations of the state,[32] and to take this combined approach into the postcolonial setting. By so doing, I build on Thomas Hansen and Finn Stepputat's ethnographic explorations of the postcolonial state. Hansen and Stepputat demonstrate that law not only accords legitimacy to the ruling regime, but also shapes our idea of the state.[33] With its symbolism the law grants the state authority. This authority is closely tied to an understanding of 'the state' as standing above 'society' as a guarantor of rights, and as a means of ensuring justice.[34] Hansen and Stepputat allow for law to work alongside multiple 'languages of stateness', and call for ethnographic explorations of the role of law in maintaining particular state–society relations.

I argue that, in order to conduct such ethnographic explorations, scholars should empirically disentangle law from repressive rule and examine instead the ideas about state authority and citizenship that are embodied, enacted and debated through it. When we dichotomise law as either a mode of, or a tool for, repressive governance within postcolonial regimes, or a language of resistance to this governance, we run the risk of relating all engagements with the law and its forums directly to opposition to the state (defined both as a set of institutions and an imaginary), and judging the meaning of such engagements with law by the space they create for citizens to break out of the state's categorisations. This does not allow us to ask what understandings of the state, and one's political belonging to it, are authorised and contested

'Twilight Institutions: Public Authority and Local Politics in Africa', *Development and Change*, 37, 4, 2006, pp. 685–705.

[31] Thompson, *Whigs and Hunters*. [32] Benton, *Law and Colonial Cultures*.

[33] Thomas Blom Hansen and Finn Stepputat, *States of Imagination: Ethnographic Explorations of the Postcolonial State* (London, Duke University Press, 2001).

[34] Hansen and Stepputat, *States of Imagination*, p. 15.

through interactions with the law – or what 'myth of the state' is being articulated.[35]

Rather than reducing the debates that take place within legal institutions in postcolonial polities to symptoms of the 'fetishisation' of law, in this book I ask instead how dynamic performances engaging, or taking place within, these institutions generate and contest a 'state consciousness', a concept which links peoples' mobilisations of 'legal consciousness' to the ideas of the state that are at stake in their contestations.[36] I argue that, in the case of Zimbabwe, civil servants and citizens may engage the law not only as an attempt to reform or reject the modes of governance used against them, but also to reaffirm their ideal of the state and their understanding of citizenship within this state, demanding that their government engage with and be held accountable to this ideal.

In this book, I therefore foreground interactions within judicial institutions, and argue that we should move questions of what law as a language of 'stateness' authorises back into our study of the dynamics of meaning-making within the state's institutions specifically. As Lazarus-Black and Hirsch show, the judicial system, and particularly the courts, are 'complex sites' within which a range of hierarchies and power relations can be contested and restructured.[37] To capture these dynamics, I study trials in the Zimbabwean courts as spaces of performance. In the following section I lay out why this is a useful approach in relation to political trials.

Courts as Spaces of Performance

Scholars have derived important insights into the dynamics of state formation and contestation by studying courtrooms as spaces of

[35] Philip Abrams, 'Notes on the Difficulty of Studying the State', *Journal of Historical Sociology*, 1, 1, 1988, pp. 58–89; Timothy Mitchell, 'Society, Economy and the State Effect', in G. Steinmetz (ed.), *State/Culture: State-Formation after the Cultural Turn* (London, Cornell University Press, 1999), pp. 76–97.

[36] In developing the notion of 'state consciousness', my conversations with, and engagement with the work of, Dr Sophie Andreetta have been hugely beneficial. See Sophie Andreetta, 'Pourquoi Aller au Tribunal si l'On n'Exécute Pas la Décision du Juge? Conflits d'Héritage et Usages du Droit à Cotonou', *Politique Africaine* 141, 1, 2016, pp. 147–68.

[37] Lazarus-Black and Hirsch, *Contested States*.