

‘ZIMBABWEANS ARE FOOLISHLY LITIGIOUS’: EXPLORING THE LOGIC OF APPEALS TO A POLITICIZED LEGAL SYSTEM

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Law works in the world not just by the imposition of rules and punishments but also by its capacity to construct authoritative images of social relationships and actions, images which are symbolically powerful. (Merry 1990: 8)

INTRODUCTION

In a discussion of Zimbabwe’s legal system as of 2000, Professor John Makumbe, an active supporter of the Movement for Democratic Change (MDC) who taught political science at the University of Zimbabwe in Harare,¹ argued that the police force and the judiciary were rife with political interference. Zimbabweans nevertheless continually appealed to the law. He stated: ‘Zimbabweans are very litigious ... I mean, you call [President] Mugabe an idiot, somebody takes you to court. If I call my colleague next door a bum, he’ll say that is defamation of character and take me to court. Zimbabweans are foolishly litigious.’

In this paper, I ask whether Zimbabweans were indeed ‘foolishly litigious’. I raise this question to examine the logics of appealing to a politically partisan legal system. Viewing appeals to legal institutions as foolish not only dismisses them as naïve, it limits how we conceptualize the law as a space for repression and resistance. I caution against conflating resistance through legal appeals with opposition to the state (defined both as a set of institutions and an imaginary), and against judging the success of such appeals by the space they create for appellants to break out of the state’s categorizations. Defining the law as a multi-layered (and at times contradictory) practice and idea(l), I argue that Zimbabwean citizens appealed to it because of the ways in which it continued to meaningfully serve both as a marker of their identity in relation to the Zimbabwean state and as a guide for engaging with that state. By engaging with the law in this manner, citizens further differentiated this state and their belonging to it from the ruling party ZANU-PF and its increasingly politicized legal institutions.

I engage first with scholarship on law as a space for repression and resistance, and then focus primarily on the narratives of two men – Patrick and Father

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¹John Makumbe was an outspoken critic of ZANU-PF. He planned to run as an MDC-T member of parliament (MP) in the country’s 2013 parliamentary elections. Makumbe died on 27 January 2013. Interview, John Makumbe, political analyst, Harare, 11 January 2012.

Mkandla, who were not directly involved in political activism but who often turned to the police to report cases of political violence in their regions – in order to examine the construction and impact of their interactions with the law. Although their experiences were far from unique, I examine these two cases in detail in an effort to tease out both the contradiction and the consistency that marked Zimbabwean citizens' legal appeals. Their logics for and the effects of their appeals allowed both men to distinguish between the use of legal institutions to legitimize ZANU-PF's rule, and the law as a means of asserting the authority of a shared imagination of the future of the Zimbabwean state and their citizenship within it.

RESISTANCE, REPRESSION AND THE LAW

Guided by E. P. Thompson's (1975) seminal argument that for a regime to maintain its legitimacy, the law occasionally has to work in favour of those members of society who are otherwise repressed through it, numerous scholars of colonial Africa have recognized and explored the manner in which appeals to the law may offer a platform for resistance (see, for example, Chanock 1985; 2001; Comaroff 2001; Falk Moore 1986; Mann and Roberts 1991; Merry 1988; Zimudzi 2004). Professor Makumbe focused on the repressive aspects of this dynamic when he argued that resisting ZANU-PF through the law in Zimbabwe post-2000 would be foolish. In Professor Makumbe's view, it was irrational to appeal to the law in Zimbabwe as laws were not simply applied incorrectly; citizens further faced personal repercussions by articulating legal demands.

The deterioration of the rule of law has been documented extensively in human rights reports (IBA 2001; SPT 2005; BHRC 2008; HRW 2008a; 2008b; 2008c). These reports illustrate that as ZANU-PF sought to keep hold of political power, it relied increasingly on a politicized and repressive judicial system. The party's reliance on the country's legal system to target political opponents through arrests, violent abuses in custody, prolonged detention (often in inhumane conditions) and artificially drawn-out trials emerged further in over seventy interviews I conducted with judicial officials, human rights lawyers and their clients in Zimbabwe between 2010 and 2012. As a specific example of the judiciary's politicization, human rights reports point out that those travelling to the police station to report a case of political violence in the run-up to the 2008 presidential and parliamentary elections (predominantly members of the MDC) were met with the often-violent responses of police officers (HRW 2008a: 56–8). This, however, did not discourage activists and politicians from frequently appealing to the police and judiciary, filing reports, or applying for court orders.

In a context where legal institutions have become spaces in which government officials can commit ZANU-PF-sanctioned violence, such persistent legal appeals may indeed appear 'foolish'. In the myriad ways in which legal appeals tie appellants to state structures and institutions, however, not all interactions need restrict their autonomy. In her study of legal consciousness among working-class Americans, for example, Sally Engle Merry (1990: 8) argues that law has the 'capacity to construct authoritative images of social relationships and actions'. The legal ideology of those who may be repressed through the law is therefore 'a negotiated, constructed reality developed in local social settings through repeated

interactions, not a faithful replica of the dominant ideology' (Merry 1986: 255). Elaborating on this in *Getting Justice and Getting Even*, however, Merry (1990: 182) concludes by drawing attention to a paradox, namely that by 'seek[ing] to use the law to establish a more autonomous life, one regulated by law rather than by violence', those appealing to it 'become more dependent on the law to order their lives', opening themselves up to increased state governance. Nandini Sundar's (2011: 422) exploration of the citizenship struggles of India's adivasis similarly highlights that 'even as they try to resist or transform the state, subalterns are bound by state categories'.

An appeal to law, however, can also be about reaffirming the idea of the state, and a demand that government engage with and be held accountable to this idea. In their study of courts in authoritarian regimes, Tamir Moustafa and Tom Ginsburg (2008) remind us that '[t]he more a regime relies on rule-of-law rhetoric, the greater the opportunity for litigants and judges to expose the shortcomings of the government'. Sally Falk Moore's (1998) observations that lawyers within many African countries value the courts for their ability to expose these shortcomings through record keeping support this view. She writes that 'some public accountings may contribute towards building the moral foundations of new democratic regimes' (Falk Moore 1998: 149), pressing us to think of law in a more dynamic fashion. The law can shape state authority, as much as it can be an avenue through which the relationship between the state and its citizens is (re)negotiated. As Mindie Lazarus-Black and Susan Hirsch (1994) remind us, when examining legal appeals in 'contested states', we should ask not whether these appeals yielded successful outcomes, but rather how and why law was invoked and to what effect.

In the remainder of this paper, I explore Father Mkandla's and Patrick's narratives and argue that their legal appeals allowed them to challenge ZANU-PF's politicization of the legal system without undermining the prospect of the formation of a rule-bound state in the future. Playing on contestations that persisted within Zimbabwe's legal institutions and among its officials, Father Mkandla and Patrick appealed to the law for the occasional successes they experienced, and as a performance of their commitment to remain on the 'right side of the law'. With this performance, the men positioned themselves on the moral high ground in negotiating their relationship with the state. As a result, the logics of their appeals were three-fold. Firstly, by reporting cases to the police, they demanded that the state follow its own rules. Secondly, in the context of the selective application of the law, these legal appeals were expressions of an ongoing belief in government officials and their potential capacity to respond to such demands in a practical, non-partisan manner. Thirdly, in making their appeals, both men interacted with the police and the courts as if these institutions and their officials were bound by rules.

APPEALS AS DEMANDS TO THE STATE TO FOLLOW ITS RULES

In this section, I examine the demands that Patrick and Father Mkandla made when they appealed to the police. Both insisted that the police should record a police report, investigate the case, and apprehend someone. These interactions often involved members of the Zimbabwe Republic Police (ZRP) Law and Order division, notorious for its violent and partisan behaviour, and whom the men had met before and would meet again. Both men articulated that their

continued appeals increased their awareness that they were engaging with a violent and politically partisan police force. At the same time, their interactions with the police, and later the courts, increased their knowledge of – and, in Father Mkandla’s case, access to – Zimbabwe’s extensive human rights networks. The men’s heightened awareness, and to some degree protection, of their rights served to reinforce their demands for the rule of law to be upheld.

The first case focuses on Patrick, who worked as a teacher at a rural high school in Manicaland province, about an hour’s drive from Harare, Zimbabwe’s capital. Prior to the 2008 presidential and parliamentary elections, he had no interest in politics. He described himself as ‘just a neutral citizen’.² He was the breadwinner not only for his own family of six, but also for two out of his four brothers and their families. Like many others in his home town, Patrick and his younger brother, who was an MDC member, were victims of ZANU-PF youth violence in the run-up to the June 2008 presidential elections. Patrick reported the two incidents of violence involving himself or his family to the police.

Patrick first went to the police to report damage to his property, and its looting, in June 2008. In this turbulent period, Manicaland was one of the provinces where ‘ZANU-PF [was] deliberately displacing thousands of people from their homes in the rural areas ... through a campaign of beatings, burning of huts and homesteads, the deliberate slaughter of livestock, and the looting of property’ (HRW 2008a: 46). Teachers such as Patrick were targeted due to their positions of influence among the youth, and their often-assumed trade unionist and MDC affiliation (Zimbabwe Human Rights NGO Forum 2002; PTUZ 2011; PTUZ and RAU 2012).

At a time when severe hyperinflation in Zimbabwe had destabilized the incomes of civil servants, Patrick was in a relatively self-sufficient economic position as he had invested in building his homestead and raising cattle. In June 2008, he lost much of his savings when his home was looted and many of his animals were slaughtered.³ Together with Patrick’s work as a high school teacher, his brother’s political affiliation could have contributed to Patrick’s homestead being targeted. Several individuals whom Patrick recognized from his home town and identified as ZANU-PF youth destroyed his granary, slaughtered some of his animals and broke into his home. Patrick filed a police report following the incident in the hope that the police would ‘come, apprehend the perpetrators, maybe recover part of the property, get it back to me and maybe make those people pay reparations, or ... what can I say, sort of rebuilding what they destroyed’.

After filing the police report, Patrick left town with his wife and children to ‘get some shelter’. A week later, he received news that his younger brother and sister-in-law had been forced to attend a ZANU-PF meeting, where they were severely beaten. Three days went by before one of their neighbours felt safe enough to bring the couple to a hospital for medical attention. Two days after being admitted to hospital, Patrick’s brother died. Patrick recounted that, although ‘the police would not do anything’ following his first report, when he ‘heard about the

²Interview, Patrick, teacher, Harare, 20 January 2012.

³The economic consequences of this still troubled Patrick when we met, who explained that he could not afford to care for his family, especially with the added burden of care for his deceased brother’s family.

death of my young brother, I went again to the police ... I was lucky to find the police officer in charge present. I went straight to his office. The officer in charge walked out of the police station.'

Patrick explained the police officer's departure as a political act of evasion. He noted that his younger brother had been an MDC supporter, and the police were unwilling to take the case as 'they play according to the tune of ZANU-PF. Once they hear that you are aligned to the MDC, then they do nothing.' He nonetheless believed it was important to report cases to the police: although he realized that the odds were stacked against him, he persisted, approaching several police officers. Demonstrating the unevenness of ZANU-PF's control over legal institutions, which allowed for a certain police officer's willingness to follow a moral code to prevail, Patrick was eventually able to report the case to a policewoman in the charge office.

In a second case, Father Mkandla, a Catholic priest without any ties to political activism who worked in the provincial capital of Matabeleland North, Lupane, regularly reported cases of political violence in his home area. He also demanded that the police follow the rules by investigating cases and apprehending suspects. In 2002, a man died in close proximity to the mission where Father Mkandla was working and people in his parish suspected that war veterans had murdered him. The man's family asked Father Mkandla to attend the funeral, and at the funeral he spoke broadly about human rights abuses that were prevalent in the region and the innocent victims that they claimed.

Following the funeral, Father Mkandla went to the police to enquire after the progress of the case. The police warned him that he 'was now on the hit list' of the police and the Central Intelligence Organization (CIO), because he 'was critical of the government'. This conduct angered and upset Father Mkandla, who felt that the police should have been concerned with the case at hand:

I don't know how the government came in, here was an issue of a person who had been murdered and I went to the police station just a kilometre from there, and they told me they did not apprehend anybody, no suspects. I made a lot of noise in that police station.⁴

For Father Mkandla, the police's threat that he was 'on the hit list' was a first indication of the dangers he could face when reporting cases of ZANU-PF political violence. After he had 'made a lot of noise' at the police station, he was arrested under the Public Order and Security Act (POSA). Passed in 2002, the act was primarily aimed at regulating public gatherings and demonstrations. However, Father Mkandla was arrested for carrying an axe in his trunk, which he used to clear the road to the mission at which he was stationed. After an uncomfortable three nights in police custody, he was remanded out of custody for approximately three and a half months before his case was dismissed due to lack of evidence.

As with many of the young political activists I interviewed, who were not deterred from appealing to the law by the considerable time they spent in police detention, remand prison and Zimbabwe's courtrooms,⁵ Father Mkandla's

⁴Interview, Father Marko Mkandla, priest, Hwange, 30 November 2011.

⁵Interviews with student activists, for example: George, Harare, 18 July 2010; Philip, Harare, 21 July 2010; Jason, Harare, 12 August 2010; Robert, Bulawayo, 12 December 2011; Sarah,

arrest in 2002 did not discourage him from bringing new acts of political violence within his parish to the attention of the police. For example, he recounted that, in November 2007, when he was living in Regina Mundi mission near the town of Lupane, his driver, who was also a village head, had gone to run an errand in town. There, several war veterans approached him and threatened to murder him for failing to organize a ZANU-PF rally in his village. Father Mkandla met the driver on his return and recalled:

The man was shaking, a seventy-three-year-old man, he was shaking. And I said to him, 'What is it?' and then he said, 'Ah Father, they said I was going to die.' I then drove straight to the police station in Lupane, I went to the officer in charge, I met him outside his office. Then I said, 'I have come here to report a case of death threats by some political elements here.'

During interviews, both Patrick and Father Mkandla began their narratives by recounting their appeals to the police. When making these appeals, they urged the police to take the appropriate action by following their own rules and procedures. For Patrick, the appropriate action consisted of investigating his brother's murder, apprehending the murderers, and providing his family with some security. Father Mkandla wanted the police to investigate cases of political violence in his parish, and to detain the perpetrators. The men articulated these expectations in their interactions with government officials, but they were frequently disappointed. Patrick's attempts to report were obstructed, while Father Mkandla was himself arrested. Although the police often threatened Father Mkandla and Patrick, or obstructed their attempts to report their cases, both men nevertheless repeatedly demanded that the police follow legal procedure.

In the following section, I show that, while such legal appeals may not follow standard procedure or yield what were viewed to be just outcomes, both men nonetheless acknowledged that they experienced a degree of success when engaging with the law. Within legal institutions, for example the attorney general's office, some civil servants sought to balance pressures of corruption and intimidation stemming from the judiciary's politicization with their commitment to practise the law professionally (Verheul 2013). Patrick and Father Mkandla played on these productive tensions in their interactions with the law and with the officials appointed to uphold it in order to reaffirm that the law's authority was contestable.

THE OCCASIONAL 'SUCCESS' OF LEGAL APPEALS

ZANU-PF's partisan and politicized application of the law was far from complete or uniform. Inconsistencies were observed both between government officials, as some relied on the instrumentally repressive dimensions of the law while others upheld the rule of law as the most professional form of statecraft, and within the same government official's everyday application of the law.⁶ Human rights

Bulawayo, 13 December 2011; Jeremiah, Bulawayo, 13 December 2012; and Peter, Harare, 28 January 2012.

⁶For an account of this complexity within one state institution, the attorney general's office, see Verheul (2013).

lawyers explained that, because the law, including repressive legislation such as POSA and its successor the Criminal Law (Codification and Reform) Act of July 2006,⁷ remained in the hands of government officials who chose when and how to apply it, the outcomes of legal appeals were unpredictable. Alec Muchadehama, a prominent human rights lawyer based in Harare, pointed out that, as a defence lawyer, ‘you get various signals from the courts, and there is no way of knowing whether the courts have now really come out in the open to defend human rights. Some courts, they try, but others, they are quite disappointing.’⁸

Tafadzwa Mugabe similarly noted that many of the cases he worked on while employed by Zimbabwe Lawyers for Human Rights (ZLHR), from 2004 until the formation of the Government of National Unity in 2009, had challenged him. He recalled that he had visited magistrates’ courts across the country and had worked in the High Court and the Supreme Court. These diverse experiences had taught Tafadzwa Mugabe to expect that, as a human rights lawyer, ‘we lose cases and we don’t get court orders’.⁹ By way of example, he referred to a high-profile case in which he took part early on in his career: an application for an injunction against further demolitions in Operation Murambatsvina, filed on 3 June 2005. Tafadzwa Mugabe recalled:

[I] was making my submissions, talking about international human rights treaties, our own bill of rights and legal submissions. And the Judge said to me ‘No no no, you don’t need to tell me about all those things, you are speaking to the converted.’ And after all that, he then dismissed my application.

Tafadzwa Mugabe described the case as ‘quite significant in my professional life’, as it served as ‘a rude awakening to the workings of the system’ early in his career. Within this system, a judge could respond to the urgent application Mugabe filed after his initial application was dismissed:

[by] giving me a good ten-minute shouting in his chambers. He gave me a ... long admonition ... basically threatening that ‘at some point, if you guys are trying to make a case against us, the time is going to come when we will deal with you’ ... And after that ... he says that he is going to give us a written judgment after going through our submissions. Suffice to say that it’s now five years later, still that judgment is not out.

Lazarus-Black and Hirsch (1994: 16) make the case that ‘the decisions to seek justice in court cannot be reduced to a simplistic calculation of whether or not one might “win”’. Muchadehama similarly pointed out that although he enjoyed ‘winning’, or securing the release of his client during a political trial, the uncertainty of whether legal procedure would be followed meant that he looked for other incentives to continue appearing in court. Here, he pointed to two particular motivations. Firstly, he argued that legal appeals could serve as a

⁷The Criminal Law (Codification and Reform) Act of July 2006 incorporated sections of POSA, expanding the repressive powers that the prosecution could invoke against political opponents, at times with ‘drastic increases in the penalties for these offences’ (see SPT 2006: 17).

⁸Interview, Alec Muchadehama, human rights lawyer, Harare, 12 January 2012.

⁹Interview, Tafadzwa Mugabe, human rights lawyer, Harare, 7 September 2010.

threat, reminding government officials and ZANU-PF supporters that the judicial process could work against them to hold them to account for the political violence they had committed. Secondly, Muchadehama noted that by performing his own commitment to the law during his court appearances, he was occasionally rewarded by judicial officials who also chose their professionalism over political interests, opting to follow legal procedures. Like Muchadehama, for Father Mkandla and Patrick their legal interactions mattered because they served as a platform for their performances of citizenship. These performances reminded government officials that the law was central to the authority that they, as rights-bearing citizens, would grant the Zimbabwean state. At times, the government officials engaging with these performances responded in a manner the men deemed appropriate.

Father Mkandla reflected that when he made his legal appeals, he often engaged with individuals who appeared to be above the law within Zimbabwe's politicized legal system. By reminding them of the proper legal procedures, Father Mkandla noted, he could either threaten them or appeal to the official's own moral compass or professional norms in an effort to have them make the 'right' decision. He drew particular attention to two instances when the government officials he had engaged with 'softened up' or became friendlier and more cooperative after he had reminded them of the correct legal procedures to follow.

In the first instance, Father Mkandla highlighted that, in response to political intimidation and harassment, he frequently alerted the police, ZANU-PF youth and war veterans that he intended to take action against them through the courts. For example, in the run-up to the March 2008 elections, ZANU-PF youths came to his house to intimidate him. He asked who had instructed them, and the youths informed him that it was a war veteran. Father Mkandla, who knew the war veteran, drove to the war veterans' office the following morning. The man initially denied having sent the youths, but admitted it when Father Mkandla told him, 'You cannot deny it because the people you sent are even ready to testify that in the court. So you said it.' The man then 'softened up'.

When reporting the death threats made against his driver in 2007, Father Mkandla again drew on the law to challenge the government officials who, he explained, were acting on political instructions and thus not following the law. Father Mkandla recalled the details of his exchange with the officer in charge, a detective he had met before. Rather than dealing with the case, the detective took the opportunity to threaten Father Mkandla. In response, Father Mkandla challenged the detective, saying that if there were an appropriate time and place for such threats, this was not it:

I talked to the detective inspector, and said, 'I've come to report a case here of, of political harassment. My driver was threatened by people that he knows, and I know them. It's not a hidden thing. He had been instructed – he's the kraal head – to organize a meeting.'

Then, instead of responding to that, he said to me ... 'Actually we have been instructed to investigate you from above.' Then I said, 'What investigation? I have come here to report a matter. I think if you have been instructed to investigate me, that is at Regina Mundi, this is not Regina Mundi, I stay at Regina Mundi. Here I have come on a different matter.' They said, 'No, no, no, you are making a mistake, we know that you have been so vocal and critical about the government so we have been instructed, we are following you.' Then he began to tell me the types of cars that I was using, and he said, 'We

know all the number plates of your cars, and we are following you.’ And I said, anyway, I was angry, and I didn’t want to stick to that. So I said, ‘I am saying I have come to report a matter, what are you talking about, who stopped you from coming to Regina Mundi, don’t tell me that here, I am talking about this matter.’

Then he said, ‘Yea, but you see, what you are doing, what we have heard you are doing, criticizing the government almost all the time, you are influencing people badly here, you see this is very dangerous.’ Then I was adamant, and I stuck to ‘I have come here to report on this matter, I am not interested in discussing what you are telling me, OK?’ Then I said, ‘And if you are not taking this matter, say so. But I will testify against you in the court of law, if anything happens to that man, you bet I will.’

Following Father Mkandla’s warning that he would take the matter to court, the detective stopped intimidating him and instead took Father Mkandla’s report. In the end, they ‘parted on almost kind of soft terms, on kind of [a] friendly basis’.

Here, both Father Mkandla and the detective were acting out a kind of script partly focused around ZANU-PF’s efforts to politicize the application of the law to exclude an extensive group of Zimbabwean citizens – defined by the party as constituting an illegitimate political opposition – and partly shaped by a continued commitment to professional, rule-following governance. To challenge his exclusion from the Zimbabwean rights-based citizenship he felt entitled to, Father Mkandla attempted to (re)negotiate his relationship with a government official, and to express that he would grant authority only to a state that offered him protection. His role included reminding the detective that it was his duty to facilitate the reporting and investigation of a crime. To enact his adherence to ZANU-PF directives, which allowed war veterans relatively free rein to undertake violent political intimidation within the area, the detective initially avoided taking this report. However, when reminded of his professional obligations and confronted with further legal action that would involve the creation of a case – and thus a record – against the detective himself, the man conceded. The precise reasons for this remained unclear to Father Mkandla, who explained that, in such interactions, government officials often refused to explain their decisions. He assumed, however, that the detective’s change of heart was linked to his understanding that law and professionalism were valued in Zimbabwean society.

Impressing on both the war veterans and the police detective that he would take them to court, Father Mkandla was not only reminding them of proper legal procedures; he was also invoking the courts as record keepers of their wrong-doings in the present, for justice in the future (Falk Moore 1998). The African human rights lawyers in Falk Moore’s study fought for the rule of law despite the politicization of judiciaries across the continent. She notes that, in part, these African lawyers were driven by their ‘hope in the future’, when ‘the injustices of today will be remembered tomorrow, and that culpable people will be called to account’ (Falk Moore 1998: 128). Describing an encounter with some war veterans who had caused much damage in his area in the run-up to the 2008 elections, Patrick recalled, in similar vein, that he had threatened to take them to court. Upset that ‘these murderers are still ... roaming the streets’, he cornered two of them in his home town one morning and told them:

‘We are waiting for the time, we are really waiting for the time. The time shall come where you are going to face the courts’ benches.’ And I am still very sure that these people will be brought to court some time.

In Patrick's political imagination, the courts became more firmly rooted as record keepers following what he experienced as an unanticipated success in his legal appeal. The police had obstructed his attempts to report and thus record his brother's murder, and so Patrick had lowered his expectations of obtaining a positive outcome when the case came to court. While he still advocated for a trial, he was 'surprised' when the crimes committed against his brother by ZANU-PF supporters were in fact recognized by the courts. For this, the judicial process was central. This process, Patrick recalled, allowed for the creation of a narrative around, and shared recognition of, the tragedy of his brother's murder. In the creation of this narrative, the law formed a shared language that allowed for the construction of a relationship between this state institution and a citizen.

After reporting his brother's murder, Patrick focused much of his time and financial resources on ensuring that the two men accused of the crime went to trial. Supported by his local MDC-T councillor, Patrick repeatedly went to the police station to check on the progress of the case and became acquainted with the prosecutor. His persistence paid off when the prosecutor decided to take the case to trial. Initially, Patrick described his attendance at the trial as 'a very bad experience'. The presence of CIO agents and war veterans in the courtroom 'frightened' him; he hesitated to put himself 'in the limelight' for fear of the consequences. He further found it 'painful' to hear the two accused recount the details of his brother's abuse. While this was difficult to witness, Patrick valued certain procedural aspects of the trial, because they exposed 'the truth of what happened to my brother'. He was particularly 'satisfied' with the clarity of his witnesses, because 'they were fluent, they were very very fluent, they were capable of saying the things as they were, as they happened ... they were telling the facts as they were ... the facts were very convincing, and I was very happy about it'.

Patrick was especially 'touched' by what he saw as the magistrate's recognition of the severity of the case:

[It] was very painful, and I could not stop myself shedding tears ... I was at times driven off, out of the court, I could not stop that. Until one other time, when the murderer was asked to explain what happened, he started by refusing, and later on he started narrating, he'd throw in bits and pieces. I also could see that even the magistrate was touched, he was touched. Because he kept quiet for some time, he looked at me, he looked at some of the people who were there, he shook his head, he was again quiet for some time, he looked on the floor. He was really touched.

The magistrate acknowledged what had happened to Patrick's brother and went on to convict the men. Patrick, however, was not content with the magistrate's initial sentencing of the men to four years in prison: this sentence was 'too short, because these people have committed a lot of crimes' and had to be 'punished'. On review by a High Court judge, the accused were sentenced to an additional twelve years in prison.¹⁰ Patrick explained that he welcomed this decision

¹⁰From conversations with Heal Zimbabwe Trust officials, it would appear that the longer sentence passed by the High Court in the case of Patrick's brother's murder was in keeping with the crime of manslaughter for which two men were convicted, and that the initial sentence was

because the men's behaviour posed a danger to 'peace and stability' in his home town. In addition, it was important to him that such behaviour be 'punished' in order to 'make an example of them'.

However, these 'successes' did not guarantee the security of those who filed such appeals. When the High Court extended the sentence against the two men who had murdered his brother, for example, Patrick would have liked to know the reasons for this. He remained unsure as to why the sentence has been extended because:

If I get to know that, I would be putting myself in the limelight. Because by the time I try to go ... to the courts asking what they discovered, why they needed to do all that, these people will again report me to the same people and I could be murdered as well.

For Alec Muchadehama, Father Mkandla and Patrick, the selective and changeable application of the law at times opened up spaces for 'success'. In these spaces, the men interacted with people who appeared to be above the law, such as the police officers who refused to take Father Mkandla's case, the war veterans who threatened him, or the ZANU-PF youth and war veterans who murdered Patrick's brother. These interactions highlighted the proper application of the law to the people who frequently disregarded it. This offered them an opportunity to display their own professional commitment to upholding the law, or reminded them that they might face repercussions for their illegal actions. Patrick and Father Mkandla measured the 'success' of their appeals as much, if not more so, in the ways in which the law allowed them to communicate this aspiration for equality under the law within the Zimbabwean state in the future, as in whether or not they 'won' in legal terms.

REMAINING ON THE 'RIGHT SIDE OF THE LAW'

The persistence with which Patrick and Father Mkandla made their legal appeals, however, is not fully explained by the relationship it allowed them to negotiate with civil servants and in court. Their appeals were also political claims; they were a performance of their citizenship and an articulation of their morality. In their engagement with the police and the courts, Father Mkandla and Patrick tied their legal appeals to imaginings of their citizenship within a state that safeguarded social order through legal institutions. In addition to engaging with the law's potential for perhaps unanticipated successful outcomes, Father Mkandla and Patrick – and the government officials they drew into their appeals – engaged with ideas about the law that featured centrally in the public imagination. Both men translated these ideas into their understandings of citizenship.

In the Zimbabwean public imagination, the idea of law has long been widely and firmly contested. Jocelyn Alexander (2011a: 556; also see Alexander 2010; 2011b) remarks on how political prisoners under the Rhodesian Front's repressive

relatively lenient. The original presiding magistrate had been reluctant to pass a tougher sentence given the political nature of the case (field notes, Harare, 13 January 2012).

rule articulated their nationalist visions of social and political order through the lens of the law. 'They did not think of law as a means to political victory ... The rule of law came to serve instead as a standard against which the Rhodesian Front could be held up and found wanting.' This continued, Alexander shows, in the post-2000 period. Younger or newer political activists subjected to political imprisonment similarly upheld the rule of law as central in their political imaginings, where it served as a critique of a rights-based citizenship under threat.

After 2000, and beyond the space of imprisonment, Father Mkandla and Patrick also performed their attachment to 'remaining on the right side of the law' in an effort to critique ZANU-PF's exclusionary citizenship. In their performances, both men embodied values that had also been upheld by Rhodesian-era prisoners. Those prisoners mimicked the state's judicial system to maintain law and order among detainees, in part to counter 'the "lawlessness" of the Rhodesian state and its construction of nationalists as uncivilised thugs and terrorists' (Alexander 2011a: 569). Of particular interest here are the values this 'prisoner government' upheld, which, alongside education and discipline, included 'civility and restraint' (Alexander 2011a: 552).

During his arrest and interrogation by the police, Father Mkandla specifically sought to distinguish his behaviour from the actions, speech and mannerisms of police officers. At the time of our discussion in November 2011, Father Mkandla was on remand for organizing a healing service on 14 April 2011 in a village near Lupane. As his trial was ongoing at the time of our interview, Father Mkandla was not in a position to elaborate on these proceedings and instead focused on his interactions with the police while he was in detention. In these interactions, he challenged the police for failing to follow the 'proper' procedures when arresting and interrogating him.

Father Mkandla described the healing service for which he was on trial as 'a programme meant to empower those victim/survivors' of the *Gukurahundi* massacres. From 1983 to 1987, a government-led military campaign in Matabeleland and the Midlands provinces had cost the lives of between 10,000 and 20,000 people (CCJP and LRF 1997). Among citizens in Matabeleland, this violent period and its continued lack of redress contributed much to their experiences of exclusion from the Zimbabwean nation after 2000.¹¹ Father Mkandla was therefore not alone in expressing his hopes that, under the Organ of National Healing, established by ZANU-PF and the two MDC factions under the Global Political Agreement of 2008, space was emerging to involve the government in facilitating the 'healing' of these abuses. In an effort to demonstrate his faith that the government was committed to facilitating this process, Father

¹¹For further details on the *Gukurahundi* and its aftermath, see CCJP and LRF (1997) and Alexander *et al.* (2000). The extensive consequences of the *Gukurahundi* on Matabeleland were further discussed at length in interviews with Vumani Ndlovu, Bulawayo Agenda, Bulawayo, 10 November 2011; Sibusiso, human rights lawyer, Bulawayo, 22 November 2011; Jenni Williams, Women of Zimbabwe Arise (WOZA), Bulawayo, 27 November 2011; Kucaca Phulu, human rights lawyer, Bulawayo, 29 November 2011; Matshobana Ncube, human rights lawyer, Bulawayo, 29 November 2011; Father Mkandla, priest, Hwange, 30 November 2011; Wisdom Dube, MDC member, Bulawayo, 5 January 2011; and Owen Maseko, visual artist, Bulawayo, 8 January 2012.

Mkandla invited Moses Mzila-Ndlovu, the Co-Minister of National Healing, to address the meeting. On a visit to the area before the service, however, Father Mkandla was informed that other members of the government, specifically agents from the CIO, had come to the village to intimidate people, as had happened in the past.¹²

Nonetheless, several people from the village encouraged Father Mkandla to continue preparing the service, which eventually attracted 250 to 300 community members. At the start of the service, four CIO agents appeared:

I saw a twin cab coming; it stopped about 500 metres away from us. And I noticed it earlier, that vehicle was used by the state security agents ... I thought they would come straight to me, I was prepared ... But they didn't, they went behind some school toilets and hid there.

The service finished without any interruption, and Father Mkandla returned home. He was just about to make dinner when 'a very big group of police officers, with baton sticks' came to his gate. He noticed the cars with no licence plates, and also recognized some war veterans. This large group of people at his gate 'frightened' him, but when they informed him he was under arrest, he asked: 'My friend, you were at that service. If I was doing something wrong, why didn't you arrest me there?'

Father Mkandla recounted that throughout the process of his arrest, he continually challenged police officers to demonstrate their ability to follow the 'proper' legal procedures. He explained that this was necessary because 'the system is very cruel'. What he was speaking against here was not simply his arrest, but the very manner in which the illegality of it diminished and dehumanized him:

A violation of my rights as a person, my freedom, I mean, I am not yet charged, I am not a criminal, I have not been charged by the courts, I am still innocent ... I am there [at the healing service] trying to help people come to terms with their pains. Not even making a reference to those who killed them. But this is the way I am treated. The dignity of the person is not something important here.

Despite his treatment, Father Mkandla maintained his belief in judicial due process and performed his desire to stay on the 'right side of the law' from his arrest until his release from detention a few days later. After some deliberation with the men at his gate, Father Mkandla went inside to call his lawyers, his housekeeper, and Minister Mzila-Ndlovu. In the process, he was surprised by the police officers and war veterans, who had climbed over the fence. He challenged them on the rough nature of the arrest:

They kicked the door open to the house 'You are wasting our time here,' and then straight away they took away my cell phone and checked on it. 'You are phoning while we wait,' and I said, 'I have to inform people, does getting arrested, does that mean that people shouldn't know where I am?' Then they were very rough, they handcuffed me.

¹²This was not the first time the CIO attempted to prohibit efforts to commemorate the violence experienced in the 1980s. Richard Werbner, for example, refers to a similar commemoration ceremony at a Gandangula primary school in Lupane in 1997 that was shut down by the CIO (see Werbner 1998).

He was subsequently taken to the police station, where ‘they played all tricks, to try and intimidate’ him. Father Mkandla explained that the manner in which the police continually flouted the ‘proper procedures’ during his arrest and interrogation made it clear that they were acting on instructions from ZANU-PF. This meant that the police could:

do whatever they want to do to people, you are just there. As an accused in Zimbabwe when the police officers are dealing with you, you are a subhuman. They can say what they want, they can do what they want. Even before you are charged by the courts, they can do whatever they want.

Father Mkandla was aware that ZANU-PF relied on the legal system to harass and intimidate perceived opponents. He ‘accepted’ his arrest as he was one among ‘so many people [who] have gone through the same thing’. His experience in detention had taught him that there was no ‘civility’ within the arrests, and that the police officers who followed ZANU-PF’s orders were ‘very cruel, very rough ... these men lack the semblance of humanity, simple’.

It was against their ‘lack of humanity’ that Father Mkandla judged his own performance as an exemplary Zimbabwean citizen under interrogation. By responding to police intimidation in a calm and dignified manner, Father Mkandla felt that he maintained the upper hand:

Someone was looking at me, popping their eyes open, ‘Tell us why you are doing all these things against the government!’ It was, I don’t know where I got that gravity from. I just looked at them, and I was questioning them: ‘Where are you taking all these things from?’ I was so calm. And they wanted even to speak up in loud voices and I was calm. I said, ‘I don’t know what you are talking about.’

Father Mkandla further distanced himself from the police officers interrogating him by underlining their ignorance in matters that concerned Matabeleland, specifically those relating to the *Gukurahundi* and the need within the region to address the consequences of the violence and lingering ethnic tensions. The police informed him that he was charged under Section 42(2) of the Criminal Law (Codification and Reform) Act for ‘causing offence to persons of a particular race or religion’ (Government of Zimbabwe 2005). Father Mkandla explained to the police that his service had not been about politics or ethnicity, but was concerned with healing the wounds of people in Matabeleland in line with debates around the importance of commemorating the *Gukurahundi* in the region. When the police responded that ‘those things are past, it’s healed’, Father Mkandla replied:

If you are trying to obliterate the memory of the people, then you can say that. If you are saying that people do not have memories anymore, what happened, the people know it. People know what happened to them ... *Gukurahundi*, Fifth Brigade, you are working here in Lupane, and you don’t know that, then probably you are a misfit.

The ‘misfit’ police officers Father Mkandla encountered demonstrated a lack of ‘civility’, ‘respect for human rights’ and ‘the semblance of humanity’, degrading him and treating him as if he were already convicted. Instead of simply dismissing

his interrogation as a technique of political repression, however, Father Mkandla chose to engage with the police officers. When he had reported cases to the police, this engagement allowed Father Mkandla to 'soften up' detectives, parting with them on friendly terms. During his arrest, he could not persuade his interrogators to show 'civility' or to respect his rights. Faced with contradictory and changeable government officials, Father Mkandla explained, all he could do was to remain consistent in his own reliance on the law. Understanding the case against him as 'all their creation' to intimidate him and stop his engagement with healing in the area, he concluded that this sort of behaviour only strengthened his reliance on the law:

I am seeing through their systems, there are too many loopholes. They only depend on when people are afraid, fear. That is their strategy, fear. To make people so much afraid that they would not move, they would not do anything. But fear is something that is very temporal. You can frighten me now now, as you come in. But when I look at you steadily, then I will say come on, I will gather my courage.

In my interviews with student activists it similarly emerged that their interactions with members of the ZRP became spaces in which they could perform their claims to political belonging as Zimbabwean citizens, thereby distancing themselves from the 'unprofessional' government officials who arrested them and strengthening their commitment to the law. George, an active member of the council of Zimbabwe's National Student Union (ZINASU) who had been arrested seven times at the time of our interview, recalled that he took each of his arrests as an opportunity to show the police that students were 'better educated on matters of law' by remaining calm and courageous.¹³

In 2009, he was warned by university security forces not to attend a sports day at Harare Polytechnic. George abided by this warning, but at the games the ZRP arrested ten of the students distributing fliers signed by George critiquing the cost of university fees. George received a phone call from the police, informing him that no one would be released unless he came to Harare Polytechnic. George made his way to the polytechnic and was arrested as soon as he entered the grounds. He, too, questioned the police's ability to follow the 'proper procedures':

When I just arrived, I was loaded in a truck but I tried to refuse. And I said, 'No, why are you arresting me? I have come here, you have called, and now you are arresting me, why?'

Although he knew that it was likely the police would arrest him, George felt that he could not leave his fellow student activists. 'Honestly I went there because I did not want to portray myself as a coward in the face of our national executive council members having been arrested.' Going to Harare Polytechnic, George argued, was a performance both for his fellow students and for the police of his commitment to ZINASU, of their shared imagination of how the Zimbabwean state ought to function, and of his ability to stand for this ideal within his leadership position.

¹³Interview, George, student leader and activist, Harare, 18 July 2010.

Patrick, in a similar vein, said his interactions with the police and judicial officials in the court had 'strengthened' him. While the police had disappointed him, legal procedure in the courts provided Patrick with a degree of recognition for the crimes committed against his brother. This small success, Patrick explained, was a result of his personal commitment and persistence with the case, as much as it was a result of the correct application of legal procedure. Patrick therefore stressed that it remained important for him to continue performing his commitment to the law as a fundamental component of his citizenship. As his interactions with the police and the courts had increased his awareness of what constituted a crime, and how the legal system worked, Patrick started a programme to train young people on the judicial process. He elaborated:

Though the police are doing nothing, I always try to make sure that such cases [of politically motivated violence] are brought out. And to show that I want these cases to be reported, I have introduced what we call a junior police in school, where our young people are ... enlightened on some of the offences which they commit and all those things, there's penalties which you might face. In line with that, we are conscientizing these people so that they don't do that, they don't commit crimes. So if I do that, if I educate kids not to commit crimes, it means I am also educating my fellow people to report cases to the police, so that we stay peacefully.

Patrick explained that this programme was important for him because it was high time for Zimbabweans to demonstrate what state they wanted to be a part of. The manner in which ZANU-PF had ruled since the country's independence needed to be changed. 'If we remain under the hands of these people, these unscrupulous people, then it means we continue to see hell. We continue to suffer. And we are fed up, we are really fed up.'

His commitment to the law through appeals to judicial institutions and rule-bound behaviour were also central, Patrick commented, in setting an example for some of the perpetrators of political violence who still walked free in his home town. Although he had no clear indication when, or if, the Zimbabwean state would become rule-bound, it gave Patrick the courage to act as if this state could and would exist. It was only by remaining on the 'right side of the law' now that he could be 'fearless' in the face of the physical harassment and intimidation that resulted from his appeals to legal institutions. He accepted that such behaviour could incur violent repercussions from perpetrators within his home town, but reasserted his belief that, in the future, the Zimbabwean state would function as it had done in the past. This allowed him to conclude that, if the ZANU-PF supporters in his area 'could do anything, let them do harm'. In the future, they would be tried and sentenced for the harm they had caused.

CONCLUSION

Through their demands for rule-bound institutions, and their continued treatment of politicized legal institutions as if they were bound by rules, Patrick and Father Mkandla remind us of the contestability of the law's authority, and what this legitimates. The shaping of identity or belonging under the law, or the mobilization of

the law for resistance, need not be primarily shaped by a government's (repressive) control over legal language and practice. The cases of Father Mkandla and Patrick remind us that 'law works in the world not just by the imposition of rules and punishments but also by its capacity to construct authoritative images of social relationships and actions' (Merry 1990: 8). Their uses of the law and legal institutions in effect authorize their political imagination of, and future belonging to, a rule-bound state.

In their interactions with Zimbabwe's legal system, Father Mkandla and Patrick echoed the human rights lawyers and activists who viewed the courts as record keepers. ZANU-PF's efforts to apply the law selectively so as to repress its political opposition had increased the uncertainties around the outcomes of legal appeals for state and civic actors alike. In the face of this uncertainty, drawing up a police report or bringing a case to court also opened up a space that remained governed by the rules of legal procedure. In this space, experiences could be recounted, wrongs could be acknowledged, and the names of perpetrators could be filed for future reference. For both men, their interactions with the legal system also served as a way to situate themselves as assertive, law-abiding citizens rather than political pawns within Zimbabwe's contested state institutions. In a sense, they matched Falk Moore's (1998: 134) description of individuals striving for human rights and accountability as the 'archivists for the future ... crafting a history of the present for future reference'.

Father Mkandla's and Patrick's legal appeals were thus not 'foolish'. Both men were all too aware of the limits placed on police and judicial action due to the politicization of Zimbabwe's legal system, yet they persisted with legal appeals for three reasons. First, they both demanded that state officials 'play by the rules', approaching them through the very channels that were meant to uphold these rules. Second, due to the cleavages in Zimbabwe's legal institutions and among its government officials, Patrick and Father Mkandla occasionally experienced 'success' through the legal process. Here, invoking legal process allowed them to engage with, and served to remind government officials of, the centrality of law for government authority, as a guideline for professional conduct, and as a critical component of an imagined rule-bound state in the future. Finally, legal appeals served as performances of the men's commitment to being rights-bearing Zimbabwean citizens. Through their performances, they showed that the police officers or CIO agents who harassed or arrested them did not 'understand' what it truly meant to be Zimbabwean citizens. To set themselves apart from these officers, both men performed their moral and political belonging to the Zimbabwean state by remaining 'courageous' and 'dignified' and by staying on the 'right side of the law'.

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ABSTRACT

In this article, I focus on the narratives of two men, Patrick and Father Marko Mkandla. I ask whether their continued interactions with, and appeals to, Zimbabwe's politicized legal system were 'foolish'. The two men inhabited different geographic regions and diverged in their economic positions, political engagement, and ties to Zimbabwe's human rights networks. They nonetheless both started their accounts by recollecting that they persisted in reporting cases of political violence to the Zimbabwe Republic Police. Their accounts show us that imagining, invoking and interacting with the law in Zimbabwe was often an ambiguous, occasionally dangerous, and very contradictory exercise. Under ZANU-PF's rule, judicial institutions were increasingly politicized as instruments for repression. The men nevertheless continued to interact with the state and its officials as if these were bound by rules. This allowed Patrick and Father Mkandla to perform their rights-based citizenship, to experience occasional 'successes', and to differentiate themselves from the 'unprofessional' politicized civil servants they encountered during their appeals. Rather than 'foolishly' invoking the law, some Zimbabwean citizens engaged it as a shared language through which they could articulate their imagination of, hopes for, and belonging to a rule-bound state in the future.

RÉSUMÉ

Cet article s'intéresse aux récits de deux hommes, Patrick et le prêtre Marko Mkandla. Il se demande si leurs interactions persistantes avec le système juridique politisé du Zimbabwe, et leurs appels auprès de celui-ci, étaient menées « bêtement ». Les deux hommes vivaient dans des régions géographiques différentes et présentaient des divergences en termes de situation économique, d'engagement public et de liens avec les réseaux des droits de l'homme au Zimbabwe. Tous deux ont néanmoins commencé leurs récits en

remémorant leur persistance à déclarer des cas de violence politique à la police de la République du Zimbabwe. Ces récits nous montrent que l'acte d'imaginer, d'invoquer et d'interagir avec la loi au Zimbabwe était souvent un exercice ambigu, occasionnellement dangereux, et très contradictoire. Sous le régime de la ZANU-PF, les institutions judiciaires étaient de plus en plus politisées en tant qu'instruments de répression. Les deux hommes ont néanmoins continué à interagir avec l'État et ses agents comme si ceux-ci étaient tenus au respect de règles. Ceci a permis à Patrick et au prêtre Mkandla d'exercer leur citoyenneté sur la base de droits, de connaître des « succès » occasionnels et de se démarquer des fonctionnaires politisés « peu professionnels » qu'ils ont rencontrés à l'occasion de leurs appels. Plutôt que d'invoquer « bêtement » la loi, certains citoyens zimbabwéens s'en sont servis comme langage commun par lequel ils ont pu exprimer leur imagination, leurs espoirs et leur appartenance à ce qui serait à l'avenir un État tenu à des règles.