**Food Rights, Riots, Constitutions and Corruption in Zimbabwe 1997-2002:
A Geographic Interpretation of the Law and Development Movement**

**By
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the degree of Doctor of Philosophy

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Abstract

Superficial evaluation of politico-legal landscapes acknowledges the shifting geographies found within labour union demonstrations, food riots and civil rights movements: individuals' visions of justice collide with the legal power of the state, the legal and justice system and the international community. Somewhat deeper analysis highlights the local/national/international linkages: local legal struggles were shifted into the international political arena after the Zimbabwean judiciary, non-governmental organizations and the media challenged the Mugabe Administration's anti-human rights legislation. Much deeper analysis highlights the phrases found in the World Bank/Commonwealth's analysis of the Zimbabwean politico-legal and economic crisis: legal phrases such as *corruption*, *constitutions*, *riots* and *rights* signal locations wherein the New Institutional Economics/Law and Development Movement logic has the potential to dominate and redefine the pluralistic politico-legal economy of a common-law African country.

The argument is made that transnational legal activists have exacerbated and sustained the Zimbabwean crisis. The Zimbabwe/Commonwealth/World Bank case study provides the empirical evidence. Yet geographers tend to neglect the important analytical category: *transnational legal activists*. This neglect extends to the analysis of transnational legal activists' political activity in abstract space and individuals within the legal and justice system challenging the state. The terms *trajectories of legal activists* and *the space of judicial independence*, and the analytical framework, *Transactional Legal Activists Network*, are developed to suggest that local activists within the legal and justice system have local/global connections.

The empirical evidence supports a theoretical critique of the legal geographic literature, the international humanitarian law and economic law literature, the critical legal development and post development literature, and the state transformation literature. Other points made include: 1) A broader alternative to thinking about political activities in legal space is necessary, one that understands that international and domestic law are not binary dualisms; the complex and contextual nature of a legal culture; intersections between law and space; the space of judicial independence and subtle politics and activism within the legal community. 2) Transnational legal activists are important in global governance. 3) Future research should focus on law as a political discourse, law and place, and the legal and justice system as an object of analysis.

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GLOSSARY - ABBREVIATIONS

ACHPR	African Charter of Human and People's Rights
AI	Amnesty International
AIPPA	Access to Information and Protection of Privacy Act (Zimbabwe)
AU	African Union
BSAC	British South African Company
CC	Constitutional Commission (Zimbabwe)
CCJP	Catholic Commission for Justice and Peace
CEDAW	Convention on the Elimination of all forms of Discrimination Against Women
CID	Criminal Investigation Department
CIO	Central Intelligence Organisation
CMAG	Commonwealth Ministerial Action Group
CS	Commonwealth Secretariat
CS-PI	Commonwealth Secretariat, Press Information
CUR	Carleton University Researcher
D-PHR	Denmark – Physicians for Human Rights
DRC	Democratic Republic of the Congo
EIU	Economic Intelligence Unit
ESAP	Economic Structural Adjustment Program
ESC	Electoral Supervisory Commission (Zimbabwe)
ET	Emergency Taxi
EU	European Union
FATF	Financial Action Task Force
GAPWUZ	General and Agricultural Plantation Workers Union
GCA	Global Coalition for Africa
GNP	Gross National Product
HDRA	High-Density Residential Area
HIPC	Heavily Indebted Poor Countries
HRW-Z	Human Rights Watch - Zimbabwe
ICCPR	International Covenant on Civil and Political Rights
ICG	International Crisis Group
ICJ	International Commission of Jurists
IDHR	International Declaration of Human Rights
IMF	International Monetary Fund
INGO	International Non-Governmental Organization
IRC	The International Rehabilitation Council for Victims of Torture

IRIN-Z	Integrated Regional Information Network - Zimbabwe
K-TN	Kenya – The Nation newspaper
LAMA	Legal Age of Majority Act (Zimbabwe)
LCHR	Lawyers Committee for Human Rights
LDM	Law and Development Movement
LHA	Lancaster House Agreement (Zimbabwe)
LOMA	Law and Order (Maintenance) Act (Zimbabwe)
LRF	Legal Resources Foundation
MDC	Movement for Democratic Change
MP	Member of Parliament
NAGG	National Alliance for Good Government
NCA	National Constitutional Assembly
NDI	National Democratic Institute
NDP	National Democratic Party (Zimbabwe)
NEPAD	New Program for Africa's Development
NGO	Non-Governmental Organisation
NIE	New Institutional Economics
NLDM	New Law and Development Movement
N-NEOM	Norway - Norwegian Election Observation Mission
N-WT	Nigeria – Weekly Trust newspaper
NYTS	National Youth Training Scheme
OAU	Organisation for African Unity (now African Union)
OECD	Organization for Economic Cooperation and Development
POSA	Public Order and Security Act (Zimbabwe)
POSB	Public Order and Security Bill (Zimbabwe)
POVA	Private Voluntary Organizations Act (Zimbabwe)
SA-BD	South Africa – Business Day newspaper
SADC	Southern African Development Community
SA-HSF	South Africa – Helen Suzman Foundation
SA-News 24	South Africa – News 24 newspaper
SAP	Structural Adjustment Program
SA-SA	South Africa – Sunday Independent newspaper
SA-SAPA	South Africa – South African Press Association
SA-TS	South Africa – The Star newspaper
SA-TST	South Africa – The Sunday Times newspaper
SI	Statutory Instrument (subsidiary legislation)
TAN	Transnational Advocacy Network
TI	Transparency International
TLAN	Transnational Legal Activists Network
UDHR	Universal Declaration of Human Rights

UDI	Unilateral Declaration of Independence (1965-1979)
UK	United Kingdom
UK-DT	United Kingdom – Daily Telegraph
UK-T	United Kingdom – Times newspaper
UK-TG	United Kingdom – The Gaurdian newspaper
UK-TST	United Kingdom – The Sunday Times newspaper
UMP	Uzumba-Maramba-Pfungwe (constituency in Zimbabwe)
UN	United Nations
UNDP	United Nations Development Program
U.S.	United States (of America)
USA-Z-HRR	U.S. Department of State Zimbabwe Country Report
U.S.A.	United States of America
USSR	United Soviet Socialist Republic
UZR	University of Zimbabwe Researcher
WB	World Bank
WB-WD	World Bank – World Development report
WWII	World War Two
ZACH	Zimbabwe Church Related Hospitals
ZANU	Zimbabwe African National Union (also known as ZANU-Ndonga)
ZANU PF	Zimbabwe African National Union – Patriotic Front
ZAPU	Zimbabwe African Patriotic Union
Z-AT	Amani Trust
ZBC	Zimbabwe Broadcasting Corporation
ZCC	Zimbabwe Council of Churches
Z-CFU	Zimbabwe – Commercial Farmers’ Union
Z-CISZ	Zimbabwe – Crisis in Zimbabwe Coalition
Z-CFU	Zimbabwe – Commercial Farmers Union
ZCTU	Zimbabwe Congress of Trade Unions
ZESN	Zimbabwe Election Support Network
Z-FG	Zimbabwe – Financial Gazette newspaper
ZHR-NGO	Zimbabwe Huamn Rights NGO Forum
ZHR-NGO-SR	Zimbabwe Huamn Rights NGO Forum – Special Report
ZHR-NGO-TM	Zimbabwe Huamn Rights NGO Forum – The Monitor
Z-I	Zimbabwe – Zimbabwe Independent (Harare) newspaper
Z-Insider	Zimbabwe – The Insider
Z-Kubatana	Zimbabwe – Kubatana
ZLP-Z	Zimbabwe Library of Parliment
ZLR	Zimbabwe Local Researcher (see Appendix 1.2)
Z-MDC	Zimbabwe – Movement for Democratic Change
Z-MMPZ	Zimbabwe – Media Monitoring Project

ZNA	Zimbabwe National Army
Z-NCA	Zimbabwe – National Constitutional Assembly
Z-News	Zimbabwe – The ZW-News
ZNLWVA	Zimbabwe National Liberation War Veterans Association
ZOP	Zimbabwe Office of the President and Cabinet
Z-RO	Zimbabwe – Read On
ZRP	Zimbabwe Republic Police
Z-S	Zimbabwe – The Standard newspaper
Z-TDN	Zimbabwe – The Daily News newspaper
Z-TH	Zimbabwe – The Herald newspaper
Z-TM	Zimbabwe – The Mirror newspaper

Food Rights, Riots, Constitutions and Corruption in Zimbabwe 1997-2002: A Geographic Interpretation of the Law and Development Movement

Introduction: Legal Space

The post cold war legal order is producing laws, global legal-institution-strengthening initiatives, legal activists, and legal discourses. Scholarly journals, newspaper articles, electronic advocacy networks and many other sources readily provide evidence that the legal words - *corruption, good governance, democracy and human rights* – are easily found in popular and high culture. The literature that identifies the driving forces behind this rise in legal phrases is the critical legal institution development literature led by Trubek (1972, 2000 (see Appendix 1.1)) and state transformation/democracy/human rights literatures led by Sikkink (1996). Both have developed theoretical/analytical frameworks with which to analyse transnational legal activism. This literature identifies that most countries have two externally driven legal-institution-strengthening initiatives running through their political landscape. The first seeks to strengthen legal mechanisms to protect the material rights of the market economy (often known as the New Institution Economic logic and/or the Law and Development Movement (NIE/LDM). The second seeks to strengthen politico-legal structures to help institutionalise local civil rights (more commonly known as the human rights movement). Both initiatives create the momentum behind the increased presence of legal discourse.

This literature connects themes such as space, place, law, economic development, developing and post soviet countries, telecommunication networks, advocacy groups, *modernity/progress* myths, Euro-American domination, the human rights industry, violence, torture, death, North/South issues and many others. More specifically, this literature suggests that politico-legal economic landscapes around the world are affected by two global externally driven legal-institution-strengthening initiatives that seek to take legal power away from the state.

Rhodesia/Zimbabwe is an excellent case study with which to probe into the conceptual

flexibility of this literature. National leaders have a chequered history protecting civil rights: a rebel colony refusing to give the majority the right to vote (1965-1979), an authoritarian leader (1980 to the present), who violates basic civil rights of the people such as freedom of speech, freedom of association, freedom of movement and ratifies many International Instruments - the International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights, Convention on the Elimination of All Forms of Racial Discrimination, Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), African Charter on Human and Peoples' Rights (HRW-Z 8/03/02-Land, AI 03/01- Z). Moreover, the poor human rights record is mirrored by the sketchy history of international economic trade and aid. Since 1966, to the present, Rhodesia/Zimbabwe's interactions with the global community have been punctured with sanctions. In 1966, the international community imposed "economic and various political and social sanctions" (Godwin and Hancock 1997:17), to the 1999, "undeclared sanctions" imposed by the World Bank (Z-MDC 17/09/01- IRIN), to the more formal and recent sanctions imposed by the international community. In March 2002, the European Union and the United States of America placed a targeted sanctions regime on the Mugabe Administration. On February 2003, the EU "...renewed the sanctions against 79 members of the ZANU-PF leadership but allowed Mugabe to travel to France for the [Franco-African] summit". In March 2002, the Commonwealth suspended Zimbabwe from the Councils of the Commonwealth. As of March 2003, they still have not decided whether or not to lift the suspension (ICG 10/03/03: 1-2, 15). The Zimbabwe case study has many similar themes found in the critical legal institution development literature and state transformation/democracy/human rights literatures. The Zimbabwean politico-legal landscape is also described with terms such as *democracy*, *human rights*, *good governance*, *leadership*, *corruption* and others.

For a geographer, reading the empirical evidence from the Zimbabwean politico-legal landscape against the critical legal institution development literature and the state transformation/democracy/human rights literatures raises more questions than answers. This literature does not seem to explain local reactions to the multitude of opportunities and limitations presented by these initiatives. For example, what will be the outcome of

the Commonwealth implementing the World Bank's *good governance, anticorruption* and *strengthen-democratic-institutions* development initiatives (CS-04/03/02-PI, CS-4/6/99-PI, CS-9/6/1999-PI)? What sorts of responses, tensions and forms of conflict will be apparent in local societies throughout the Commonwealth, as local societies rework this externally driven legal institution strengthening initiative? How does this literature explain the United Nations' Special Rapporteur on the Independence of the Judiciary's public criticism of the Mugabe Administration, who stated: "...Zimbabwe is no longer a government of laws but of men", words chosen to de-legitimise a sovereign-state in international relations (AI 25/06/02: 26-27)? Or why the explosion of NGO electronic advocacy networks, which has risen during the Zimbabwean economic and political crisis, focus on publishing legislation, interpretations of law and the legal and justice system when they could be collecting more stories of torture, violence, suffering and victimisation by the state, stories which could be transmitted in and through cyberspace? Geographic investigation seeks to understand spatial patterns, flows of information, and struggles over symbolic and material resources in a location, or in a space. Questioning how these two initiatives might blur, combine and unfurl as new and much more complex patterns of inclusion and exclusion, is distinctly a geographic perspective.

Blomley (1994, 2001: 1, 2) argues that the "... the concept of a geography of law [creates some] confusion...there seemed a general presumption that the legal and spatial were, and should be, distinct". Blomley's (2001:1) position is important in the legal geographic literature for many reasons; two are highlighted here. First, he acknowledges that both geographers and lawyers hold this view. Second, he focuses on the themes society, space and law. He argues that geographers are hesitant to weave together these three themes in their analysis, and much less theorise the "law/space binary". This hesitance, he argues has created a "lacuna" (Blomley 2001: 2). This perspective offers some insights into some of the difficulties legal geographers generally encounter. Legal geographers have yet to connect the United Nations' Special Rapporteur on the Independence of the Judiciary, to NGO electronic advocacy networks and the Commonwealth implementing the World Bank's *good governance, anticorruption* and *strengthen-democratic-institutions* development initiatives to specific case studies. However, despite these

difficulties, this dissertation seeks to weave together law, economics, space and society to fill in some of the gaps in the geographic literature, because it believes that raising broader questions about the globalisation of legal discourse is directly relevant to understanding how global processes affect a location such as Zimbabwe.

Given these questions, concerns, and interests, based on a contemporary case study, this dissertation will question – *is there an urgent need to reconceptualise the threat of the NIE/LDM logic, in a manner that acknowledges that NIE ideas are circulating in and through local and transnational legal activists, international organisations of nation-states and international lending agencies who use this discourse to attack the sovereign state, and thereby create more space for the NIE/LDM logic which seeks to reposition the legal and justice system against the state for the purpose of creating economic development?*

Several observations made about the *Workshop on the Changing Role of Law in Emerging Markets and New Democracies*, held at the University of Wisconsin-Madison (March 2000) suggest that this is a useful question for women and men inside Zimbabwe. First, the disciplines represented at this workshop were predominantly from the political sciences and international relations. A discipline, which was not represented, was geography. This dissertation will argue that the curious absence of geographers is revealing. It reveals that the critical legal institution development literature does not take geography seriously. More importantly, this scholarly community does not take the intersection between law and space seriously. Second, the purpose of the Workshop was to engage participants with theoretical, methodological and empirical questions.

Participants focused on three questions:

- *Why is law in development?*
- *Whose Law, Whose Development?*
- *If you build it, will it matter* (building the bridge between written law and social behaviour)?

The themes which these participants were encouraged to engage with, were human rights, development economics and the globalisation of legal development initiatives. An interdisciplinary array of literatures was referred to. These ranged from human rights

theorists illustrating that human rights advocacy networks have gained political power (Keck and Sikkink 1998b), to the New Institutional Economics (NIE) theorists Douglass North and Ronald Coase's rising popularity in the 1980s, to the much cited debate between Seidman (1978) and Burg (1977) responding to Trubek and Galanter's (1974) critique of law being used to create economic development (Weaver 2000). Full discussion and analysis of the critical legal institution development literature's key ideas is offered in Appendix 1.1 Table 1.1 provides a summary and literature review of some similarities and differences between the two-development projects: the New Law and Development Movement (1990s/2000s) and the Law and Development Movement (1960s/1970s): the impetus, theoretical underpinnings, critiques, social visions, methodology, program concerns, as well as sources of funding and academic interests.

The critical link that the current critical legal institution development theorists were making is that international lending institutions had adopted the logic of the NIE and had initiated a new Law and Development Movement. International lending institutions use the work of the CDAWN (Coates-Demeste-Alchian-Williamson-North) School to argue that weak institutions inhibit economic growth. The solution suggested is to encourage governments to strengthen institutions, and thus reverse the process of social, political and economic decay (Bates 1995, Chhibber 1998, Harrison 1999, Watts 2000a). Hendley (1997, 2001) unravels the modernisation argument implicit in this literature and critiques the ethnocentric and Eurocentric threads. Carothers (1998) maps the geographic reach of this reasoning and argues that this logic is being applied to nations around the world. At this workshop, present and future scholars were being encouraged to focus on these themes and develop their critiques based on this literature, which would become the future theoretical contribution to the critical legal development literature.

The March 2000 Workshop was set up as an academic response to the increasing popularity of the NIE/LDM development initiatives being advanced by international development institutions across the globe. The third observation is that this workshop was public recognition that academics *must* contribute to the debate. Trubek began the Workshop with the point that more sensitive theory and methodologies were needed, a

point also made by Rose (1998). Yet the curious absence of geographers at the March 2000 Workshop suggests why the next generation of critical legal institution development literature will, in all likelihood, not draw from geographic analytical tools. This intellectual boundary is unfortunate, given that geographers are engaged with exciting interpretations and questions about territoriality, development, power, authority, identity, economics and many other relevant themes (Agnew 1994, Grant and Agnew 1998, Santana 1996, Dalby 1998, 1999a, 1999b; Herod et al 1998, Kelly 1999)

More pointedly, these observations hold a theoretical critique questioning the ability of the critical legal institution development literature to develop more rigorous analytical tools that map legal and justice systems cutting into sovereign-state territory. While the themes being discussed in the critical legal institution literature encompass human rights, different types of law, different legal interpretations, judicial independence, democracy, globalisation, peace, etc, a methodological sensitivity seemed to be missing. As a geographer very much interested in the intersection of law and space, as outlined by Blomley (1994), and familiar with the work of Slater (1997, 1998), Watts (2000a, 2000b) and other geographers who worked at multiple scales of analysis, the lack of dialogue became evident. The critical legal institution development literature and theorists were not drawing from geographical analytical tools. Moreover, nor were the critical geographers engaged with the sorts of questions that the critical legal institution development literature were raising.

At the heart of this argument is that the critical legal institution development literature needs geographical analytical tools and an awareness of the intersections between space and law to move through certain current conceptual limitations. This dissertation will suggest that geographic analytical tools offers the critical legal institution literature a way to think beyond the current analysis shadowed by Trubek's interpretation based on dependency theorists. Geographic analytical tools can help think through the NIE/LDM as a form of international intervention in the day-to-day administration of the state, but at the same time reveal the possibilities and complexities that the critical legal institution development literature seems to be missing.

Two ways that the literature can be advanced have been identified. A geographical line of questioning that examines the spatial relationships of this economic and social form of interventions in local societies will extend the current conceptualisation of the impact of the NIE/LDM. This dissertation will approach these theoretical questions by making the geographic presence of the LDM a political entity. This can be done so through a postdevelopment/postcolonial/poststructuralist point of view which suggests that discourses construct a political structure.

In addition, a multiscalar analysis of how local societies responded to the new opportunities that are presented to them will suggest the sorts of struggles that occur at different geographic scales of analysis. This will be initiated, based on the work of Flint (1999), and Taylor and Flint (2000). The beginning spatial scale begins with the individual. The analysis ranges from the individual, to legal communities, to international organisations of nation-states. Central to the analysis presented in this dissertation is the argument that geographers have neglected the category and spatial presence of transnational legal activists. Focusing on transnational legal activists as an analytical category offers an important contribution to the geographic literature. At the same time, this dissertation can, and should, be situated in the broader social movement literature (Miller 2000), the globalisation and governance literature (Dalby 2000), and the post structural/postcolonial/post development scholars to reveal the silences and omissions in the scholarly literature (Nederveen Pieterse 2000: 180, Ashcroft et al 1989, 1995, Ashcroft and Ahluwalia 1999, Peet 1996) because this study examines North/South and sovereign-state/legal community power relations.

This study develops a multiscalar, multi-institutional analytical framework to better understand the power relations running in and through the legal and justice system. The analytical framework connects themes such as externally driven legal-institution-strengthening initiatives (that seek to take legal power from the state); the global politico-legal economy of transnational legal activists; changing rule of law relationships and spatial patterns that constantly renew the cultural politics within the legal system among

civil society, the state and the local legal and justice systems, the ever-changing socio-spatial relationships among members of the legal and justice system and the sovereign-state and transnational legal activists and different patterns of politics in and among the sovereign-state, government institutions and the legal and justice system. More specifically, four concepts underlie the analytical framework of this dissertation.

Four Concepts Underlying The Analytical Framework

First, the analytical term, *trajectories of legal activism* is meant to create a way to view how a state, legal and justice system, and civil society - which are all bound to a location - interact with a trajectory of legal activism. The distinction between the state, legal and justice system, and civil society and a trajectory of legal activism is that trajectories of legal activism are bound by a common vision of justice/rule of law rather than to a location. This social movement has multiple places of origin seeking to change laws, legal practices, interpretations of laws rather than focusing on a specific place.

Second, is the contrast between the sovereign-state and the legal and justice system. Of major note in this contrast are the historical circumstances which have functioned to separate the state from the law; the power relations between the state and the law; the space where judges and lawyers use the language of justice, rule of law, and law to debate the form of justice being drawn into the legal system; and the administration of the law by the state.

This study will begin by differentiating the legal and justice systems from the sovereign-state. This study does not focus on the sovereign-state as key political player. Rather, this study establishes that the Zimbabwean sovereign-state appears to be a pawn affected by the changing patterns of global governance in the post cold war era. Symbolically, at least, the Head of State is portrayed as responding to global coalition of transnational legal activists - nongovernmental organisations (NGOs), lawyers and judges advocating for human rights norms through legal and economic reform - the global legal architecture and the global circulation of new ideas of justice. Each of these elements in this social movement seeks to take legal power away from the State.

To make the complexity of the political structure of the legal and justice system evident to the reader, this study uses several terms such as *externally driven legal-institution-strengthening initiatives*, the *space of judicial independence*, and the *space of judicial independence/legal order*. These terms are important because they establish that there are many layers, nuances, spatial relations and complex politics and processes constructing the legal architecture. This study develops the vision that the political structure of the legal and justice system is spatially separated from, yet connected to, the state.

To make the spatial relationships between the legal and justice system and the sovereign-state clear to the reader, this study defines space based on the vision that the legal and justice system has a unique political space created through a series of historical circumstances. As a means to illustrate the unique characteristics of this space, this study establishes that the legal community has developed *the space of judicial independence/legal order*, the legal superstructure that is an extrastatal space, which continues to strengthen its political position relative to sovereign-states. As another means of illustrating that the political structure of the local legal and justice system is separate from the state, this study acknowledges the points of intersection between the state and the legal and justice system. This study develops the idea that six spatial patterns in *the space of judicial independence* constantly renew the cultural politics within the legal system. The *space of judicial independence* connects the local legal and justice system to the global legal order: it is a space which intersects with several externally driven legal-institution-strengthening initiatives and continually changes complex arrangements between the state and the legal and justice system. The critical distinction between these two spaces is that *the space of judicial independence* is daily altered by politics in a location. Whereas the *space of judicial independence/legal order* is a political structure that allows organisations and institutions to use new ideas about justice to attack the politico-legal state structures thereby gaining more legal power over the state and changing the global-local legal order.

In short, *space* - in this study - is defined by the points of intersection between the legal and justice system and the state. Transnational legal activists understand these points of intersection, and use these to take legal power away from the state. Transnational legal activists politicise the legal and justice system and create legal texts that empower legal activists who work inside and outside national borders who daily challenge the sovereign-state legal power and authority. Consequently, the definition of space differs from most other geographers (see Dalby 1990, Paasi 1991, Agnew 1994 and others). The distinct characteristic of legal space is that the legal and justice system is connected to, yet separate from, the state, allowing the constant changing of socio-spatial patterns among the state, civil society and the legal and justice system. The legal and justice system also draws from international legal power and interpretations of the law to control the state from intruding into this space (Widner 2001).

The third concept is to stress that the legal architecture harbours transnational legal activists who are positioned against the state. Against the backdrop of the legal and justice system as a political structure positioned against the state, this study describes the manner in which these activists agitate within the political structure of the state, pursuing their own visions of justice. While transnational legal activists connect the two political structures – the legal and justice system and the state - their presence and forms of activism highlight that there are complex political processes within the space. This description is used to suggest that transnational legal activists are daily shifting the geopolitical power of sovereign-states.

The fourth concept is that international lending agencies are advancing *an idea* that holds the power to restructure local societies. This study demonstrates that a justice/rule of law view is dangerous because the legal and justice system and transnational legal activists have become a powerful force in the post cold war era. This study focuses on how local and transnational legal activists, research institutions; international organisations of nation-states and international lending agencies advance the NIE/LDM logic. This analysis shows the power of transnational legal activists (as a complex social movement) advancing an idea. The NIE/LDM logic dramatically illustrates that a narrow vision of

justice/rule of law put in the centre of these complex interactions between the sovereign-state; the law and transnational legal activists can restructure local politico-legal economies and cultures.

The intention in developing the analytical concept - *trajectories of legal activism* – is to give the NIE/LDM a political presence. By giving it a presence, this study can evaluate how the NIE/LDM logic interacts with different allies. In addition, this study can evaluate how the NIE/LDM logic collaborates with the human rights movement by focusing on three focal points to examine the political presence of a trajectory of legal activism in a place. Trajectories of legal activism will advance ideas about justice in a society (visionary ideas that hold the power to restructure societies); they will use the political structure of the legal and justice system to advance their own agenda; and they will collaborate with transnational/local legal activists (judges, lawyers, NGOs and the media), with whom they will attack the legal power of the state with three methods- legal discourses, encourage judges, legal activists and NGOs to agitate within national boundaries and support other global social movements to agitate from the inside and outside national borders.

In this dissertation, this analytical framework is operationalised with the purpose of evaluating if transnational legal activists are becoming increasingly important in global governance; and if transnational legal activists are advancing the NIE/LDM logic. This study focuses on a Head of State's response to transnational legal activists (judges, lawyers, NGOs and the media) and the international community advocating for legal and economic reform in Zimbabwe. The evidence suggests that transnational legal activists threaten state sovereignty, For instance, by November 2002; the Mugabe Administration has put forward the public statement that “*NGOs allegedly threaten national peace and security*” (AI-Z-16/11/02). Indeed, the Mugabe Administration felt so threatened by human rights advocates that it threatens nongovernmental organisations, such as Save the Children UK, which advocate that children have the right to food.

The choice of the case study is based on my longitudinal study of urban food insecurity (1994-1998), as well as the broader current and historical record. Zimbabwe is like many postcolonial countries that rely on the World Bank and the International Monetary Fund (WB/IMF) for foreign currency. In 1989, the WB/IMF and the Zimbabwean State finalized their ESAP (Economic Structural Adjustment Program) agreement. Since then, Zimbabwe's economy became increasingly connected to the global economy (Potter et al 1999).

This study draws from contemporary case studies from African, Latin American, and Eastern European, Asian and Middle Eastern countries to suggest that the Zimbabwean case study is not that unique. During the 1990s, Zimbabwe – like many African, Latin American, and Eastern European, Asian and Middle Eastern countries - was exposed to a paradigm shift occurring *within* the IMF/WB, as a response to empirical evidence that ESAPs were failing to deliver basic needs. Multilateral development banks adopted New Institutional Economic (NIE) theory to explain why ESAP had been a failure. The NIE logic focuses on strengthening legal infrastructure and re-writing laws to facilitate faster economic growth and institutional capability (Keefer and Knack 1997, WB-WD-2002, Chhibber 1998, Harrison 1999). On the surface, it appears that the Mugabe Administration has strengthened legal infrastructure and re-written laws. However, this study will provide much evidence to suggest that grassroots civil rights initiatives have not been incorporated in the Mugabe Administration's institution- strengthening-exercises (see SA- SA 25/07/01). In sum, Zimbabwe like many countries illustrates the friction and wide spread violence as externally driven legal-institution-strengthening initiatives suggest a legal *solution* such as – integrating the principles of constitutionalism, separation of powers, and the supremacy of law over rule - and this *solution* is abruptly implemented by local administrators (Mathews 1986, Tate 1997, Doe 1997, Katouzian 1998, Ayittey 1999, Hendley 2001).

This study will suggest that the global shift in thinking has been an important factor in creating Zimbabwe's current crisis and has changed the local politico-legal economy. The Zimbabwean case study provides evidence that the NIE/LDM idea is circulating in

different institutions, being shared by different stakeholders and then being implemented as local development policies and practices. Other scholars have established the impact of NIE/LDM logic affecting legal cultures, legal theories, and legal activists' agendas and, as a consequence, affecting real people's lives. Moreover, many suggest that the material threat of the NIE/LDM logic can only be understood in the context of the failure of ESAP, which the World Bank initiated as a global development initiative in the 1980s. Between 1980 and 1990, 64 countries had adopted ESAP, and by the early 1990s, numerous cases studies confirmed that ESAP had negatively affected women's and children's food security (Potter et al 1999). This study will stress the need to make these global-local connections if we wish to understand how global processes transform Zimbabwe's food security.

In many ways Zimbabwe is like many Commonwealth countries which will be affected by the March 2002 Commonwealth acceptance of the World Bank and other international lending institutions' multibillion-dollar legal institution strengthening/development initiative (CS-04/03/02-PI). Despite these similarities to many ex-British colonies, post soviet and developing countries, Zimbabwe is also very different. Zimbabwe, for example, provides an excellent case study of the unexpected consequences of the legal institution strengthening development initiative. As recently as September 2001 to March 2002, Zimbabwe was at the centre of international discussion, observation, critique and debate inside and outside the Commonwealth. During the economic and political crisis, there has been an explosion of humanitarian NGO advocacy. Many NGOs use the Internet to advocate for change.

The Commonwealth Committee has been listening to many NGOs. Based on the NGOs reports and other sources of information, by March 19 2002, the Commonwealth Committee "...decided to suspend Zimbabwe from the Councils of the Commonwealth for one year with immediate effect" (CS-19/03/02-PI- 02/26). Zimbabwe's re-instatement to the Commonwealth Committee will be based on whether or not the Commonwealth Secretary-General reports that Zimbabwe had made progress based on the Commonwealth Harare principles". *Progress*, in this case, is measured through a list of

indicators that include independence of the judiciary, rule of law, peace and “ extending the benefits of development within a framework of respect for human rights...” (ZHR-NGO 04/08/01: 5). Such phrases suggest that human rights advocates play an important role in Commonwealth foreign policies and practices, including their interactions with African countries. Yet, this study suggests that Zimbabwe’s suspension from the Councils of the Commonwealth (2002-2003) must be seen in light of the changes in the practices, tactics, strategies and even the theoretical underpinnings of international development have changed in the postcold war period. This study suggests that Zimbabwe has been deeply affected by the World Bank- Commonwealth conversations (1997-2002). Since 1996, the Commonwealth has been increasingly adopting the World Bank and other international lending institutions’ legal development logic of good governance, anticorruption and democracy = economic development (CS-04/03/02-PI, CS- 4/6/99-PI, CS-9/6/1999-PI).

The Zimbabwean Case Study Illustrates Three Points

Three main points can be taken from the Zimbabwean case study. First, this study provides empirical evidence that when the Head of State takes legal power from the local legal and justice system, the international legal community quickly responds. The local judiciary and the Head of State have had many political struggles over three laws: the Presidential Powers Act (1986) and Law and Order Maintenance Act (1960), which became the Public Order and Security Act (2002), and the Constitutional Prerogative of Mercy (1956). After 1999, the Head of State’s increasing use of these laws to control freedom of speech, freedom of movement and freedom to demonstrate has incurred the wrath of the local and international legal community. The Law Society of Zimbabwe, the Zimbabwe Lawyers for Human Rights, the International Bar Association and the Commonwealth Lawyers Association have protested against the State’s use of these laws to legally silence, suppress and deny individuals their political voice. (ICG 13/07/01:12, ZHR-NGO-SR-01/01, LCHR 19/12/01-POSB-HR). The response of the legal community is significant because it suggests that transnational legal activists are becoming increasingly important in global governance.

Second, the information from NGOs during the Zimbabwean political and economy crisis has played a critical role in *changing* the political economy of information. This study identifies that NGOs' information can be used in international relations and fed into lending institutions' political practices because many NGOs focus on human rights issues and they advocate for legal and economic reform with a rather narrow and naïve vision of *who* will benefit from these legal institution strengthening initiatives. This study suggests that NGOs' reports negatively represent legal cultures and narrowly focus on the Head of the State and local institutions as the problem (rather than global-local institutions and organisations). Human rights NGOs carefully select the prose of *civil rights, human rights, food rights, social movements, empowerment, popular participation, etc.* to shame the Mugabe Administration. However, this study suggests that this discourse maintains the Commonwealth - World Bank 1997-2002 negotiations, good governance development agenda. In other words, the abstract legal concepts are inverted to become an economic rule of law discourse which uses the language of *good governance, institutions, efficiency, law and order, foreign policy, development programs, etc.* repositions the legal and justice system against the state to strengthen the market economy rather than the civil rights movement. All of this creates a more complex situation. The text written by many NGOs allows international lending agencies to proffer a solution based on the NIE/LDM vision that focuses on procedures and institutions rather than "equity and fairness" (Tshuma 1999: 75) which will negatively affect the civil rights movement.

Third, this interpretation of the Zimbabwean case study draws from three groups of studies. The first group of studies are those that highlight the evolving discussion of transnationalism, globalisation, global governance, legal reform and moral imperialism (Salbu 1999, Wang and Rosenau 2001). This literature acknowledges that after the 1997 Asian Crisis, the World Bank has attempted to protect investments and create more economic transparency, eliminate corruption, bribery and black-market economics in member states (WB-ACK 2001, Feldstein 1999). These studies introduce themes such as disintegrating political bonds, the symbolism of corruption, transnational anti-corruption movements among the elites of corporations, nation-states and NGOs changing local

economies and proposing legal solutions which restructure local societies to create new political spaces. The second group of studies attempts to suggest that outside ideas suggesting legal solutions brought into the local legal culture positively influence the civil rights culture (see Keck and Sikkink 1998a, 1998b, Risse and Sikkink 1999, Sikkink 1999, 2002). Variations of this theme are found in the good governance/ pro-democracy/ human rights rhetoric. A third set of studies, predominantly affiliated with the Institute for Legal Studies at the University of Wisconsin-Madison Law School, are critical of the use of law as a tool creating *modernity/progress* in post soviet and developing countries and focus on the prevalence of the *corruption, good governance and democracy* discourses, (Dezalay and Garth 2001, Weaver forthcoming). This is the critical legal institutional development literature.

The main thread connecting these studies is that they reveal that the legal and justice system is a central category of analysis, whether investigating moral behaviour, economic development, social justice, ethics, elections or transnational legal activism. This literature also shows how the legal and justice system is inflected by the global political economy of lending institutions changing NGOs' activism and the contextually specific ways in which law functions across time and space. Most, importantly, this literature points to a gap in the geographic literature. The Zimbabwean political and economic crisis seems to be best explained through this interdisciplinary approach, yet this seems to be the first geographic study to bridge geographic tools of analysis with the critical legal institutional development literature. Although this study has encountered several difficulties - because geographic literature has not made judicial independence or the legal and justice system an analytical category – this study, although exploratory, is breaking new ground.

Contributions to the Literature

This study makes five contributions to the literature. This section will only highlight a few points that will be fully discussed in Chapters Seven through to Nine. One, this study provides new theoretical insights into some of the global processes protecting, affecting and threatening legal and justice systems. Two, this study may revitalise the

post development literature. Three, the case study of Zimbabwe illustrates that there are both positive and negative outcomes of NIE/LDM legal discourses restructuring spatial relations of civil society, the legal and justice system and the state at local, national and global levels. Four, this study has been able to reconstruct Zimbabwean legal history and the recent politics of lawmaking by downloading NGO reports from the Internet. This information has been readily available for the first time in Zimbabwean history, and this may be the first study documenting changes in the legal culture. Five, while critical of the legal/social justice/human rights geographers' lack of interest in legal and justice systems, judicial independence, rule of law and legal activism, this study has established a new reference point for human geographers. Two themes surface from this study: law as political discourse and legal activism rather than law in a place. This study could, and should, be situated in future studies of development (Watts 2000b), social movements, (Miller 2000) and the law and society literature (Blomley et al 2001). In light of the points made above, this study makes an important contribution to the legal/social justice/human rights geographic literature.

This study also suggests three areas for future research (further elaboration is offered in Chapter Nine):

- Law as political discourse
- Law and place
- The legal and justice system as an object of analysis

Chapter Descriptions:

Chapter One: Voices and Silences in the Postcold War Legal Order

This chapter provides primary evidence that suggests that the practices, tactics, strategies and even the theoretical underpinnings of international development have changed in the postcold war era. This chapter provides a brief review of the post development literature and the legal/human rights/social justice geographic literature, critical legal institutional development literature and state transformation/democracy/human rights literature to suggest that this is the first study to bridge geographic thought with the critical legal institutional development literature. The purpose and objectives of the dissertation are

outlined with the emphasis on the need for a more sensitive analytical framework, which will allow geographers to *see* how transnational legal activists alter the political space of the legal and justice system, and plays a role in repositioning the legal and justice system against the state. This chapter concludes with a few points about analytical methods and methodological considerations.

Chapters Two and Three combine the critical legal development literature led by Trubek (1972, 2000) and the state transformation literature led by Sikkink (1999). Their analysis is extended through a focus on several themes: legal philosophy and struggles of ideas about justice and many others. Paasi's (1991, 1996) treatise on the *institutionalisation* of places allows this study to conceptualise these processes as spatial, territorial and ever changing which in turn create new patterns of inclusion and exclusion at different geographic scales.

Chapter Two: The Context - Trajectories of Legal Activism take Legal Power from the State

The purpose of this chapter is to illustrate that different trajectories of legal activism have interacted with, and altered, the political structure of the legal and justice systems around the world. By legal activists it is meant activists who wish to change social power into legal power. This illustration is central to the concerns of this dissertation's focus on the political structures of the legal and justice system. To many legal, economic and political science scholars, this literature would be loosely categorised as the literature that examines the *institutionalisation of rule of law*; that is, the process of binding the state with the law.

More specifically, this chapter evaluates the Transnational Advocacy Network (TAN) Framework. In this evaluation, themes that the Transnational Advocacy Network (TAN) Framework appear to have missed are also identified, which raises a series of methodological issues involved in simply adopting this approach for the Zimbabwe-Commonwealth-World Bank case study. This chapter concludes with the suggestion that the issues that the critical legal institution development literature raises need a deeper

understanding of legal philosophy as well as a better understanding of legal practices used within the legal community to take legal power away from the state. The next chapter will develop several concepts serve as part of the analytical framework of this dissertation and are used in further analysis in the rest of the dissertation.

Chapter Three: Philosophical Positions and Practical Politics of Legal Activists

This chapter will develop three concepts, which underlie the analytical framework of this dissertation. The first is the ideas that hold the power to restructure societies. The specific ideas are ideas about justice, rule of law, law and injustice. The second is the difference between the sovereign state and the legal and justice system. This chapter suggests that the global social movements in the legal community create the global context in which the local legal and justice systems have evolved. Briefly the international law literature, the state transformation/human rights/democracy literature and the critical legal institution development literature are mentioned as a way to illustrate - with empirical and historical evidence - the global and local trajectories of legal power separating the state from the legal system. These trajectories illustrate the location of the real struggle between the state and the legal and justice system. However, the contrast is most clearly defined in the space of judicial independence. This study also reviews some of the literature that offers a sense of the changing spatial relationships in the space of judicial independence. This study has identified six spatial patterns renewing the cultural politics within the legal system.

The third is that legal activists are harboured by the legal architecture. This chapter will examine how the legal architecture has been layered through time and space offering a new political space to dissident voices after the 1980s. This chapter identifies several features of transnational legal activists movement and highlights several important characteristics of the legal and justice system. This chapter introduces several terms such as *externally driven legal-institution-strengthening initiatives*, the *space of judicial independence*, and the *space of judicial independence/legal order* as a way to illustrate the legal architecture as layers, alliances, networks and a complex political economy connecting local and global legal communities.

Given that the international law, the state transformation/human rights/democracy, and the critical legal institution development literatures can be criticised for failing to problematise socio-spatial relationships, this study suggests that geographic analytical tools can offer a reconceptualisation of institutions and organisations that seek to take power away from the state. This chapter will suggest that Paasi's (1986, 1991, 1996) treatise on *institutionalism* can provide a geographic interpretation of trajectories of legal activism driving the *institutionalisation of rule of law* as a territorial process. Paasi (1986) offers a new way to envision the interaction between the United Nations and a nation state.

Chapter Four: Creating the Crisis 1997-2002

What, then, is the Zimbabwean identity in its current economic and political crisis? By March 2002, Zimbabwe was at the centre of international discussion, observation, critique, debate and ostracization.

The primary aim of this chapter is to examine an array of NGO reports available through the Internet, and evaluate how NGOs represent governance, law, politics and economics. This chapter will provide an overview of Zimbabwe's politico-legal economic crisis through information produced by transnational legal activists. This chapter relies on a wide variety of primary information - current NGO reports, interviews with specialists, and newspaper articles. This chapter reads all this information for its overarching agenda and pattern of argumentation.

This chapter is designed to address three questions. *What are NGOs reporting?* This chapter reveals that NGOs represent Zimbabwe as if bad management and bad governance, thus many NGO reports could be read as if they support international lending institutions' *modernity/progress* initiatives to manage legal and economic reform in the near future. In addition, *why are NGOs advocating for legal and economic reform?* This chapter reviews some of the legal historical literature to understand why NGOs advocate for legal reform. NGO advocacy is most likely grounded in an awareness

of Africans' resistance to the settlers' legal culture, the oppressive legal system and political processes within the politico-legal history. Moreover, this literature review suggests that NGOs are providing an important service to the people of Zimbabwe. Three, *how is NGO information being used?* NGOs advocating for economic and legal reform in all likelihood will support the NIE/LDM legal institution strengthening initiatives.

The second aim is to evaluate how this information about Zimbabwe's economic and political crisis may be used in future global politics. This chapter will establish that NGOs' reports are important. They discuss themes such as judicial power, democratic institutions, rule of law and legal interpretation in the post-Independence Zimbabwe era. Yet, because NGOs run the risk of being misinterpreted, and having their information fed into the political practices of the NIE logic, this chapter ends with a cautionary note. It will suggest that NGOs need to be aware of this misuse of their information. This is the first study to acknowledge that NGOs reporting on Zimbabwe make it vulnerable to the next development initiative *imagined* by development specialists (see Cameron 2000, Watts 2000b). Based on the Southern Rhodesian/Zimbabwean legal history, this chapter makes a few concluding remarks. NGO reports appear to support the logic that Zimbabwe can be *fixed* with rule of law politics and programs. In addition, human rights NGOs need to be aware that their dedication to alleviating suffering may be co-opted for a future *modernity/progress* scheme initiated by outside institutions.

Chapter Five: Local Voices Protesting the Post-1997 Asian Financial Crisis Global Anticorruption Initiative (*Chikafu Cheupenyu's Analysis of the Chidyausiku Commission*)

The World Bank/Commonwealth New Institutional Economics /Law and Development Movement (NIE/LDM) anticorruption legal-institution-strengthening initiatives affects real people. In 1997, the World Bank produced an anti-corruption initiative. The World Bank began to circulate the idea that the rule of law is the key to developing a regulative framework to protect business alliances and international economic organizations from corruption (Tshuma 1999). In 1999, the Organization for Economic Cooperation and Development (OECD) adopted an anti-bribery convention signed by 36 countries (Wang

and Rosenau 2001, also see Salbu 1999). These institutions use economic rule of law discourses, discourses that have the politico-legal agenda to bind the state with the law for economic development to create a vision of a better world.

Economic rule of law discourses affects real people. Zimbabweans, particularly those working in the informal sector, feel the impact of this discourse. This chapter suggests that the recent globalisation of legal discourses affect the informal sector. In particular, the anti-corruption campaigns put forth by Transparency International/World Bank have had a tremendous impact upon local people's thinking, and in turn actions. Empirical evidence presented in this chapter suggests that by studying how local communities interact with these institutions, we can learn a great deal about how local societies respond to externally driven legal institutional strengthening initiatives. The NGO I created in 1997, *Chikafu Cheupenyu*, carefully documented the intricate relationships of political memory, economics, and household politics, which have the power to shape a multi-tiered social movement trying to take power away from the state. This chapter will provide some results from *Chikafu Cheupenyu*: a grassroots perspective of the legal culture, the sense of power and powerlessness in the people, and the politics connected to law and policy making inside Zimbabwe. This chapter will provide valuable insights into local strategies used to avoid the law, as well as the sorts of locations that nurture *anticorruption/civil rights* campaigns. This chapter provides some insights into why micro scale anticorruption/civil rights campaigns might act as a counterpoint to the *modernisation/process* initiative and exist in an uneasy tension with anticorruption initiatives led by outside institutions such as Transparency International, as well as the state.

This chapter concludes with the point that externally driven anticorruption initiatives may not be prepared for the sort of activism they invoke and/or inadvertently support with anticorruption discourses. Anticorruption discourses radicalise the local politico-legal economy. In Zimbabwe two anticorruption initiatives existed. One supported by Robert Mugabe to assuage the World Bank demands for transparency, accountability and good governance. The other anticorruption/civil right movement was a loose coalition of

frustrated women and men, civic organisations which daily participated in *kutyora mutemo* (jumping the law); and daily participated in covert critiques of the Mugabe Administration. These two initiatives differed in visibility, agenda and public legitimisation. The Mugabe anticorruption initiative allowed independent newspapers to publish stories about the War Veterans Pension's embezzlement of funds. The other was connected to historical and current events. Although these two initiatives differ, with careful analysis, this study identified a number of intersecting points between the two movements. This chapter reflects on how an *idea* from international organisations of nation-states, international lending institutions and NGOs and individuals can change local thinking and behaviour. Drawing primarily from local researchers reports, long-term interviews with key informants, open-ended surveys, local and international newspapers, Parliamentary debates and NGO reports, this chapter explores some of the different views on law, the legal system and authority figures and how women and men who work in the informal sector have reconciled their illegal workspace with the law. This chapter sheds light on how those working in the informal sector, with their raw rule of law discourses, can tell us a great deal about the microfoundations of rule of law.

Chapter Six: The Rule of Law Must be Upheld! Seeing Transnational Legal Activists Politicise the Legal and Justice System

This chapter will provide evidence that institutions and organisations politicise the legal and justice system, the interpretation and the use of specific laws. This chapter will also highlight a few of the responses made by the Head of State and civil society as transnational legal activists make these demands.

The purpose of this chapter is to establish that NGOs tend to represent President Robert Mugabe as the demon quelling the local civil rights movement. NGOs provide the evidence: three legal mechanisms - the Presidential Powers Act (1986) and the Law and Order Maintenance Act (1960)/the Public Order and Security Act (2002), and the Constitutional Prerogative of Mercy (1956). This chapter sets the stage for the next chapter, which will argue that transnational legal activists are becoming increasingly important in global governance.

This chapter draws from primary evidence: interviews, Zimbabwean and South African newspapers and NGO reports. NGO reports provide historically important evidence of a changing political, cultural, economic and legal landscape, which vividly illustrates how Mugabe's legal power cuts into the space of the legal and justice system. This chapter follows several themes found in NGO reports: Mugabe's use of three legal mechanisms, NGOs representation of Mugabe and the Judiciary; two activist NGOs - the National Constitutional Assembly and Amani Trust which politicise the current legal power of the constitution and Mugabe's use of Constitutional Prerogative of Mercy (1956) - and the response of the international community to NGOs advocacy.

This chapter emphasises that NGOs' advocacy has made a difference, locally and globally. For instance, the National Constitutional Assembly focused on the Constitution – to politicise the legal system, legal discourse and the post-Independence political system and the Amani Trust collated empirical evidence of violence. Amani Trust has been quite effective in providing a conduit for torture victims to narrate how the state has abused its power. Amani Trust's activism has brought Zimbabweans' voices to the local-global legal communities. Zimbabweans are further drawn into the webs connecting global and the local legal communities. Through NGO advocacy, Zimbabwe became the point of discussion in international relations. The example of the Abuja Agreement, a diplomatic agreement between Commonwealth Foreign Ministers and Zimbabwe illustrates the complex processes wherein NGOs work with legal activists to create new international agreements (UK-DT 29/10/01).

Chapter Seven: Summation - The Politics and Practices of International Development in the New World Order

Against the backdrop of NGOs' documentation of Mugabe use of legal power, this chapter suggests that the analytical framework developed in this dissertation allows us to better understand the power relations running in and through the legal and justice system. The analytical framework focuses on justice/rule of law views, which move through legal and justice systems, and examines how these have the power to create change in

international relations. Empirical evidence of a Head of State responding to externally driven demands to change the local legal order viewed through this analytical framework, allows this study to offer a different interpretation than many other studies.

This chapter reads the empirical evidence presented in Chapters Four, Five and Six at a coarser scale of analysis. This chapter will provide a summation of the Zimbabwean case study. We begin to see the legal community creating a territorial unit, challenging the sovereign state with three lines of attack: legal discourses (such as the International Declaration of Human Rights); the day-to-day agitation of judges, legal activists and NGOs; and the global legal institutional strengthening initiatives. Local efforts are supported by the externally driven legal-institution-strengthening initiatives who seek to strengthen their own global position. This alliance, this study will argue, needs to be fully interrogated as the silences allow the international lending agencies' NIE/LDM agenda the competitive and economic edge.

Chapter Eight: The Law and the *Postdevelopment* Movement

This interdisciplinary investigation holds the possibility to enrich the critical legal institution development literature. Moreover, because the analysis of the political implications of legal activists was completed with an eye to the postdevelopment/postcolonial/poststructuralist literature, this chapter also acknowledges that the focus on law, legal cultures and legal philosophy has challenged the boundaries of the postdevelopment literature. The argument made is that the postdevelopment literature tends to underplay the political structure of the legal and justice system, and how it is affected by transnational political and economic forces in the 21st century. This chapter will conclude on the point that the postdevelopment literature may need to reconceptualise its analysis of how global power relations are currently affecting individuals in different locations.

Chapter Nine: Conclusion

While next generation of critical legal institution development literature may not draw from geographic analytical tools, this chapter will suggest that by being bridged with the

critical legal institution literature, human geographic literature has been enriched in a manner that will allow future studies the possibility to deeply investigate the intersection of law and space. Three themes are identified, discussed and presented as areas for future research. These are law as political discourse, law and place, and the legal and justice system as an object of analysis.

Chapter One: Voices and Silences in the Post Cold War Legal Order

1.1 Introduction: The December 1997 National Day of Protest (Re- Territorializing the Territorial Arrangement between the Judiciary and the State)

I was in the city centre of the capital of Zimbabwe, Harare on December 9 1997. I walked from City Hall towards African Unity Square, the location where thousands of workers were supposed to gather to register their protest. Teargas was set off on all the streets in the city centre, towards all pedestrians in the city centre. In my panic, I ran in the alleyways with other men and women, trying to escape the teargas. As we beckoned for refuge from the teargas, people simply watched us from behind the barred doors of stores and offices. I then headed in the direction of the Harare central police station seeking protection from the panicking people as much as from the teargas. There, I joined hundreds of others: unarmed demonstrators, business people, and urban pedestrians. We seemed to share a mutual hope that we could stay in the building until this chaos was over, and as “innocent by-standees”, we would be protected by police forces. We were asked to leave as soon as the initial cloud of teargas had subsided. We tried to get to the omnibus rank (the area of public transport) when another round of teargas was released, aimed towards the rank. The teargas scattered those of us who were trying to get the rank to leave the city centre. The physical presence of teargas ensured that the omnibus drivers clearly understood that the police did not want the public mobile.

This introduction demonstrates that this study is grounded in an experience with the riot police, during a demonstration legitimated by the Zimbabwean High Court. This introduction has two parts. First, I offer a personal encounter with riot police and the broader context of this encounter. These notes illustrate the complex intersection of law, violence, basic needs, civil society/state interactions, politics, institutions, judicial rulings and economics. Then, I discuss the broader theoretical and political significance of trying to analyse this event as a geographer.

In any case, my story is not exceptional. Thousands, and perhaps millions (as cited in Z-TH 10/12/97:5)) of individuals had participated in the National Day of Protest (see Table 1.1).

Table 1.1: National Day of Protest Documented by The Herald Reporters

Bulawayo - 30,000 demonstrators
Masvingo - 30,000 demonstrators
Marondera - 5,000 demonstrators
Businesses in Mutare came to a standstill

Source: Z-TH 10/12/97:5

A lengthy statement written by a local researcher “Vengesayi” (SLK-97- 05 (male)) offers an important first hand perspective of the events throughout the city. Part of his narrative is offered here:

When I was on my way to Mbare via town [approximately 6:30-7:00 am] I met or came across truckloads of riot police well dressed for battle, armed with shields, baton sticks, helmets on, canisters and canister guns. They were taking their positions at strategic places – this was in order to contain and thwart the demonstration and to “curb” or stop any violent proceedings. Demonstrators who had promised to take a peaceful proceeding were or got frustrated by the presence of the riot police to thwart a peaceful demonstration. The police started launching canisters (teargas) to disperse the demonstrators who had converged to start the peaceful demonstration. This caused confusion as everyone else got involved and suffered for survival. No more vehicles were allowed entry into town so everyone had to march from city centre to different directions –most of the demonstrators marched toward Mbare Musika. The police followed up, launching canisters and tear smoke.

As the rioters were arriving at Mbare Musika, everyone, including [fresh produce] vendors got affected by tear smoke being launched. There was confusion all over as women screamed for help and forcibly ran into ET [emergency taxis] to try and rush out of the cross fire. One noticeable difference here I noticed was that men were brave enough to join in and become part of the demonstrators’ core. Women ran for their lives into ETs. Some men (thieves) and smugglers capitalized on the strike and looted at their level best from city stores to the ordinary innocent poor

vendor. Men were happy and enjoying but women looked bitter and worried. Business everywhere was disrupted, as rioters demanded a total halt. (“Vengesayi” SLK-97- 05 (male) see Appendix 1.2 for coding).

The Zimbabwe Human Rights NGO Forum (a nongovernmental organization (NGO)) provides a summation of these events. ZHR-NGO (1998) suggests that frustrated civilians resisted the teargas, their physical resistance to the teargas led to confrontation with the police and demonstrators. For this reason, police became incited. Thus, action of internal security forces – the police - and reaction of the civilians seemed to justify the heavy-handed approach of the police who beat pedestrians with their Billy-clubs and indiscriminately threw teargas in strategic places (inside buses and cars to frighten both the driver and passengers). The ZHR-NGO Report (1998) suggests that the police used indiscriminate force against the individuals who initially were exercising their lawful right to demonstrate peacefully. Rather than facilitating a peaceful protest, the police created the very conditions that allowed the expression of frustration to erupt. In turn, this created the chaos and turbulence in which petty thieving could occur. When such “unlawful” action took place, the police were forced to respond. The ZHR-NGO (1998) report at least acknowledged that two legal positions exist: the civilian right to hold a demonstration and the police’s duty to maintain law and order. In contrast, many state owned newspapers articles seem to imply that civilians do not have the right to protest (ZHR-NGO 1998 (see Table 1.1)).

Several general points can be distilled from December 1997 National Day of Protest. First and foremost, the December 1997 National Day of Protest was the first national day of protest condoned and legally legitimised by the High Court in the history of Southern Rhodesia/Zimbabwe. A High Court judgment considered the ZCTU's (Zimbabwe Congress of Trade Unions) application for a peaceful demonstration against the passing of Finance Bill No. 2 that would impose another 17% tax on formally employed people. The argument that ZCTU presented was that Finance Bill No. 2 would be set in front of the Minister of Parliament and the Parliamentary Legal Committee on December 9 1997. The ZCTU argued that the ZANU (PF) government had not offered the *povo* (the people)

an opportunity to participate in the debate about the Finance Bill No. 2 with the Members of Parliament. The ZCTU sought to revitalize the dialogue with a public show of protest. The court order was to allow ZCTU to hold demonstrations - in specific areas throughout the nation - against these proposed tax measures (Z-TH 9/12/97:1). The point of the demonstration was to publicly protest against the government for imposing the taxes without allowing any form of public input or debate.

As the imposition of Finance Bill No. 2 would directly affect ZCTU members' standard of living, the High Court judge deemed that a peaceful public demonstration was reasonable: a court order was issued. ZCTU published this pending event widely in newspapers. Journalists from the Herald, The Independent, Zimbabwe Mirror and others (Z-SM-7/12/97: 9, Z-I-12/12/97:1; Z-TM-8-14/12/97:1) published articles. With such publicity, ZCTU workers and a wide range of informal supporters perceived that this was a nation-wide opportunity to make a public statement against the war veteran pension. Many demonstrators saw this event as a public opportunity to make their political concerns known, and how they thought the War Veterans Pension would affect the future of the nation. As the event was legally condoned by the judicial system, they perceived that they would be safe from the oppression of the executive government.

Second, the one-day event coincided with Parliament debating Finance Bill No. 2. From the Parliamentary debates, we find a sense that while Members of Parliament (MP) disagreed with the imposition of the Bill, they were also concerned that they would be labelled "members of opposition" if they pushed too hard to get the Bill rejected. However, MPs forced a discussion to continue on Finance Bill No. 2 while the demonstration was taking place outside the parliament buildings (ZLP 1997a).

Third, Police Commissioner Augustine Chihuri made a public statement the day before the demonstration that he planned to crush the demonstration based on the presumption the ZCTU were allied with industrial employers and white farmers (Z-TC 8/12/97-1). Minister of Home Affairs Dumiso Dabengwa stated to Members of Parliament that the recent land allocation proposal had angered the white farm owners who were trying to get

back at the government. The white farmers were encouraging their black labourers to participate in the demonstration: "black people to fight a white struggle which is about land redistribution" (ZPD 1997c: 2708). For this reason, Dumiso Dabengwa publicly stated to a reporter that

.... the country-wide work stoppage had serious security implications and the police would without hesitation thwart any unlawful demonstrations.... I instructed Commissioner of Police (Augustine Chihuri) to ensure that demonstrations would not take place. I would like to give a warning to demonstrators that they stood the danger of being shot by the police if they intended to demonstrate," (Z-TH 10/12/97:1&5 see also ZLP 1997a).

Both Members of Parliament and members of civil society interpreted the police commissioner's actions as an act of aggression towards civil society.

Fourth, the State's official statements became increasingly ridiculed by the public. For example, Augustine Chihuri announced that he had unleashed 12,000 riot police in Harare alone to control the *hooligans* and *looters*. Yet the general perception was that police actions created the situation (Z-TH 10/12/97:4). Additionally, members of the Mugabe Administration, such as Chihuri and Dabengwa tried to make the December 1997 protests appear as an irrational act by civil society, as suggested by the comment made by Chihuri offered below:

There were many demonstrations before and most of them were peaceful. Ex-combatants had their reason for demonstrating. Even ZCTU had their reason but this fell away because the government had withdrawn the levy. So there was no reason to demonstrate at all (Z-FG 11/12/97-NR).

With such public statements offered, highlighting civil society's irrational behaviour, the public began to veer away from official statements. The rumour mill became the main source of information and the centre of the critique for the ZANU (PF) government (see Z-TH 26/01/98:8). The key point was that those who participated in the ZCTU demonstration had done so with the assumption that their voices would be heard.

Fifth, President Mugabe's response to the demonstration was also significant. President Mugabe gave his Tenth *State of the Nation* Address at the Zimbabwe Parliament of Zimbabwe at 2:00 pm on December 9 1997. But he did not publicly acknowledge the

demonstration. The primary evidence of this public erasure is found in the Parliamentary Debates (ZLP 1997a: 2687-2700). There is the full presidential speech made by Mugabe. Yet evidence of the thousands protesting outside of the Parliament building has been edited out. Before, during and after the *State of the Nation* Address, the nation-wide demonstrations had not been acknowledged. Mugabe's lack of public recognition had the literal effect of publicly erasing the voices of all who had participated in the demonstration (ZLP 1997a: 2687-2700, Z-TH 10/12/97:4).

Sixth, President Mugabe's lack of public recognition drew a great deal of social commentary. Moreover, the manner in which Mugabe, as the national "elected" leader, responded drew many comments (see critical commentary on elections Z-NCA Sithole 2000, see USA-Z-HRR 1993/1994 through to 2001/2002). Men and women talked about Mugabe's erasure of their protest. Several candid comments were printed in an independent magazine which are cited below:

On the day of the demonstrations, President Mugabe chilled many into disbelief when during his state of the nation address to Parliament he totally ignored the mass demonstrations even as police fought running battles with the demonstrators right outside the parliament building (ZW-P-Mutsakani 1998: 3 and 25).

Did you see the President's state of the nation address to Parliament ...no reference to the fact that in each city and town...industry and commerce had ground to a halt as virtually the whole country...had taken to the streets to spell out in simple one syllable words: Enough is Enough...halt the appalling inflation which makes it difficult (or impossible) to feed our children...While pockets of teargas still remained in odd places, the President...told us that the current economic setbacks were temporary...

Nero fiddled while Rome burned. Mugabe gave us an atavistic lecture about socio-economics! (ZW-P -Wayfarer Feb. 1998: 23)

Seventh, in theory because the High Court had given the ZCTU a court order to hold its demonstration, this space was legally sanctioned by the justice system. However, when the Minister of Home Affairs, Dumiso Dabengwa defended his decision to arm the police with live ammunition to control the demonstration by stating that the "the constitution" gave him this power, it became clear that there was *a broad struggle over whose*

interpretation of the law would be administered through the legal and justice system.

Would it be the State's or the Judiciary's (Z-TH 10/12/97:1&5)?

By using the discourse "constitution", Dabengwa helped radicalise the legal and justice system. People started talking about the justice system. Some key political divisions began to take shape after this event. Local human rights NGOs such as the Zimbabwe Human Rights NGO Forum began to publicly advocate for those who had been mistreated (ZHR-NGO 1998); the independent press published many stories of abuse; people talked about President Mugabe's response and the lack of public recognition that civil society received from their "elected" leaders. The critical division many identified was that *the legal system had condoned the demonstration, and the state condoned the violence.*

I spoke to many after this demonstration. The pivotal point many emphasised was that a legal solution was preferred over physical violence. But now that the State had forced civil society into a position where they were forced to take violent action, the only way forward was to protest against the government's presence with their bodies:

... people did what they had to - that is - *they had to be violent because it is the only way the government ever listens to any grievances by the people* (UZR-Mapedzahama 1998 – emphasis added).

Eighth, by June 2002 I understood that the National Day of Protest was only the beginning of the conflict we see today. State condoned violence has been ongoing since December 1997, and the Mugabe Administration has been interpreting the constitution in a manner that allows a shadow militia to strike fear in communities, as suggested by the quotation below:

...These "militias" [are]... a proxy force for intimidating opposition activists and potential opposition supporters through political killings, abductions, torture and assault in the context of the parliamentary elections of 2000 and the presidential elections of 2002. ...Many human rights analysts see the "militia" activity as the government's attempt to implement its policy through a seemingly non-state force disassociated from the government... (AI 25/06/02: 10)

Victims of attacks and beatings by "militias" reported that police had been present but had taken no action to stop the "militia". Privately, police have stated to

citizens that officers were unable to take any action...Eyewitnesses report that police officers told the residents that the "militia" were "untouchables" and could not be removed nor restrained (AI 25/06/02: 16).

This case study read at another scale of analysis acknowledges that in 1997 a surge of human rights NGOs rose. They created a complex network of human rights advocacy networks inside and outside Zimbabwe.

In September 1997, I arrived in Harare, Zimbabwe and created a research NGO. The purpose of our NGO was to collect quantitative and qualitative evidence of food insecurity, and advocate for food rights and food security. I was in Harare during the National Day of Protest. I observed National Day of Protest affected the informal food distribution networks, sustainable community economic development and social justice issues. Many of these observations were qualified through quantitative evidence (see Table 1.2). Our NGO interviewed 400+ women and men. We asked them how the state affected community economic development. Women, men and children told us that they were forced into the informal sector, a sphere of crime and petty theft and violence because the State had left them few alternatives. Many told us "they had to be violent because it is the only way the government ever listens to any grievances by the people" (UZR-Mapedzahama 1998, also see AI 25/06/02) and offered qualifying reasons of why they had to *jump/skip/move* beyond/through the law (Shona *kutyora mutemo*) to earn a living.

As early as December 1997, nongovernmental organisations (NGOs) such as the nation-wide Zimbabwe Human Rights NGO Forum (ZHR-NGO) began to advocate for human rights. Activism had been sparked by the State's violent suppression of the High Court condoned December 1997 National Day of Protest. Many NGOs acknowledged two points. The police must maintain law and order; yet at the same time, civilians have right to hold a demonstration (ZHR-NGO 1998). The independent press widely publicised the fact that civil society had been denied the right to demonstrate. The critical point both NGOs and the media identified was that the *legal system had condoned the demonstration and the state condoned the violence*.

In the aftermath of the December 1997, there was an explosion of NGO advocates. Their social commentary on the economic and political crisis culminates as contemporary commentary with insightful analysis. The Zimbabwe Human Rights NGO Forum (ZHR-NGO - an NGO formed in the aftermath of the December 1997 National Day of Protest). Other NGOs – the Zimbabwe Congress of Trade Unions, National Constitutional Assembly, and Movement for Democratic Change, Amani Trust –Zimbabwe, International Crisis Group, Helen Suzman Foundation, ZW-News, Amnesty International, Commercial Farmers Union, Lawyers, Committee for Human Rights, Kubatana and others use the Internet as a means to advocate for change. The number of NGO reports available

through the Internet provide a transnational presence of NGOs. To a large extent, local and transnational NGOs rely on local residents to share their stories of torture, violence, suffering and victimisation by the state, stories which are re-transmitted in and through cyberspace. For much of the legal history of Southern Rhodesia/Zimbabwe, NGOs' information has been tolerated by the state. Throughout 2000-2002 a more autonomous presence of NGO information has been allowed through technological advances. Nonetheless, this advocacy continues to retain elements of its origins, still affected by laws constructed during the settlers' legal culture

1.2 Law, Development and Transnational Advocacy Networks

The purpose of this chapter and this dissertation is to suggest that geographers demonstrate a reluctance to engage with the analysis and/or theorisation of boundary disputes between the judiciary and the state, particularly in developing countries. In addition that geographic inquiry into legal institutions, legal philosophy, legal practices and legal spaces must develop an interdisciplinary approach if geographers wish to understand the differences between the legal and justice system and the state. To ground this argument, this dissertation, will suggest that the Zimbabwean crisis has evolved from the practices and power relations of contemporary international development initiatives. To argue that the Zimbabwean crisis is connected to a contemporary development initiative may seem odd in light of the World Bank/International Monetary Fund activities in 1999, wherein they withdrew earlier funding commitments to the Zimbabwean government. Much of the political and economic crisis has occurred since then. This is what is so fascinating about this case study.

This dissertation will analyse the cause of the demonstrations and riots at several scales of analysis. Table 1.2 allows us to stand back from the detail of the case study and evaluate the patterns of logic that surface at different geographic scales. Table 1.2. suggests that the World Bank produced these ideas in response to the 1997 Asian financial crisis, and these ideas were circulated to international organisations of nation-states, such as the Commonwealth, which in turn have operationalised these ideas as development policies and practices. The local riots and demonstrations are part of the civil rights movements responding to these externally imposed ideas. Human rights NGOs, connecting the changing legal geographies to the High Court's ruling, have made

the High Court's ruling an important political presence in local discourse and international relations.

With this said, the layers can be unravelled a little more carefully to see how an idea is adopted and/or challenged by different stakeholders. The use of geographic scale, as an analytical tool, is significant. We see a much clearer picture when using a coarser scale of analysis for example, organisations and institutions, to examine how an idea flows from one location to another. Three scales of analysis - the international, the Commonwealth and the grassroots - highlight the complex linkages in and through local and global scales. The broadest scale of analysis, the international scale, focuses on a global shift in ideas in the late 1980s. The significant global event occurring parallel to the Zimbabwe December 1997 demonstrations was that the International Monetary Fund/World Bank and other international lending institutions were responding to the Asian Financial Crisis with a new development initiative: a global anti-corruption initiative which is part of the law and development movement (LDM) (Tshuma 1999, Salbu 1999, Wang and Rosenau 2001)

The second scale of analysis focuses on the World Bank's LDM being transferred as an international organisation of nation-states, such as the Commonwealth, adopts these ideas. These ideas are materialised as a new development policy and practice that has been extended into individual Commonwealth countries, such as Zimbabwe. The Zimbabwean crisis appears to be as a result of international organisations of nation-states, such as the Commonwealth, accepting the World Bank and other international lending institutions' idea of how to develop. While the conversations began in 1996, this agreement was solidified in March 2002 as a multibillion-dollar good governance, anticorruption development initiative (CS-04/03/02-PI, CS-04/06/99-PI, CS-28/04/99-PI, CS-09/06/99-PI, Tshuma 1999). By March 2002, the Commonwealth was reprimanding a member for corrupt practices and for not following the so-called good governance agenda (C- 19/03/02-PI- 02/26).

A third scale of analysis acknowledges local struggles. Grassroots civil rights movements, such as those asserting their right to employment and right to food (such as the informal food distribution network), are being suppressed by the state, which has formally adopted liberal democratic values and political structures to please the World Bank. For instance during the 1997/1998 field season, my research team completed 1200+ interviews (Table 1.2). This primary evidence suggests that the December 1997 National Day of Protest and the January 1998 food riots/civil right/anticorruption movement were driven by the fear of economic insecurity and food insecurity. This baseline study provides considerable evidence that a civil rights movement is developing in many scattered areas of Zimbabwe. Yet, much of the nation's population continues to have little access to the national legal system or framework. At the same time, President Robert Mugabe has been trying to silence the local civil rights movement with three legal mechanisms: the Presidential Powers Act (1986) and the Public Order and Security Act (2002), and the Constitutional Prerogative of Mercy (1956). The grassroots civil rights movement is empowered by the global political economy, which financially supports human rights NGOs who in turn provide extensive evidence of state-condoned suppression, torture and violence.

In short, the Zimbabwe-Commonwealth-World Bank case study is useful for understanding the *voices* and the *silences* of the post cold war legal order, and how they are represented in different disciplines, literatures and how these lines are conceptualised. This is a study about the diffusion of an idea through different organisations and institutions: an idea that has infiltrated discussions about foreign policy, international relations, economics, politics, street crime and local development initiatives, Canadian government officials implicated in corruption scandals and many other topics (Carothers 1998, WB 2002). This idea, as will be argued in this dissertation, is extremely dangerous to the well-being of the disabled, terminally ill, hungry, informally employed, poor and politically vulnerable women, men and children.

Table 1.2: The 1997/1998-Field Season set Against National and Global Events

Time and Scale	August- December 1997	December 1997	January - February 1998
International Political Economy	International Monetary Fund/World Bank and other International Lending Institutions respond to the 1997 Asian Financial Crisis		
International organisations of nation-states	Commonwealth Secretariat Conversations with the World Bank – Good Governance and Anticorruption Initiatives		
National Political Economy	After August 1997 promise to war veterans, seeking sources of money for war veterans, question in parliament - who will receive pension Nov. 1997 Land redistribution IMF responds Local dollar devalued	December 1997 Tax Bill for War veterans to be passed through Parliament Civil society protesting imposition of taxes	January 1998 War veterans monthly pension begins Civil society protesting Feb. 1998 Rumour mill breaking the silence
NGOs	Local and transnational legal activists (judges, lawyers, NGOs and the media), report that the State had transgressed the space protected by the High Court Order		
City Wide Fieldwork schedule in Harare*	Sept 1997 arrived in Zimbabwe Oct 1997 -December 1997 city wide survey of food security in 15 high density residential areas* in Harare: interviewing consumers, vendors, transporters and urban gardeners	January 1998 In-depth studies of consumers, vendors and urban gardeners (Surveys include question of perception of demonstrations)	February 1998 Interviewed vendors and consumers about perception of food riots.
Neighbourhood and Individual level evidence	430 consumers, 340 Vendors, 50 transporters From 15 HDRA*	340 vendors from 15 HDRA* 90 consumers (Warren Park, Budiro, Highfield) 25 urban gardeners	

Detailed field reports and methodology in Leybourne 1998a, 1998b1998, see van Zijl de Jong 1995 for categorization of vendors and transporters

*Kuwadzana, Hatcliffe, Sunningdale, Budiro, Old Tafara, Mbare, Dzivarsekwa, Epworth, Glenview, Glen Norah, Mufakose, Old Mabvuku, Hatfield, Kambuzuma, Highfield

(CS-9/10/1996-PI, CS-28/04/99- PI, Tshuma 1999, Feldstein 1999, Leybourne 1998a, 1998b, van Zijl de Jong 1995)

1.3 Purpose of This Chapter

The purpose of this chapter is to make four points. First, geographic inquiry into legal order and legal spaces must integrate ideas from international law, political science, economic theory and cultural studies if geographers wish to analyse the legal and justice system as a political structure, connected to, yet separate from the state. Second, the plethora of legal discourse such as *police, judiciary, violence, corruption, governance, demonstrations, human rights*, etc readily found in Northern American newspapers and magazines needs to be taken very seriously. Third, the rise of academic interest in legal geography and the process of state transformation/democracy/human rights suggest a scholarly response to this shift in popular discourse. The fourth point is closely related to the third. The New Institutional Economics (NIE) must be brought to the forefront of the

discussion if geographers wish to understand how the legal and justice system has become an important category in international development and international relations.

The first point is perhaps the most important, in this dissertation, because “... geographers...[are reluctant] to comment on law” (Blomley 1994:28). Geographers tend to demonstrate a reluctance to engage with the analysis and/or theorisation of boundary disputes between the judiciary and the state, particularly in developing countries. Very few geographers have engaged with the provocative topics such as judicial communities’ participation in global social movements, or how different legal theories and philosophical thought materialise as reality. Very few, if any, geographers have investigated the political economy of legal activists and spatial relations of the law and the state. The contribution of geographers to this contemporary debate is conspicuous by its absence. Although there are a few notable exceptions, this study suggests that *judicial independence* and legal order as a topic of inquiry, or as political category has not received the sustained interrogation it deserves. In order to move into this topic which embodies a number of wide-ranging and explicit interests in the process, politics and ideals of local legal and justice systems, this dissertation begins by identifying some of the processes and practices inside and outside the legal and justice system. Thus, this chapter will review a wide array of literature with the purpose of seeing the struggle between the Head of State and the legal and justice system as territorial ideas about social justice, and whose rule of law view should be administered as the law.

This chapter is divided into three parts. The first has established that the Zimbabwean case study appears to illustrate that the practices, tactics, strategies and even the theoretical underpinnings of international development have changed in recent years. The next section will begin with a brief review of the post development literature and the legal/human rights/social justice geographic literature, critical legal institutional development literature and state transformation/democracy/human rights literature. This is the first study to investigate how legal ideas, transnational legal activism and the political presence of the local legal and justice system agitate to take legal power away from the state. This is also the first study to bridge geographic thought with the critical

legal institutional development literature. The second section of this chapter will highlight several difficulties encountered - such as trying to find the literature that reveals the politics and practices underlying the *institutionalisation of rule of law*. This section concludes on the point that a need for a sensitive analytical framework, which will allow geographers to analyse the empirical evidence that suggests that the local legal, and justice system is a political presence, altered by transnational legal activists.

The third section will outline the purpose and objectives of the dissertation. This study uses the post structural/postcolonial/postdevelopment analytical tool -discourse analysis - to review the literature and the empirical evidence (Nederveen Pieterse 2000, Peet 1996). This chapter concludes with a few points about analytical methods and methodological considerations.

1.4 Critical Silences in the Critical Literature

The purpose of this preliminary literature review is to suggest that the critical geographic literature must bring New Institutional Economics (NIE) logic to the forefront if post development theorists and legal/social justice/human rights geographers wish to analyse anti-capitalist and anti-transnational corporation struggles in the postcold war era.

The analysis of the Zimbabwean case study can follow either the post development literature led by Watts (2000a, 2000b) and others, or the legal/social justice/human rights geographic literature led by Blomley (2000), Herbert (2002), and others. However, this section will suggest that if the focus is on transnational legal activists, neither the postdevelopment nor the legal/social justice/human rights geographic literatures fully provide the analytical tools needed to unravel the power relationship in the Zimbabwe-Commonwealth-World Bank case study. This study will develop the appropriate analytical tools in Chapters One, Two and Three.

1.4.1 Post Development

The post development literature argues that the notion and strategies of development have created structural and physical violence to the people to whom the notion of development

has been applied (Bebbington 2000, Nederveen Pieterse 2000, Mohan and Stokke 2000, Watts 2000a, 2000b, Potter et al 1999, Slater 1997,1998, Crush 1995, Escobar 1995, Ferguson 1994). When this analysis is applied to the Zimbabwean case study, many analysts produce a variation of this argument. Many focus on poor leadership decisions, the failure of the World Bank's Economic Structural Adjustment Programs (ESAP) and "... rampant corruption" to explain the current economic and political crisis. Many provide careful documentation of the Mugabe Administration's orchestration of spatial patterns of finance, products, ideas and people (Z-AT 20/05/02-PE: 6; ZW-News Johnson; ICG 2002, Dashwood 2000).

This analysis, set against contemporary events, suggests that Mugabe's Administration has transformed one of Africa's most peaceful countries into a nation in which state condoned violence has been ongoing since December 1997. A shadow militia continues to strike fear in communities and the police cannot take any action (AI 25/06/02: 10-16). Unfortunately such analysis neglects to raise the sorts of questions that might deepen analysis. For instance, how does this analysis address the World Bank's shift to NIE/LDM logic, which is part of the global movement advocating for legal and economic reform (Tshuma 1999)? If we use geographic scale as an analytical tool, what sorts of politico-legal geographies are revealed? Why do the Commonwealth Committee and the transnational legal activists' citation of international law exacerbate the complex politics of very local incidents of violence, chaos, and hunger and further threaten individual legal security? How do place, identity and human rights create the *idea* of human rights, which originates in the relationship between identity and place?

These questions provide a starting point with which to analyse legal insecurity in Zimbabwe. These questions are also raised by connecting the different events at different geographic scales (see Table 1.2). These questions also begin to make the connections necessary to understand why transnational legal activists advocating for economic and legal reform may negatively affect legal security (protection from the state through the legal and justice system). Unfortunately, this line of questioning also highlights the point that some of the leading critics of economic development (as theory and practice)

do not seem to be aware that the NIE, as an economic paradigm shift which occurred in the early 1990s, has been interpreted by international lending agencies in such a manner that international lending agencies can justify another law and development movement in the present. This development initiative was pronounced a failure in the 1970s (Watts 2000a, 2000b; Mohan and Stokke 2000, Trubek 1972, 2000 (see Appendix 1.1)).

The key point is that many post development theorists have not explicitly interrogated the interpretation of international lending agencies interpretation of the New Institutional Economics theory (NIE). Lending institutions' interpretation suggests that legal reform will create political and economic "progress". In contrast, the critical legal institution development literature acknowledges that international lending institutions, such as the World Bank underwent a paradigm shift in the late 1980s, as a response to empirical evidence that ESAPs were failing to deliver basic needs. Other institutions (multilateral development banks, international and regional organisations of nation-states, NGOs, educational institutions, and research organisations) followed suit and adopted NIE theory – which broadens neoclassical economic theory by recognising the importance of institutions, law and legal reform for developing countries, as a superior economic development theory. The NIE logic was used to explain why ESAP (based on neoclassic economic theory) had been a failure. The NIE logic focuses on weak institutions, such as the paternalistic and corrupt state, as the root cause of underdevelopment. The solution, according to this logic, is to strengthen legal infrastructure to facilitate faster economic growth and institutional capability. This logic is materialised in rewritten laws and reformed legal institutions. Legal reform is meant to create stability and predictability in market relations, which, in turn, reallocates resources to enterprises and industries. The NIE logic has inspired five new development initiatives: good governance, anticorruption, and strengthen-democratic-institutions (NGOs, the media and the judiciary) information management and private property rights (Keefer and Knack 1997, Feldstein 1999, Chibber 1998, Harrison 1999, Webb 1999, Cameron 2000, WB-WD 2002).

Many post development theorists have not carefully engaged with legal discourse as development discourse, nor explored the political implications of this discourse. Legal discourses, more specifically *rule of law* should evoke criticism from those who study economic development in developing countries (Bates 1995, Tshuma 1999,). Moreover, it seems that not only “... geographers have been reluctant to comment on law” (Blomley 1994:28). This study will suggest that post development theorists seem to be quietly ignoring the political implications of the World Bank’s *Global Conference on Law and Justice* (July 2001) and the logic threaded through the *World Development Report 2002: Building Institutions for Markets*. Both of these policy documents highlight the logic that believes strengthening legal institutions will bring economic development to post soviet and developing countries. The critical point that most post development theorists are missing is that local legal and justice systems are being strengthened by external lending agencies such as the World Bank. Stated in other words, the legal and justice system is threatening the power of the sovereign-state and developing a new political presence in international relations. As suggested by the Zimbabwe-Commonwealth-World Bank case study, sovereign-states tend to react negatively to such threats, and adversely affect civil society. The failure of the law and development movement which transnational legal activists initiated in the 1960s, suggests that history is repeating itself (Trubek 1972, 2000). As this dissertation will argue, all too infrequently, the discourse of rule of law, law and social justice is contested in the development literature. This study will stress the need to make these global-local connections if we wish to understand how global processes have transformed Zimbabwe’s politico-legal culture in 1997.

The post development analysts’ discussion of the state, lending institutions and NGOs raise many questions about the transference of global power, the global circulation of ideas, people, products, finances and tensions between local and global processes. This review also acknowledges that the post development literature focuses on themes such consumerism, information politics, gender relations, the need to encourage broader research agendas and transformation research agendas to eliminate inequalities that have resulted from centuries of Eurocentric, ethnocentric views, alternative vision of development, participatory development, resource management, basic needs, bottom up

strategies and sustainable development. Moreover, the post development literature celebrates their “alternative” position. Many, who use post development literature as a point of departure, see themselves creating political space for marginalized voices, knowledge, social relations, etc. This in itself creates an element of legitimating inside and outside post development commentary. All of these themes suggest that the post development literature’s engagement with philosophical and political questions and social theory would provide a useful methodological point of departure for this study. However, because of the disconnect between the post development literature led by Watts (2000a, 2000b) and the critical legal development literature led by Trubek (1972, 2000), this study will suggest that the post development literature is unsuitable for evaluating the deeper global-local power relations led by transnational legal activists who are creating local struggles, conflict and tensions in their efforts to strengthen and reposition the legal and justice system against the sovereign-state. Transnational legal activists (judges, lawyers, NGOs and the media), international organisations of nation-states and international lending agencies advance new ideas about the role of the law and legal institutions. These ideas – when operationalised – attack state sovereignty and the politico-legal state structures. This process, as the Zimbabwean case study will suggest, has real implications for real people. The power relationships in and among the legal community and the sovereign-state deeply affect men and women who exist on the margins of local societies.

In short, the post development literature is not a suitable point of departure for two important reasons. First, the post development theories have not brought the New Institutional Economics (NIE) logic to the forefront of their discussion. For the most part, the post development literature pushes from a wide array of intellectual and geographical positions as they push for social and economic justice, defining and redefining the need for sensitive theories, methodologies, and multiscalar analysis (Mohan and Stokke 2000). Yet, because the NIE logic is not being explored as the dominant logic in development discourse, post development theorists do not appear to be articulating how the complex power relations between the state and transnational legal activists affect real people on the ground.

Second, because many postdevelopment theorists do not discuss the power relations connected to legal discourse, this study will not begin like many other post development studies (which use discourse analysis to deconstruct the notion of development). This study will begin at a different point. It will first establish the political structure of the legal and justice system and the state by deconstructing international community's desire to institutionalise the rule of law. This step establishes that the state is positioned somewhat connected, yet disconnected to the legal and justice system. Then this study will examine the power relations between the state and the legal system as transnational legal activists drive the institutionalisation of rule of law (the significance of this approach is revealed in Chapter Two and Three). This dissertation will argue that political implications of the NIE/LDM agenda to institutionalise the rule of law must be considered first and foremost (Trubek 2000). As there is a wealth of primary evidence that suggests that international lending agencies are operationalising this logic and empowering local legal and justice systems around the globe, this study does not provide an extensive literature review of the post development literature (Hendley 2001, Mathews 1986, Tate 1997, Murrell 2001, Katouzian 1998, Doe 1997, Bebbington 2000, Mohan and Stokke 2000, Watts 2000a, 2000b, Potter et al 1999, Slater 1997, 1998, Crush 1995, Escobar 1995, Ferguson 1994).

1.4.2 Legal/Social Justice/Human Rights Geography

As the focus of this study is on how legal ideas, transnational legal activism and the political presence of local legal and justice system create new patterns of inclusion and exclusion at different geographic scales, the Zimbabwean case study could be analysed through the work of the legal geographers, human rights geographers and social justice geographers. The literature shares a common interest in law, socio-spatial relationships, critical social theory and sensitive methodologies. For example, legal geographers identify and discuss legal texts. Legal geographers also study the individuals who interpret these texts to regulate spaces, alter legal meaning, using different conceptions of space to enforce and create laws as well as change socio-spatial arrangements. Many contemporary studies focus on state and civil societal interactions to explain the

oppression of a rising social movement. Many provide careful examination of legal structures and society. Many incorporate diverse theoretical and methodological positions in their investigation of the relationships between law, society and space (Blomley 2000, Herbert 2002, Blomley 1994, Blomley et al 2001, , Delaney 1998, 2002, Peake and Kobyashi 2002 and others).

However, the language of social justice, law and human rights seems to be too delicate for the Zimbabwean case study. Numerous NGOs document that the Head of State's interpretation of the Presidential Powers Act (1986) and Law and Order Maintenance Act/ the Public Order and Security Act, and the Constitutional Prerogative of Mercy (1956) is abusive, coercive and a constant threat to citizens (ZHR-NGO-SR-09/01: 16, 19, SA-TST 08/07/2001-Gubbay). Details from this case study could be too easily set into a framework of the language of justice/injustice. This legal language does not seem to capture nor accurately represent the lives of the men and women with whom I ran to escape the teargas.

Based on my experience with riot police, my experiences during the 1997/1998 field season, and my desire to adequately represent these women's and men's legal reality, this study will argue that to follow the legal geographic literature may provide a misleading analysis of the legal geographies in Zimbabwe. Three reasons are offered. One, the New Institutional Economics (NIE) logic must be brought to the forefront if legal geographers wish to unravel power relations, texts and discourses being produced by the NIE/LDM logic and participate in the critical analysis of how legal geographies are changing in the post cold war era. The state versus legal and justice system power relations began when the *De Jure Belli ac Pacis* (The Law of War and Peace (1625)) was written, permanently splitting the geopolitical history of the state and the judiciary, and allowing the political structures of the state and the legal system to take on unique personalities (see Chapter Two). Since then, different legal-institution-strengthening initiatives, such as the NIE/LDM have developed, positioning the state against the legal and justice system (Murphy 1999, Stark 1999, Trubek 2000).

The NIE inspired legal-institution-strengthening initiative is just one of several legal-institution-strengthening initiatives, which have the power to alter the spatial architecture of legal and justice systems and change the policies and processes inside legal and justice systems in a manner that may threaten the sovereign-state. In the case of Zimbabwe, the NIE inspired legal-institution-strengthening initiative appears to have changed the fluid spatial relationships of law, society, power and authority of the Zimbabwean Supreme and High Court Judges. This study will suggest that the Supreme Court Judges activism in 1999-2002 is intimately connected to the legal community in the International Bar Association, Law Society of Zimbabwe and the Zimbabwe Lawyers for Human Rights, Commonwealth Lawyers Association and the United Nations Special Rapporteur on the Independence of the Judiciary who receive international funding under the rubric of the NIE logic (Z-CIZC-19/06/02, AI 25/06/02: 26-27). The critical argument being made in this study is that the power relations between the legal and justice system and the state are *not* local. Moreover, by studying how women, men and children's daily lives have been affected by the new legal geographies created in the wake of the impact of NIE inspired legal-institution-strengthening initiatives can tell us a little about how legal geographies around the world have been permanently changed because of the NIE logic.

Second, although a number of geographers have mapped the global shift in thinking about human rights law, documented abuses of human rights and acknowledged the increased geopolitical presence of human rights NGOs (Fenster 1999, Price 1999), few make the important connection that this activism has been legitimised by transnational legal activists and the NIE/LDM logic. The United Nations accepted the Basic Principles on the Independence of the Judiciary (1986) and the acceptance of the Basic Principles on the Role of the Lawyers (1990) permanently changing the political space of legal activists, and in turn the NGO community. In 1989, when the World Bank adopted the NIE logic, this international lending institution becomes a powerful economic force driving the dual agenda of human rights and capitalism. In short, there seems to be a significant silence in the critical geographical understanding how the 1980s and 1990s have created powerful changes in legal geographies around the world.

Third, because there is a disconnect between the legal geographic literature led by Blomley (1994, 2000, 2001) and the critical legal development literature (led by Trubek 2000), this dissertation will not provide a full discussion of the legal geographic literature. Blomley (1994, 2000) provides a full discussion of legal geographers' three dominant themes: i) legal geography's origins, ii) methodological concerns and iii) empirical themes. In particular, Blomley (1994, 2000) makes an important argument for a fluid, multiscalar analysis that examines how legal geographies produce place and new forms of place. These points deserve more than a passing comment, because many of them are creating a new version of legal geography that acknowledges themes such as the intersections between space, place and law, material situations, rules and power relations intersecting with specific geo-historical situations, social systems and legal cultures. For instance, Blomley (2000) opens up the possibility of recognising how legal structures are geographically fluid, disruptive, shaped by the production and circulations of social values, legal cultures and local understating and desired for social stability. Examples of contemporary legal geographic investigation can be found in Herbert (2002), Blomley et al (2001) and others.

While acknowledging that the purpose, imagination and meaning of legal geography has radically changed as geographers have engaged with philosophical and political questions and social theory, moving through Marxist to postcolonial and poststructuralist philosophies (Peet 1996, Blomley et al 2001), this study will suggest that if geographers wish to analyse how the NIE/LDM logic is restructuring the political structure of the legal and justice systems around the world, they must make the politics and processes within the legal and justice system the central category of analysis. Blomley (2000) suggests that legal geographers have become interested in developing a theoretically informed legal geography. Legal geographers tend to emphasise themes such as the necessity of the location as the setting/context for interaction between law and power, the significance of place, power relations binding society, individuals in place creating particular practices. Yet, this study will suggest that geographers ask new questions that liberate geographic analysis from a place, and lift the processes of constructing legal

structures away from a specific location to *see* the global legal structure in order to understand spatial relationships of an idea being passed from one space to another.

This study also suggests that the *order* in the legal order is created based on assumption about *how* the sovereign-state will interact with the legal and justice system. This assumption is produced and reproduced by different institutions; organisations and individuals believe that the judiciary can act independently from the political system, in the interest of citizens rather than the state (Russell 2001a). This point is discussed in subsequent chapters.

Moreover, for geographers to appreciate the threat of the NIE/LDM logic, they will need to liberate geographic analysis from a place so that geographers can see how transnational legal activists and international lending agencies alter the political space of the legal order and re-envision social justice, legal and human rights issues. The political structure of the law is not location specific. It is connected to the global legal order, which operates under a different set of power relations. By *legal order*, it is meant the multiscalar legal order, a global social construct produced and reproduced by legal institutions and global social movements of lawyers, human rights advocates, economic development lawyers, police, legal aid programs, investigators, public defendants, bar associations, law schools, legal theorists, judges and many others. The structure of the legal order has been developed through time and space through organisations and institutions creating international law, legal mechanisms and altering domestic/international law around the world (Chesterman 1998, Donnelly 1998, Dillon 1998, Odinkalu 1998).

This review identifies a gap in the geographic literature. This review has made the following points. One, it has suggested that the postdevelopment methodology is appropriate for this study. Two, this study has expressed several reservations with the legal/human rights/social justice and postdevelopment literature because this literature does not appear to engage with the key question – how does the NIE/LDM affect local legal cultures? Because the leading legal/human rights/social justice and

postdevelopment geographers have not pulled the NIE/LDM logic to the forefront of their discussions, the power relations connected to the economic theory are not made apparent. Another reservation is that the legal/human rights/social justice and post development geographers have not made politics and processes within the legal and justice system the central category of analysis. At the same time, this study will suggest that following the proposed line of inquiry may resonate with other scholars seeking to explain how a government's use of the law materializes in a landscape of anarchy, violence and lawlessness.

1.5 Who is discussing the Postcold War Legal Order?

Many scholars are discussing the post cold war legal world order. Legal literature, which acknowledges the chronological development of domestic/international law around the world, provides a review of the institutions and institutions' development of international law and legal mechanisms to change local norms (Chesterman 1998, Donnelly 1998, Dillon 1998, Odinkalu 1998). For example, Palley (1966), Okafor (2000), Mutua (2001), Chinkin and Charlesworth (2000) and others offer the history of international law, suggesting that nation-states, organisations and institutions have constructed international law to create a technical ability to include or exclude individuals, communities and countries on the basis of geography, race, gender, covert and overt violence, class and religious beliefs, etc.

This section offers a preliminary literature review to suggest the difficulties in bridging geographic literature with the legal literature. This section will focus on answering three questions:

- Are scholars discussing, analysing and theorising the post cold war legal world order?
- What space do geographic studies occupy in the analysis that examines institutions and organisations who have adopted the NIE logic in the postcold war era
- If we bridge geographic analytical tools with the contemporary literature, what new spatial processes will be revealed?

The economic legal literature suggests that there has been a global shift in thinking about the relationship of law and economics, which in turn has altered legal interpretations, laws and the legal, and justice system around the world. This shift in thinking is evident in international lending institutions, institutions (multilateral development banks, international and regional organisations of nation-states, NGOs, academic, research and educational institutions, and research organisations). Many institutions and organisations have interpreted the New Institutional Economic (NIE) theory as a way to operationalise the logic that constructs policies and programs designed to strength legal institutions. The purpose of strengthening legal institutions is to create economic development in countries around the world (Keefer and Knack 1997, Tshuma 1999, WB-WD-2002, Chhibber 1998, Harrison 1999). These ideas have been practiced in countries around the world: Eastern Europe, Asia, Latin America, the Middle East and Africa (Clement and Murrell 2001, Hendley 2001, 1997, 1992, Mathews 1986, Tate 1997, Murrell 2001, Katouzian 1998, Doe 1997).

The critical legal institutional development literature traces the shift in economic theory, which has been translated to legal institution development policies, and practices, which seek to *modernise* post-socialist, and developing countries. By critical legal institution development literature, it is meant the literature that is critical of the assumption that the United States' legal model of a modern legal framework can be spatially transferred to different geographic regions and will *modernise* a location (Rose 1998). The most well known example is the World Bank's Law and Development Movement (LDM). The law and development movement is a new development initiative based on a narrow interpretation of the New Institutional Economics (NIE) that focuses on weak institutions, such as the paternalistic and corrupt state, as the root cause of underdevelopment (Keefer and Knack 1997, Chhibber 1998, WB-WD 2002). Through the studies offered by scholars at the Institute for Legal Studies at the University of Wisconsin-Madison Law School - such as Trubek (1972, 2000) - the negative impact of the NIE/LDM logic is beginning to be acknowledged. In the post cold war many countries are undergoing a process of transition toward a market economy. Alongside the increasingly globalisation of the world economy, many nation-states try to facilitate this process by adopting

western legal mechanisms to change domestic economic activities thereby attract foreign trade and investment. The assumption being extended through time and space is based on the belief that the United States legal model of a modern legal framework can be used to modernise *Other* geographic regions. In short, the critical institution development literature argues that this vision, which is based on the notion that this interventionalist method will *modernise* a location, is theoretically and methodologically ethnocentric, elitist and imperialist (Rose 1998).

Another group of scholars who are discussing and theorising the postcold war legal order is found in the state transformation/democracy/human rights literature. This literature is being led by Sikkink and collaborators who have attempted to answer the question *how does international law work?* The Transnational Advocacy Networks (TAN) framework is based on an analysis of how nongovernmental organisations draw the power of the global legal framework of legal institutions (see Keck and Sikkink 1998a, 1998b, Risse and Sikkink 1999, Sikkink 1999, 2002). Political scientists use the TAN framework to theorize shifts and changes in human rights norms acceptance by sovereign-states (see Risse et al 1999). It has gained increasing popularity. To summarise, this brief review suggests that many scholars are discussing the postcold war legal world order.

In continuation of the preliminary literature review, the answer to the question - *What space do geographic studies occupy in the analysis that examines institutions and organisations that have adopted the NIE logic in the postcold war era?* – is less positive. Theoretically, spatial analysis does not feature in the contemporary legal institution development literature (see Murrell 2001, Hendley 1997, 2001, Hendley et al 2001, Weaver forthcoming, Trubek forthcoming), nor does the law and development movement surface in the post-development geographic literature or contemporary studies of legal geography (see Potter et al 1999, Bebbington 2000, Watts 2000a, 2000b, Blomley et al 2001, Herbert 2002). For example, although judicial independence is a key component of the NIE/LDM agenda, geographic research on judicial independence is essentially non-existent and geographic literature on judges is extremely sparse (Delaney 1998, Blomley 1994, Blomley per com 2001, Clark 2001).

Based on this review, this study appears to be the first to bridge geographic thought with the critical legal institution development literature. At the same time, this study argues to exaggerate the boundaries of the discipline does little to serve a geographic study. This study will argue that geographers are well positioned to contribute to the current debate. For instance, geographers' interest in social theory, sensitive methodologies, processes of globalisation, positions them well in the contemporary debate. Analytical tools such as geographic scale, as previously suggested, can provide for a geographic analysis of the sorts of conflict which surface when different international and local stakeholders struggle over the interpretation of specific laws, the legal system and specific laws. To clarify, the brevity of the geographic literature review in this study is not because I think this literature is unimportant. Rather the opposite is true. This literature has stimulated these lines of thinking. And the analysis of the political geographers such as Dalby (1990, 1993, 2000) and Flint (1999) legal geographers such as Blomley (2000) and Delaney (1998), development geographers such as Watts (2000a, 2000b) and feminist geographers such as Monk (1996) complements this study. All have had a deep and profound effect on the way that I think about geographic issues. At the same time, this study suggests the need to integrate ideas from international law, political science, economic theory and cultural studies is important to the future of geographic inquiry into legal order and legal spaces. This dissertation is an exploratory attempt to bridge these disciplines. It is a beginning point to unravel some of the struggles created in the wake of two global legal institution strengthening initiatives – the human rights and the capitalist – that are constructing a new legal order, based on different visions of a better world.

Moreover, this study will critique the legal literature, the critical legal institutional development and the state transformation/democracy/human rights literature for failing to problematise socio-spatial processes such as the territorial patterns of legal ideas. The significance of this critique is that it offers an important springboard for this study to develop a geographic interpretation of the legal order and the space of judicial independence. This study will suggest that there has been a global shift in thinking about the relationship of law and economics. Many have interpreted the NIE logic by

recognising the importance of institutions and law. Legal development initiatives have been adopted by development agencies in response to the notion that *law=economic development/progress/modernisation*. More specifically, macroeconomic structures such as the World Bank fund NGOs such as Transparency International to eliminate corruption, bribery and black-market economics. Such visions hold the power to permanently change local politico-legal economic reality, as the case study will suggest. Moreover, when these ideas are applied as development policies and practices, these ideas agitate the already complex politics of law and economics in a place. In short, the NIE/LDM discourses are altering local politico-legal structures, leaving in its wake conflict, confusion and chaos.

1.5.1 Current Analytical Frameworks

The critical legal institution development literature closely examines how international lending agencies produce and re-produce these ideas, which are materialised in specific development policies and programs. This literature is sharply critical of international lending institutions' (such as the World Bank) interventionist interpretation of the local legal and justice system. Only the critical legal institutional development literature, led by Trubek (1972, 2000) connects a paradigm shift in economic theory to the popular idea that strong legal institutions equate with economic development. In sum, the critical legal institutional development literature holds the key to understanding how the NIE/LDM ideas of good governance, anticorruption, and strengthen-democratic-institutions (NGOs, the media and the judiciary) information management and private property rights flow through organisations and institutions. This literature is producing evidence that these ideas are penetrating locations around the world. Most importantly, as Tshuma (1999) argues, these ideas hold the power to produce and reproduce the capitalist system rather than empower local notions of justice.

Nonetheless, the critical legal development literature fails to problematise: 1) spatial processes or 2) provide a critical analysis of the tensions, conflict and chaos created as this ideas flow through the landscape and materialise as changes that affect local women's, men's and children's politico-legal reality. In short, the analysis lacks a sense

of the complex geographies created as institutions and organisations cite NIE/LDM ideas of good governance, anticorruption, and strengthen-democratic-institutions (NGOs, the media and the judiciary) information management and private property rights. This is but one critical silence in the literature, which has created several difficulties for this study, which seeks to understand how ideas flow through organisations and institutions to produce and reproduce a new legal order. This literature review also reveals that geographic studies do not surface in the analysis that examines institutions and organisations that have adopted the NIE logic the postcold war era. This is a second difficulty.

Some analysts have attempted to portray the spatial relations of activists' institutions and organisations, the state and civil society. For instance, the TAN analytical framework reads spatial local-global relationships of legal discourse, legal activism and legal processes in an innovative manner. At the same time, this study has some reservations about the state transformation/human rights/democratisation literature's ability to illuminate the processes and politics within global-local spatial relationships of legal institutions, legal activists and legal discourse. Other critics, such Meili (2001), argue that the TAN framework has the tendency to essentialise political structures rather than represent politico-legal structures as negotiations negotiated within specific contexts. He argues that international human rights norms drawn into the administration in the day-to-day practices of the state create struggles at the global and local level.

In addition, this study offers its own critique of the TAN framework for failing to problematise socio-spatial processes of individuals and intragroup negotiations over what constitutes human rights norms in a location. As suggested by the introduction of this chapter, this study works with primary evidence: interviews, Zimbabwean and South African newspapers and NGO reports which focus on the role of lawyers and judges advancing different notions of justice through the legal system. This primary evidence provokes a series of questions that cannot be answered by the TAN framework. These questions include:

- What is the legal landscape that NGOs navigate within, particularly if local governments resent international and local NGOs' investigation of alleged human rights, but may be forced to allow NGOs to remain because of signed international treaties?
- Do legal words and ideas - which flow in, through, and alongside, the normative architecture of humanitarian international law - change local and national attitudes and behaviour around the legal system and do these encourage men and women and children to change their thinking about the local legal system?
- How are new legal theories used to interpret the current legal text and to change the current administration of law?
- How does a Supreme Court judge wrestle with the day-to-day reality that the elected government in power is probably not supportive of rulings, yet will risk the anger of the government to advance an idea of justice?
- What are the political implications of the *World Development Report 2002: Building Institutions for Markets* using the argument that strengthening legal institutions will bring economic development to developing countries?
- Why are international organisations such as the Commonwealth, Transparency International, the Organisation of African Unity, the World Bank using economic rule of law discourses, a language which tends to connect the integrity of the legal system to the financial system of the nation-state, with a focus on flaws within the political legal system rather than within the global politico-legal economy?

Taken together, these critiques and unanswered questions point to a problem of generalisation in the TAN framework. This framework does not include a multiscale analysis of a wide variety of institutions and organisations changing the processes of inclusion and exclusion. Nor does it suggest the complex territorial patterns created by the legal and justice system, NGOs, civil society and the Head of State as a wide variety of institutions and organisations try to gain more legal power over the state. The TAN framework suggests that human rights law differs from international law insofar as the origin of politics lies with the individual, not the state. Moreover, it provides a sense of the spatialisations created as different stakeholders' struggle over the legal order. This framework makes clear that local and global connections matter because human rights law and power-relations connect local organisations with global institutions and organisations to challenge the nation-state.

While establishing these reservations, this study does not mean to reject the TAN framework, but rather problematise its tendency to construct a vision of political structures being produced and reproduced as local level activities break down national

and international boundaries. Although the TAN framework suggests that politico-legal power can be drawn from the local up through and into the international sphere to direct diplomatic power onto a nation state, effectively eroding sovereign-state territoriality over its citizens, the TAN framework neglects to *explicitly* articulate the fluid movement of politico-legal power. This point is only implied. The TAN framework also neglects to highlight international postcold war changes in the legal order. Tolley's (1994) brief, but insightful comment that the United Nations accepted the Basic Principles on the Independence of the Judiciary (1986) and the Basic Principles on the Role of the Lawyers (1990) suggests that lawyers and judges have become more territorial about protecting this political space. Based on the rise of human rights NGOs, as articulated in the TAN framework, these territorial tendencies have been creating a new world order and creating major changes in legal and justice systems around the world.

A third difficulty in developing a critical geographical understanding of how ideas circulate in and through a multitude of organisations and institutions to create a new legal order is that this is the first geographic study to do so. *The geographic literature has not made judicial independence or the legal order an analytical category.* Nor have geographers evaluated how an economic and political crisis in an African country is closely connected to institutions and organisations advocating for judicial independence and/or an *ideal* legal order (see Okafor 2000). Nor has the geographic literature provided an analysis of NGO reports written during the Zimbabwean political crisis between 1997-2002. In sum, somewhat critical of the analytical framework developed by Sikkink and others (see Risse and Sikkink 1999), this dissertation moves laterally over to the critical legal institutional literature and the post development/poststructuralist/post colonial literature to support the argument that there needs to be more careful, comparative and in-depth studies of the impact the NIE/LDM ideas have had upon post soviet and developing countries.

To conclude this section, this section has expressed a number of reservations in the current literature, which is theorising the processes and politics creating the postcold war legal order. Although the state transformation/human rights/democracy literature and the

critical legal development literature provide a useful analysis of the political structures creating the legal order (which the economic law does not!), geographic studies tend to not surface in this literature. This means that this study must interpret the Zimbabwe-Commonwealth-World Bank case study without a template. This is the first reservation, which is closely connected to the second. This study will put the NIE logic at the forefront of the analysis, yet much of the contemporary literature problematises socio-spatial relationships. Against this backdrop, this study will have to develop an analytical framework based on these two literatures.

1.5.2 Preliminary Literature Review Establishes Three Points

This preliminary literature review establishes three important points. Scholars at the Institute for Legal Studies at the University of Wisconsin-Madison Law School are leading the discussion, which acknowledges that the NIE/LDM logic is a threat to local societies.

In addition, geographers are poised to contribute to the debate. This study firmly believes that geographic analytical tools may reveal a number of silences and assumptions about how the NIE/LDM reproduces global inequalities and sustains global capitalism. The similarities between the literatures can be better understood against the broadcloth of social sciences engagement with philosophical and political questions. This engagement has led them through a wide range of social theory in the past forty years - from Marxist, existentialism, structuralism, structurationist, postcolonial and poststructuralist philosophies. Many scholars incorporate more sensitive analysis of changing legal cultures, to highlight that feminist and postcolonial approaches are useful for the purpose of writing more inclusive analyses of the differences between genders, races, classes, etc. (McEwan 1998, 2000, Rose 1998, Charlesworth and Chinkin 2000). The key point is that geographers continue to engage critical social theory with empirical questions and develop more complex conceptualisations of interactions within and through society and structures (Peet 1996).

Finally, the plethora of legal discourse circulating within telecommunication networks and readily found in Northern American newspapers and magazines needs to be taken very seriously. Popular culture is producing and producing the NIE/LDM anticorruption and good governance discourses and the vision of an ideal world constructed by international lending institutions such as the World Bank. This study will suggest that these discourses are particularly threatening to the civil rights movement in developing countries and countries with their economies in transition. Moreover, much empirical evidence has been presented by various scholars that this new legal world order has the tendency to exclude the most vulnerable, weak, poor, hungry, politically disenfranchised in African, Middle Eastern, European, Asian and Latin America countries. In addition, different studies show that human rights activists' advocating for legal and economic justice are being funded under the rubric of NIE/LDM good governance, anticorruption, and strengthen-democratic-institutions (NGOs, the media and the judiciary) information management and private property rights development initiatives (Hendley 2001, Mathews 1986, Tate 1997, Murrell 2001, Katouzian 1998, Doe 1997). In short, the human rights agenda has become entwined with the capitalist system (Sarat and Scheingold 2001b). All of this provides evidence that these ideas are quickly creating a new legal world order, a legal world order often dominated by a specific worldview, an economic rule of law view, a view that focuses on technical procedures and practices rather than social justice.

To conclude, this literature review has established several points: who is analysing the threat of NIE logic; geographers are poised to contribute to the debate; and legal discourses circulating around the globe must be taken very seriously. Based on this literature review, this dissertation makes its case. This dissertation will argue that social scientists, in particular geographers, should critically explore how legal ideas, transnational legal activism and the rapidly changing political presence of local legal and justice system are creating new patterns of inclusion and exclusion at different geographic scales. This dissertation will argue that the Zimbabwean political and economic crisis can be interpreted as a case study in which civil society, NGOs, the

judiciary, the media and sovereign-state are responding to the externally driven legal legal-institution-strengthening initiatives and transnational legal activists.

1.5.3 Three Areas of Investigation

Based on this literature review, this study argues that three areas of investigation are urgently needed. First, an examination of new empirical evidence that suggests changes to local legal structures around the world. The plethora of legal discourse circulating in popular culture must be conceptualised as a threat to those most marginalized by legal systems. For instance, the NIE/LDM discourses of *good governance, anticorruption, and strengthen-democratic-institutions (NGOs, the media and the judiciary) information management and private property rights* flow through organisations and institutions. These phrases are driving externally driven ideas that advance a narrow worldview, an economic rule of law view. The economic rule of law view is a view that has politico-legal agenda to bind the state with the law for economic development. As the increased use of legal discourses can politicise the legal and justice system, and activism within the legal and justice system may be seen as threatening to sovereign state power. Moreover, these ideas hold the power to produce and reproduce the capitalist system rather than empower local notions of justice; such processes and politics need to be identified, analysed and theorised. We need critical theoretical understandings of *how* legal discourses constructed and disseminated by transnational legal activists and international lending institutions force a sovereign-state to respond.

Second, we need more analytical frameworks - that incorporate sensitive methodological tools such as gender sensitive analysis – to evaluate the political implications of such responses. Sikkink and others have provided a geographic framework – the Transnational Advocacy Network (TAN) Framework - with which to visualise the spatialities of the NGOs advocating for legal and economic reform and how this advocacy works in practice. This is a useful starting place. The TAN Framework illustrates changing local values in and among gendered communities, nation states protecting sovereign-state interests and global legal activism as a territorial presence.

Third, these conceptual tools need to be grounded in case studies. The NIE/LDM logic has added economic theoretical legitimacy to these grassroots efforts, and supported international lending institutions and international organisations of nation-states support of NGOs as geopolitical players (Cameron 2000). In light of this global shift in thinking about the role of NGOs, this dissertation will ask what are the political implications of NGOs advocating for economic and legal reform. This is an innovative and fresh interpretation of Zimbabwean current events. This is the first study that attempts to connect questions about judicial independence, the politics of lawmaking and the role of NGOs with global systems of oppression, inequality and empowerment. It is the first study to suggest that legal discourse is a development discourse, which has the power to change legal structures through time and space.

Although exploratory, this research could be initiating a fascinating area of investigation. A new area of geographic research has been identified: judicial intervention. By this it is meant that the legal community and the United Nations' Special Rapporteur on the Independence of the Judiciary and Lawyers can intervene in the affairs of the state on behalf of political reconstruction, peace and justice. This research will raise the important question of how the international community is intervening in the affairs of a sovereign-state. This has become an important question connected to the postcold war conflict and postconflict situations. This line of questioning is going deeper than whether or not the international community should intervene with military force: "military intervention is only the first stage in a process designed to resolve deep rooted conflict" (Olonisakin 2000: 41). The deeper line of questioning uses the broad definition of intervention. It begins with the acknowledgment that when a sovereign-states signs the United Nations Charter, the state becomes politically open to the surveillance of democratic institutions such as NGOs who report on legal matters. This information goes to many interest groups, including the United Nations' Special Rapporteur on the Independence of the Judiciary and Lawyers. Thus, the United Nations' Special Rapporteur on the Independence of the Judiciary and Lawyers plays a key symbolic role in the day-to-day surveillance of local peacekeeping and justice institutions to ensure political reconstruction, especially in postconflict situations. Moreover, NGOs advocacy,

information collection and dissemination have become an established method to reinforce the democratic political process, including the interpretation of justice being administered by the courts (Tolley 1994, Olonisakin 2000).

This line of investigation, and interpretation of the Zimbabwean crisis, will be of significance to human geography for three reasons. First, this is the first study to explore the process by which transnational legal activists agitate to take power away from the state, which is then transferred to the global capitalist system. More importantly, this is the first study to suggest that social movements seeking to create peace and justice are now having their political strategies used by the global capitalist system. Second, it reveals that the sovereign-state is vulnerable to the international community through the legal and justice system. Third, it suggests that the political structure of the legal and justice system is influenced by the global political economy as much as national political and economic events.

1.6 Purpose of this Study

Because the Commonwealth - World Bank (1997-2002) conversations appear to set the political context of the Commonwealth Committee advocating human rights, development and rule of law (legal and economic reform), and then imposing economic and political sanctions upon Zimbabwe, this dissertation will argue that there is an urgent need to reconceptualise the threat of the NIE/LDM logic in a manner that acknowledges that NIE/LDM ideas are circulating in and through local and transnational legal activists, international organisations of nation-states and international lending agencies who use this discourse to attack the sovereign state, thereby creating more space for the NIE/LDM logic which seeks to reposition the legal and justice system against the state for the purpose of creating economic development (CS-04/03/02-PI, CS-04/06/99-PI, CS-28/04/99-PI, CS-09/06/99-PI, CS-19/03/02-PI).

Grounded in the Zimbabwe-Commonwealth-World Bank case study, this dissertation has three objectives. The first is to examine the political structures of the legal and justice system. The intention is to identify several characteristics of the legal and justice system

that make it distinct from the sovereign-state and explain why this political structure has strengthened in the post cold war era. The second objective is to identify how transnational legal activists take legal power away from the State. The significance of this line of inquiry is to understand how transnational legal activists have become increasingly important in global governance. The third objective is to explore what the Zimbabwe case study can tell us about the unexpected consequences of the NIE/LDM legal institution strengthening development initiatives. Based on the Head of State's response to transnational legal activists (judges, lawyers, NGOs and the media) and the international community advocating for legal and economic reform in Zimbabwe, this study will seek evidence that suggests that transnational legal activists advancing NIE/LDM logic has had a tremendous impact on local legal and justice system, and that the practices, tactics, strategies and even the theoretical underpinnings of international development have changed in the postcold war period.

To this end, this study will:

- 1 Establish the spatial and political presence of the legal and justice system (its geographic structure, practices, politics and processes).
- 2 Describe the characteristics of the capitalist and human rights legal-institution-strengthening initiatives and highlight the possible dangers these two global legal legal-institution-strengthening initiatives may pose to local societies.
- 3 Analyse new NGO reports and further analyse existing data sets from my longitudinal study of informal food distribution networks in Zimbabwe (1994-1998) to trace changes in Zimbabwean legal culture alongside the World Bank-Commonwealth conversations to establish the impact of the NIE/LDM justice/rule of law view on the Zimbabwean legal culture and local legal activists' agendas as international donors and lending agencies have shifted their thinking about development and embraced the NIE/LDM logic.
- 4 Identify how power relations in and through the legal and justice system have shifted in response to shifting relationships in and among civil society, and democratic-institutions/transnational legal activists (judges, lawyers, NGOs and the media) and a Head of State.

- 5 Provide a future research agenda for social scientists to document and analyse the complex processes of inclusion, which create more space for grassroots to articulate their visions of social justice, as well as the processes of exclusion based on the connection of the local justice system to the global capitalist system rather than to civil rights activists.

1.7 Possible Ways to Evaluate the Threat of the NIE/LDM Logic

The purpose of this section is not to review this now substantial debate over economists' use of law and legal institutions to create economic development. The debate has been developed in different stages since the 1970s. Even in the 2000s, this debate has tended to reflect the intellectual influence of Trubek's analysis, much inspired by dependency theory. Rather, this dissertation will explore two areas to which Trubek (2000) has suggested that future scholarship should be directed and to which geographic research engaged with critical social theory and the postdevelopment literature has much to offer. The first concerns his reference to incorporating more sensitive analytical frameworks into the current analysis. Trubek (2000) has suggested present and future researchers refer to Sikkink's Transnational Advocacy Network (TAN) analytical framework with the caution that the human rights agenda is woven within the capitalist agenda. The TAN framework highlights that there are complex spatial relations in the process of humanitarian intervention with multiple connections at different geographic scales. Moreover - unlike much of the literature outlining forms of international intervention - the TAN framework does not make the state, civil society and international community discrete spatial units (see Olonisakin 2000). The TAN framework is useful to illustrate the spatial diffusion of an idea and international intervention in the internal affairs of a nation-state. Yet, the difference between Trubek's (2000) critique of the human rights movements reproducing the capitalist system and his suggestion that new scholars refer to the TAN is the first of many contradictions with the theory and practice of critical legal development literature. Scheingold and Sarat (2001a), the leading scholars of the legal activists literature, have used the TAN framework to demonstrate some of the tensions between the two global legal initiatives suggestive that Trubek's suggestion is being operationalised in contemporary theoretical and empirical studies.

The argument being made is that Trubek's (1972, 2000) work tends to reflect a somewhat narrow understanding of the possibilities of sensitive theory, a point also made by Weaver (2000). She suggests that the postdevelopment literature has several analytical tools to offer the critical legal institution development literature. While Weaver (2000) reviews the postdevelopment literature, leading her critique of the NIE/LDM with these analytical tools, she fails to operationalise it from a spatial perspective. The aspatial analysis in some of the leading voices in the critical legal development literature scholars' work is significant because this silence is being reproduced in other scholars work (see Hendley 1997, 2001).

The second suggestion refers to the need to understand how local societies respond to international lending agencies' advancing of the LDM. Various approaches to this question indicate that street crime, corruption, civil violence, institutional failure, violations of human rights, changing social norms are some of the challenges facing segments of local societies undergoing "transition trauma" (Carothers 1998, also see Widner 2001, Rose 1998). Yet few acknowledge that multiscalar analysis is the key to making these linkages.

As will be argued in this chapter and the next, this conceptual limitation is because intersection between law and space is not being taken seriously. This is in spite of the many references to the Euro-American nation-states funding human rights projects in Latin America, Asia, Eastern Europe, African and the North's economic domination of the South (Carothers 1998). However, sensitivity to different interpretations of law, space and power as a fluid essence offers a way to think through the dependency theory argument threaded through much of this literature. Moreover, the work of Trubek and others contains a sense of the spatial relationships of the North/South, legal institutions/state, political structures/social norms and many others. Yet, the influence of the legal literature is evident in much of their analysis. Legal literature, as Blomley (2001) rightly argues, is distrustful of geographic analysis. Because spatial analysis is

often not operationalised in the legal literature or the critical legal institution development literature, this conceptual limitation must be acknowledged as well.

Developing a geographic interpretation of the Law and Development Movement has been a process of recognising that each discipline tends to approach a theme in a different manner. The broad themes being discussed in the critical legal institution literature are human rights, development economics and the impact of globalisation upon legal cultures. This dissertation has reviewed many of these themes in a wide array of literatures. A brief scan of the general bibliography will attest to the wide array of literatures that have been engaged with. Generally speaking, in this review, ten gaps in the literature have been identified.

1. Post development theorists do not engage with the critical legal institutional literature (Nederveen Pieterse 2000, Watts 2000b, also see McIlwaine 1998, 1999).
2. Post development theorists generally are not critical of the human rights literature (Watts 2000b).
3. Very little, if any, of the human rights literature engages with geographic analytical tools (Eide 1995a, 1995b, Donnelly 1998).
4. Very few human rights scholars acknowledge that a shift in economic theory has changed the global funding pattern for human rights NGOs (Kerr 1993, Risse et al 1999, Chandler 2001, Kent 2001)
5. Very few development economic theorists discuss the nebulous question of social justice when they suggest strengthening legal institution for economic development (Keefer and Knack 1997, Bates 1995).
6. Political science and international relations scholars who focus on human rights issues do not use geographic analytical tools (Falk 2000, Sikkink 1999)
7. Geographic analytical tools are not apparent in the critical legal development literature (Weaver 2000, Hendley 1997, 2001).
8. Geographers have a tendency to avoid analysing the history, politics, economics, cultures and philosophy of legal and justice systems (Delaney 1998, Blomley 1994, 2001).

9. Geographers do not examine the activism within the legal community (Scheingold 1994).
10. Geographers who tend to discuss economics and economic theory generally do not engage with questions of law and space (Thrift 1998).

These gaps in the literature reveal the borders and boundaries of many disciplines. Yet, one thread that is significant is that *geographic analytical tools are not apparent in the critical legal development literature*. This dissertation will approach the geographic presence of the LDM from a postdevelopment/postcolonial/poststructuralist point of view. The conceptual framework developed for this dissertation will focus on the themes law, space, economics and society.

The beginning spatial scale begins with individual women and men in local communities affected by the NIE/LDM, as subsequently discussed. Amai Tsitsi's ability to speak and to break the silence suggests that there are many contradictions of the NIE/LDM. The analysis ranges from urban locations to a sovereign-state reacting to a legal community within an international organisation of nation-states admonishing a state. Central to the analysis presented in this dissertation is the argument that geographers have neglected the category and spatial presence of transnational legal activists. The sorts of complex patterns of law and space their activism creates suggest an interesting research topic for future geographic investigation.

Focusing on transnational legal activists as an analytical category offers an important contribution to the geographic literature in a broader manner. Transnational legal activists allow geographers the possibility to contribute to the debate and will encourage other researchers, alarmed by the NIE/LDM reasoning, to appreciate the necessity of strengthening the analysis of local-national-international linkages. Transnational legal activists (including *democratic-institutions* (NGOs, the media, lawyers and the judiciary)) is a category which mediates between international funding agencies, international organisations of nations-states, civil society, and the state. While much of the social movement neglects to mention this category of activities, these activists can help us understand the spatial presence of the NIE/LDM logic. In the following section, three

possible ways to evaluate the linkages between NIE/LDM development theory and political action creating new political spaces will be discussed. Following this evaluation, a brief justification of why this dissertation will use information from transnational legal activists, specifically NGOs who report on the legal culture, legislation etc. will be offered. The discussion on the methodological considerations for the texts which will be examined will be conceptualised in geographic thought, because a further aim is to examine how the deconstruction of transnational legal activists' reports – reading for the presence of the NIE/LDM logic in the absence of more complex forms of conceptualisation – reconstructs a new geography of transnational legal activism that suggests a territorial presence of the NIE/LDM logic at local, national and global scales.

1.7.1 Spatial Diffusion of NIE/LDM Development Initiatives

The first possible way to evaluate how the NIE/LDM logic affects the political economy of a nation-state is to examine the linkages between this development theory, political action and the way that new political spaces are being imagined and constructed. Several difficulties arise in trying to use this approach. One, there is very little published conceptual literature. Trubek (2000), for instance, offers the vision that the NIE/LDM logic is moving through legal cultures, legal systems and institutions around the world, produced and reproduced by different organisations and institutions, shifting and changing the balance of power between the legal and justice system and the sovereign-state. Trubek's (2000) conceptual endeavour suggests that the NIE/LDM logic grants more power to the legal order and takes away the state's legal power. A further aim of Trubek (2000) is to consider the political implications of international lending institutions imposing these ideas upon postsoviet, developing, and postcolonial countries. He contends that international lending agencies advance the NIE/LDM idea to create international legal uniformity to take advantage of economics across the globe. He also asserts that the human rights project and the capitalist project intersect and entwine with one another. Trubek (2000) emphasises three key themes: a) the circulation of ideas; b) legal and justice systems are an important political presence in international relations and c) spatial relationships are also changing as the legal order (a multi-institutional and multiscalar space) interacts with local places to take power away from the state. Trubek's

(2000) argument leads to the troublesome question - *Who* is being served by the spatial transference of legal knowledge, legal ideas and legal activists' agendas; and how can we conceptualise these local-global processes through a geographic lens?

Conceptually, this critical question is the entry point with which to interrogate explanations offered by different scholars who are documenting how legal ideas and legal discourses are creating social, politico-legal and economic changes in local societies and legal and justice systems. Yet, despite this literature, which offers many details about local societies, institutions and organisations responding to changes in the global legal order, few scholars critically examine or conceptualise North-South relations. The general conclusion being made is that Trubek's (2000) probing questions are not the norm of this literature. For instance, Appendix One offers a summation of the key ideas of the critical legal development literature: the impetus, theoretical underpinnings, critiques, social visions, methodology, program concerns, sources of funding and academic interests (see Appendix 1 - Table 1.1). This summation compares and contrasts the 1960s/1970s' and 1990s/2000s' law and development initiatives. The more recent literature acknowledges that there is need for critical social theory and sensitive methodologies to make the 1990/2000s' LDM a somewhat successful development initiative. Although the critical legal development literature acknowledges that technological advances are changing the way that this development initiative is being materialised, this literature does not acknowledge the need for spatial analysis (Bates 1995, Hendley 1997, Rose 1998, Weaver 2000, forthcoming; Trubek 2000, Widner 2001, Z-Insider 31/07/01-O). Other critical silences in this literature are as follows. First, research on the threat of the NIE logic tends to focus on location specific development initiatives put in place by international lending agencies. Second, much of the critical legal development literature is not familiar with the poststructuralist/postdevelopment/postcolonial literature that defines development as an idea constructed by lending institutions and closely examines the political implications of this idea on local communities (see Potter et al 1999). This tends to create a critical silence on the way that legal discourses are being diffused through time and space

(Keefer and Knack 1997, Feldstein 1999, Chhibber 1998, Harrison 1999, Webb 1999, Cameron 2000, WB-WD-2002).

Empirically, there has been a concentration of scholarly studies completed on the impact of the NIE/LDM development initiatives situated in postsoviet and Latin American countries, and less so in African countries. As will be suggested in subsequent chapters, the global legal order has substantially changed in the postcold war era, and is undergoing even more changes as the NIE/LDM logic gains momentum. Transnational legal activists rely on having legal ideas diffuse through space and time. Moreover, these ideas about justice have the power to mobilise a social movement to change international and domestic laws, such as initiate an anti-death penalty movement in the United States of America (see Sarat 2001). However, because the concentration of previous studies tends to neglect African countries' experience with the NIE/LDM, (Widner 2001), to establish a scholarly critique is difficult because of lack of empirical evidence and published literature. Thus, it is difficult to establish that *the idea* of NIE/LDM flows through abstract space (Hendley 2001, 1997, Weaver 2000, Chhibber 1998). More specifically, this study is faced with a difficulty of trying to conceptualise the vision that *the idea* of NIE/LDM affects and alters the politics and processes inside and outside the legal and justice system and how these ideas are being adopted, challenged and changed by institutions and organisations, particularly as Widner (2001) is one of the few scholars who provides a sense of how African local societies and legal and justice systems respond to these ideas. She details how different stakeholders create a process of politico-legal, economic and social change and participate in the institutionalisation of courts and public knowledge of the law and legal system in the African context.

Given that the critical legal institution development literature has difficulty working with multiple geographic scales, incorporating the poststructuralist/postdevelopment/postcolonial literature (see Potter et al 1999), acknowledging the spatial diffusion of an idea, and articulating how some African communities react to this development initiative and development discourse, this dissertation will put forward its own conceptualisation to suggest the spatialisations and

geographies created as legal cultures undergoes a process of social change. This dissertation will develop the abstraction – *trajectories of legal activism* – in order to conceptualise both the logic and the history of how an idea can affect specific locations. This abstraction will allow for an understanding of the wider politico-legal economic connections of the legal and justice system to the international community. At the same time, this dissertation will provide for a vision that suggest that the legal and justice system is somewhat disconnected from the state. In doing so, this dissertation may be able to provide some evidence of the World Bank/Commonwealth NIE/LDM driven legal-institution-strengthening initiative using the momentum of the civil rights movement, the struggle between the Head of State and the legal and justice system and the synergy of the state transformation/human rights/democracy legal-institution-strengthening initiatives to justify a World Bank good governance development initiative in the post conflict era.

1.7.2 NIE/LDM As a Political Space - Urging the State to Cede Some Sovereignty (?)

The second possible way to evaluate the threat of the NIE/LDM logic to local societies is to evaluate its presence as a form of international intervention reaching into the internal affairs of a nation-state. From its inception, the NIE/LDM has an overarching agenda to *fix* the institutions of postsoviet, postcolonial or developing countries, especially legal institutions and economic law (Carothers 1998). To focus on NIE/LDM as a form of intervention would be supported by the critical legal institution development literature, which suggests (rather than explicitly makes the point) that the movement in the law and development movement is a spatial process. For example, this literature acknowledges that the North bridges the South with a political economy of legal development initiatives in order to re-position the legal and justice system to protect capitalist initiatives. In addition, the state transformation/democracy/human rights literature acknowledges that the overarching agenda of the human rights movement is to institutionalise civil rights in the nation. Both literatures acknowledge that these movements have one purpose: to take legal power away from the state. Moreover, both literatures acknowledge that externally driven legal-institution-strengthening initiatives seek to agitate within the space of judicial independence to take legal power away from the state, or in the words of

international relations specialists - the purpose of human rights laws, institutions and organisations is to encourage a state to “cede some sovereignty to international organizations charged with enforcement [and compliance of international law]” (Braden and Shelley 2000: 126). Both sets of literature suggest that the legal and justice system is working with different legal activists (such as economic development lawyers or civil rights lawyer) to institutionalise different types of international law.

However, the main difficulty of focusing on the NIE/LDM logic as a form of intervention in the internal affairs of the state lies in traditional approaches to law. For instance, the legal geographic analysis traditionally tends to be location specific (Blomley 2000, 2001). Moreover, political scientists and international law specialists’ analysis of the influence of international law upon the behaviour of specific nation-states tends to focus on a rather coarse two-dimensional state-international community scale of analysis (see Addo 2000). Thus, relying on the legal geographic, political science or even the international law literature will make a dissertation that seeks to evaluate the extent to which the state has been forced to *cede* some sovereignty quite difficult.

General and specific difficulties have been identified as impediments to establish that the NIE/LDM logic is a form of day-to-day intervention. Generally, there is little acknowledgment of the fluid power relations or shifting positions of authority as the legal community collaborates with the United Nations and international human rights organisations such as Amnesty International to challenge a sovereign-state inside and outside national borders (Kent 2001, Chandler 2001). This gap in the literature, as will be argued in this dissertation, pivots around the traditional analysis of law, specifically international law.

Traditionally, the political presence of international law is represented in rather static terms, as suggested by the following quotation, which highlights the four defining characteristics of international law:

First, international law obligates a certain moral code of behaviour...it is constrained by the sovereignty of states and has no international enforcement mechanism on an ongoing basis [thus]...relies on expectations of behaviour.

States' actions must show a belief that there must be some mutual benefit in following rules and some consequences in breaking them.

Second, international law is an ongoing process rather than a specific set of rules...

Third, international law requires a declaratory tradition...[such as] treaties, international agreements, resolutions, court rulings and even customs...

Fourth, international law requires a proper authority... (Braden and Shelley 2000: 124).

Understood through this lens, many studies that examine the process in which a nation state is forced to cede some sovereignty will focus on the response of the state to the international community. In international law, *sovereignty* is defined as the "right of a state in regard to a certain area of the world to exercise jurisdiction over persons and things to the exclusion of other states" (Carter and Trimble 1999: 1020). Because the focus is on the interaction between the state and the international community, rather than on *whose authority* is used to interpret the law, scholars tend to have a static vision over the power struggle over sovereign-state power. Moreover, this has meant that an overwhelming number of studies focus on a nation-state's ability to protect their sovereignty.

To support this assertion, an example will be offered. A trend that is quite common in the literature is that researchers tend to focus on regional organisations such as the Organisation of African Unity (OAU) and suggest that the OAU is unable to mediate conflict because of the "...non-interference in internal affairs clause in their Charters" (Olonisakin 2000: 42). Moreover, the current argument is that many OAU Heads of State have prioritised defending their sovereignty rather than promoting the values of the Charter of the United Nations and the Universal Declaration of Human Rights (Carter and Trimble 1999, Odinkalu 1998, 2001 and Hatchard 1993). Some take a position similar to Henkin (1994: 52) who suggests that this international pressure is a failure, as suggested by the following quotation:

Some of the defects of international human rights instruments cannot readily be cured in a system of states still committed to state "sovereignty" - to state values, to state "privacy" and the territorial impermeability. Ordinarily, the human rights movement can only exert political-moral pressure on states to take domestic measures to improve the condition of their constitutionalism.

Such studies tend to place an emphasis on the concrete institutions rather than the dynamic power relations that shift and change different political positions. For example there is a tendency to mask the oscillation of power shifting and changing as Head of State comes under attack by NGOs. In addition many of the studies crudely (if at all) illustrate the intricate political relationships at different geographic scales, the political practices of local legal activists, the covert activism of a professional identity/personal agenda challenging an economic imperative or the state on a civil rights issue (Shamir and Ziv 2001); the strategic visibility/invisibility of judges and lawyers who will often allow NGOs or the media to speak for them; and the production and dissemination of information.

The second and related difficulty is that few studies have considered the process by which human rights activists attack a sovereign-state or have considered how a multitude of different voices, activists and agendas might agitate inside national borders or coalesce to create change. For instance, the conceptualisation of the Head of State protecting sovereign-state power is dominated by studies, which examine the relative failure and/or success of international organisations and institutions seeking to take legal power away from the state. Although there has been some attempts to understand the legal history of specific nations, particularly in the African context in which postcolonial leaders inherited a legal culture discordant with international norms and values, such studies are few and far between (Okafor 2000, Odinkalu 1998, 2001). In addition, the trend of presenting the State-international community relationship as separate political spaces persists despite calls to consider the role of local NGOs and international nongovernmental organisations (INGOs) who create a multiplicity of linkages between the state and international community as NGOs politicise legislation passed by the state to the international community (Chandler 2001, Trubek 2000, Mohan and Stokke 2000, Risse and Sikkink 1999, Price 1999).

This trend in international relations literature, and especially international humanitarian law literature may be created to protect human rights groups who are considered far too

political. Many humanitarian groups deem intervention legally necessary. Cases of human suffering are cited by the international community in an attempt to become increasingly involved in the domestic affairs of countries that have signed the United Nations' Charter. More often than not, these studies focus on the problems created when nation-states resent integrating international norms in the day-to-day administration of the state. This concern is expressed through a wide range of themes, questions, concerns and debates. Much of the literature documents cases when states have not adhered to human rights treaties and/or the state is not conforming to international norms and the efforts of international organisations and institutions have been for naught. This sort of representation of the state conforming to international norms is linked to the language of multilateral treaties, international declarations, politics, laws, and international and national institutions (Chesterman 1998, Donnelly 1998, Dillon 1998).

In addition, international legal discourse (representing the political space of the international community) tends to revolve around the notion that "strictures on non-interference embedded in the Charter of the United Nations" which in principle prevents foreign powers from intervening in domestic affairs (Olonisakin 2000: 41). This representation of political space is extended into contemporary understandings of the power of the United Nations Charter. For example, these non-interference clauses tend to create a binary between sovereign-states' territory and the international community. The assumption made when an African country signs the United Nations Charter is that this action grants other nations the legal privilege of surveying the domestic legal space of the signing country. At the same time, the signatory country expects other countries to respect the "...sovereignty and territorial integrity of each State and for its inalienable right to independent existence" (OAU 2001).

However, as a result, international legal literature is relatively unhelpful in illuminating the presence of the political structure of the law rather than the fluid power relations interpreting the law because of the implicit assumptions in much of the literature which reveals a number of assumptions about "non-interference" in the Charter of the United Nations (Olonisakin 2000: 41), the political implications of a sovereign-state signing the

United Nations Charter, a sovereign-state's right to control its territory and political power of symbolic instruments. Relying on the traditional understandings of international and domestic law to evaluate the threat of the NIE/LDM logic to local legal cultures means that this literature creates another limitation. This literature extends a number of assumptions about international law that cloak rather than illustrates the power relations among the state, civil society, NGOs, the international community and the legal and justice system, making an evaluation of the positive or negative impact of the NIE/LDM logic difficult to establish.

To summarise some of the literature, there are several unfortunate aspects of international legal scholars presenting political space as discrete units when they describe international-national interactions. Many studies seek to demonstrate that human rights are not the norm in many countries by presenting the image of the state and international community as discrete spatial units. Yet, few acknowledge that the IDHR is a symbolic mechanism meant to create political change (Gubbay 1997); and offer a multiscale and multi-institutional analysis of the state, international community, legal and justice systems, NGOs and civil society interactions. In these sorts of studies, the important *effect* of the UN Charter is often masked by scholars' coarse focus on nation-states' behaviour rather than on the activism on the ground or in the courtroom. In such studies, although they do document how a sovereign-state resists NGO human rights, very few studies distinguish that the state is an institution which is separate from, yet connected to, the legal and justice system. Moreover, studies such as Hatchard (1993, 2000) and Odinkalu (1998, 2001) suggest that the local legal community is relatively powerless in this sort of situation. Yes, this study will encounter the conceptual limits in representing international law as a political presence and an essence in local-national-international affairs. However, the conceptualisation of international law is changing. For instance the new role of the international community, according to Olonisakin (2000), has a very different approach to the non-intervention question. Third, there is little acknowledgment of the multiplicity of links in and through the sovereign-state, the international community and civil society. For example, there has been little multiscale analysis of the different voices, activists and agendas at the local level which have the power to alter the

power relationships running in and through the legal and justice system, it is difficult to evaluate whether or not human rights activists have had positive or negative effect upon local societies.

These three difficulties in establishing that the NIE/LDM logic is a form of intervention also underscores the need for an interdisciplinary approach and points this dissertation in the direction of using an innovative approach.

1.7.3 Legal Discourse as a Development Discourse

The third possible way to evaluate the threat of the NIE/LDM logic is to examine the presence and practice of the new development discourse as a form of political activism. Yet, four difficulties in revealing the forms of political activism connected to the NIE/LDM discourses have been identified. One, the tradition in development economics has been to ignore politics. For example, the international lending agencies that most values an apolitical façade has been the World Bank. Economic development is based on the World Bank's principle to *apolitically* lend funds to a nation-state, although the World Bank establishes that human rights, good governance, rule of law, judicial independence are the underlying principles for successful economic development. Moreover, the World Bank's avoidance of politics is legitimised in contracts signed by the World Bank and nation-states (Tshuma 1999).

Two, the tradition in the political evaluation of development theory has been to ignore legal discourses by international agencies. Three, the legal theorists have traditionally ignored how development economists had co-opted legal arguments as a way to create economic progress. Thus, the difficulty in establishing the impact of this new development discourse at local, national and global scales is that few studies acknowledge the logic that equates legal discourse with economic progress. Thus, very few scholars can pinpoint that the doctrine of justice – the rule of law – is narrowly interpreted by the World Bank in a manner that suggests that it is necessary to increase the material well being of individuals before political and civil rights of individuals are acknowledged. With the social construction of the problem being framed in the language

of justice, very few scholars have the interdisciplinary understanding of law, economics and politics to evaluate the empirical evidence generated by such organisations and institutions. For example, Potter et al (1999) acknowledge that NGOs pursue an apolitical agenda of good governance and rule of law, but they do not acknowledge that this agenda is being funded under the rubric of the NIE/LDM logic.

Four, there are few longitudinal studies examining the long-term politico-spatial implications of human rights as a development discourse and political practice (Mutua 2001). One reason for this problem may be finding scholars who are well versed in geography, law, politics, development and who draw from human rights databases for long periods in the same location. The importance of longitudinal studies is that they offer important insights into the changing structure of legal cultures through time. Two major attempts have been to correct the silence of NGOs' role in advocating for human rights and changing the human right cultures. The Transnational Advocacy Networks (TAN) framework developed by Sikkink and collaborators attempts to trace the changes of human rights NGOs advocating for torture and death victims over the past three decades (see Risse and Sikkink 1999). Their conclusion is that through time and space, NGOs' advocacy can encourage a state to adopt international norms (see Chapter Two). The second study is by Tolley (1994) on the history and spatial diffusion of the International Commission of Jurists (ICJ), an international NGO since the 1950s. What makes Tolley's (1994) study significant is that it attempts to relate the changes in international relations to NGOs collecting information on legal and justice systems in norm-violating states (also see Mutua 2001). In sum, this political project of legal institutional development has remained relatively unnoticed by the leading development and postdevelopment theorists.

What can be learnt from this review is that there is a need to break out of the traditional social science conceptualisations of international and domestic law, the non-intervention question, the post development analysis of development discourse and the traditional understanding of social movements challenging the state.

Five significant points have been established. One, there are many different facets of the NIE/LDM logic which threaten state sovereignty, repress local societies and empower the global capitalist system. Two, there are many silences in the current literature about how this *idea* affects local societies. Three, all legal and justice systems may be affected by the NIE/LDM; and that there is a need for spatial analysis investigating interactions at various geographic and historical scales. Four, there is a need for an abstraction, such as a vision of *trajectories of legal activism* to allow for a deeper understanding of the manifestation of the politico-legal and economic crisis of Zimbabwe. An abstraction will provide a multiscalar framework with which to analyse the conflict and tensions created as new ideas affect legal cultures, unsettle state-society relationships, and even change a state's position in international relations. The intention in developing the analytical concept - *trajectories of legal activism* – is to give the NIE/LDM a political presence. By giving it a presence, this dissertation can evaluate how individuals and transnational/local legal activists (judges, lawyers, NGOs and the media) advance the NIE/LDM logic as ideas about justice in a society which are integrated into the political structure of the legal and justice system. In addition, developing an abstraction to conceptualise how the NIE/LDM logic has transformed a location to make the claim that NIE/LDM logic is a threat to local societies requires evidence.

Five, this raises the question of whether there are other analytical tools available. Useful analytical tools are best judged through three difficult questions: 1) what current analytical frameworks help us understand the political presence of transnational legal activists? 2) What sensitive methodologies could be useful to identify the geographies of the impact of the NIE/LDM logic? 3) What sorts of concerns are raised with the use of NGO reports?

1.8 Current Frameworks

The most noted and quoted example is the TAN framework, which maps geographies and spatialities of humanitarian intervention and acknowledges multiple connections at different geographic scales. This dissertation will operationalise the Transnational Advocacy Networks (TAN) framework as a template to collect NGOs' reports. The TAN framework evaluates the multiple linkages of NGOs at different geographic scales as NGOs disseminate information and advocate for legal and economic reform during a period of rapid change. In addition, the TAN framework provides a useful template to map the spatial diffusion of legal discourse and the movement of information through cyberspace and evaluate how this information is used to attack the sovereign-state. With the empirical evidence collected from NGOs during a time of economic and political crisis, this study will suggest that if we examine the relationship between the NGOs and the legal and justice system we can see how the NIE idea has the power to restructure local communities, nation-states and international relations. Three steps have been identified. These are: 1) Define the term NGOs. 2) Identify information sources. 3) Suggest analysis of primary evidence.

1.8.1 Nongovernmental Organisations

Through various critiques, the term NGOs has been pulled apart to reveal that many NGOs - which are staffed by indigenous elites - are also bureaucratic and highly politicised, as suggested by the following comment:

...although [NGOs] have achieved many microlevel successes, the systems and structures that determine power and resource allocations – locally, nationally and internationally – remain largely intact (Nyamugasira in Mohan and Stokke 2000: 254).

At the heart of this discussion is whether or not NGOs represent grassroots issues (see Potter et al 1999). According to Mohan and Stokke (2000), two main strands of thinking and forms of intervention can be identified. First, North/South, global/local, Euro-American/Third World, etc., structural limitations have been addressed in a global attempt to link local NGOs' participation to the broader agenda of feminism, anti-imperialism and democratisation. Second, the global capitalist system (reflecting the

increasingly popularity of the New Institutional Economics among economists, development economists and development practitioners (Cameron 2000)) has encouraged the vision that NGOs can help with the process of *modernisation* (Potter et al 1999). The clearest example of this is the increased number of NGOs in Zimbabwe, which developed a powerful political presence from 1997 to 2002, under the rubric of democratisation. Democratisation, defined in this dissertation is democracy in a legal sense, that is, “a state bound by law” which respects the rulings, political activism and independence of the judiciary even when rulings are made in favour of civil society or the market instead of the state (Linz in Dodson and Jackson 2001: 252).

In this dissertation, the term NGO will be very broadly defined. Traditionally, democratic institutions are judges, lawyers, NGOs and the media. Under the rubric of *democratisation*, the individual voices of academics, judges, lawyers, government officials, policy researchers, politicians, law reform commissions, single issue pressure groups, non-governmental organisations (NGOs), members of the press, religious groups, artists, writers and representatives of civil society are all perceived to have the political voice to make a difference. Many debate new ideas and advocate for change. Under the rubric of NGOs with a democratic agenda, the term NGO is to indicate that the agenda of these individuals pivots around a law: changing, creating or eradicating a law. Hence the use of the interchangeable terms such as *transnational legal activists*, *NGOs*, *democratic institutions*, etc.

This definition pivots around the idea that specific NGOs are not the specific object of analysis. Rather, the focus is upon the ideas and information that flow through them. In other words, this study is evaluating their presence in Zimbabwe, which is allowing a conduit of information to flow from the South to the North. Although the TAN framework has discussed the process of NGOs using the telecommunication networks to attack the state, this is the first known study to operationalise this framework as a method to collect some empirical evidence. While the TAN framework emphasised quantitative evidence of violence, this study will focus on NGOs collecting empirical evidence of the changing legal culture and politics associated with the legal and justice system.

The significance of broadening this definition of NGOs to transnational/local legal activists, judges, lawyers, NGOs, the media, etc. is to suggest that this analytical category mediates between international funding agencies, international organisations of nations-states, civil society, and the state, often working from within state institutions. Most importantly, this category can help us understand the spatial presence of the NIE/LDM logic. The key point is that these individual and collective voices, as a social movement, focus on changing the legal culture. Because their focus is on law, their activism attacks the state from multiple levels and from many different organisations. Each voice, no matter what political position within the global economy, is deemed significant. They represent the multiple points of attack, rather than a single attack of international organisations and institutions upon the state.

The term NGO will be used for all these voices because these diverse voices share several features within a social movement. The first feature is that they are all discussing Zimbabwe, from either inside or outside Zimbabwe's borders. Many creatively use different mediums to publicise the political and economic crisis to the outside world. While these voices are diverse in the values espoused, the most striking finding is the amount of legislation and legal analysis of the legislation posted on the Internet. The publication of this legislation is often inextricably linked to human rights advocates working to change a law with international pressure. Many will work directly with judges or lawyers. Many are connected to the grassroots level.

Another feature of NGOs is that they are legal activists at the local and global level. Many are activists who seek to change local legislation and write international law. One of the marked features is that NGOs often represent North/South relations, local/global issues. With the term *NGOs*, this study is expressing the presence of multiscalar and multi-institutional political voice, which is intensively spatial. For example, NGO voices are changing legal space as they share information that flows from local voices, such as the Zimbabwean independent media, to national voices, such as human rights NGOs that works on educating Zimbabweans of their political rights to the international voices of

international NGOs (INGO) such as Amnesty International. The information generated by this coalition of multiscalar and multinational voices during the Zimbabwean political and economic crisis is significant. This study will suggest that content of these NGO reports is of fundamental importance to the future of Zimbabwe and her presence in international relations. At a general level, this simplistic categorisation allows the reader to see the patterns of information moving from the South to the North. The key idea is to see the geographies and spatialities that these voices create through time and space. Most importantly, the idea is to see how individuals re-enforce the democratic process by offering a commentary of the justice administered by the legal system. This commentary has the power to draw the attention of the international community. More specifically, Tolley (1994) argues that NGOs collecting information about lawmaking, the interpretation of laws and the legal and justice system and law as an interactive process between the legal system, public opinion and public behaviour during a time of rapid change is significant. This information is what makes the international community respond to governments who use legal mechanisms to further a political agenda and military power to legitimate violence (see also Mathews 1986, Hatchard 1993, Odinkalu 1998, 2001).

Yet another feature is that all participate in the spatial diffusion of information. Some use electronic advocacy networks. Others are grassroots organisations. Some of these NGOs are indigenous, and others are not (see Table 1.3). The larger indigenous NGOs, such as the National Constitutional Assembly, are being funded by Euro-American agencies. NGOs such as the Helen Suzman Foundation in South Africa are the more vociferous. Inside Zimbabwe, the smaller NGOs' ability to create widespread change is limited. As suggested in Chapters Four, Five and Six, local activists must respect local quasi-security laws such as LOMA, a law that seeks to curb public and covert demonstrations, free speech and other civil liberties (SA-TST 08/07/2001-Gubbay, also see ZHR-NGO 1999a).

Another feature is that many advocate for legal and economic reform as a way to assuage the crisis. The introduction of this chapter described the political context in which the

NGO networks began to grow. This study is based on empirical evidence generated by NGOs during the period of the crisis. This study will provide content analysis of local media and NGO reports, including a grassroots NGO, *Chikafu Cheupenyu* (food for life) that I created in 1997/1998. The primary evidence generated by this NGO reflects the methodology developed for the fieldwork. Reports created under this NGO's vision articulates women's and men's hopes and fears and points this study in the direction of understanding how an externally driven anticorruption/legal-institution-strengthening initiative affects individuals' daily lives. The research team of five interviewers, four field supervisors, a translator-public relations officer, focus groups, two typists, three key informants and nine independent researchers will also offer their insights to this study. This primary evidence is significant because it will offer insights into the legal culture that the electronic advocacy networks' NGOs do not. Specific coding of key informants, researchers, etc. has been developed (see Appendix 1.2). The existing data sets from my longitudinal study of informal food distribution networks in Zimbabwe (1994-1998) also will be used to establish the politico-legal economy before and during the beginning of the crisis.

Chapters Four, Five and Six will offer primary evidence written by NGOs during a time of intense economic, political, social and cultural transition. The primary evidence is significant because it provides evidence of a changing political, cultural, economic and legal landscape. It also suggests a contemporary case study wherein transnational legal activists take legal power away from the State by documenting the political practices and patterns of lawmaking and struggles of ideas about justice among members of the legal and justice system and the sovereign-state and others. This is the first study to consider the political implications of NGOs collecting information about the legal and justice system during a period of crisis.

NGOs have the power to change the power relations running in and through the legal and justice system by reporting on facts and law and bringing this information to the international community. This study suggests that every bit of information that NGOs publish is significant, particularly when reporting on the politics inside and outside the

legal and justice system. This study will collect empirical evidence as it is being generated by a large number of commentators

1.8.2 Electronic Sources, Field Reports, Scholarly Literature

Three different sources of primary and secondary information will be used in this dissertation, suggestive of why three separate bibliographies have been developed. The first is the empirical evidence, which has been downloaded from the Internet. The time period of collecting the NGO reports from electronic advocacy networks will be from 1997 to 2002. The website bibliography reflects the fact that many Zimbabwean newspapers, NGOs and political commentators began to post reports, daily articles and commentary on the Internet after 1997. Many NGOs in Zimbabwe use electronic advocacy networks. Because of this availability of information, it is possible to provide empirical evidence of the state under attack by democratic institutions during the period of intense political, economic and culture change. A specific coding method has been developed to reflect the geography of these voices transmitting information across the globe through electronic advocacy networks (see Table 1.3).

Table 1.3: The Geography of Voices: Human Rights Commentary in Cyberspace

*Geographic Location, Source, Date	Location, Name of Organisation or Institution
UK-T 9/02/02	United Kingdom, Times
SA- HSF 2000a. 2000	South Africa, Helen Suzman Foundation
ICG 25/09/00 ICG	International Crisis Group
CS-4/28/99-PI	Commonwealth Secretariat, Press Information
K-TN 22/02/02-O	Kenya, The Nation (Nairobi), Opinion
Z-FG 21/02/02	Zimbabwe, Financial Gazette
Z-NCA-Reeler 2001	Zimbabwe, National Constitutional Assembly, Tony Reeler
Z-CFU 20/09/01-SR	Zimbabwe, Commercial Farmers Union
D-PHR 24/01/02	Denmark, Physician for Human Rights, Denmark
N- 20/03/02- NEOM	Norway, Norwegian Election Observation Mission
USA-Z- HRR 1997/1998	U.S. Department of State Zimbabwe Country Report

Source: Website Bibliography

*the coding system developed for the website bibliography reveals the geographic location of the electronic source, the name of the organisation (and/or author name), the publication date of the text and identifying characteristics of the text. For example in an African newspaper, an opinion column has been noted with the acronym "O" (see K-TN 22/02/02-O (Kenya, The Nation (Nairobi), Opinion)).

Empirical evidence of a changing legal culture has been collated through weekly visits to these websites from 2000 to 2002. NGOs provide a great deal of textual material. The focus of the websurfing is to find as much evidence of changing legal culture as possible.

The second bibliography contains other primary and secondary sources that have not been downloaded from the Internet. This includes reports written by local researchers in the grassroots NGO, *Chikafu Cheupenyu* (food for life) in 1997/1998. As well multiple years of the Economic Intelligence Unit, which was reviewed for evidence of the corruption discourse, are cited in this bibliography. Parliamentary debates, personal communication, newspapers, NGOs reports, government publications have also been included. The third bibliography contains secondary references, such as scholarly journal articles and other published literature.

1.8.3 Analysis

The analysis of the empirical evidence will be on the total effect of a wide array of voices inside and outside the borders of Zimbabwe. These voices have all played a part in slowly fraying sovereign state's legal power. The purpose of using a wide variety of sources of information, from opposition political parties, human rights advocates, the media, key informants, research institutions and other sources is to provide a vivid illustration of the geographic processes such as the spatial diffusion of legal discourse, the movement of information through cyberspace, as well as complex political implications of NGOs politicising the Head of State's rule of law view.

The central concern is with NGOs' focus on justice, law, and the rule of law and their representation of these abstract ideas. NGO reports will be analysed at several levels. One, different readings can be taken from the NGO reports. These historical *facts* offer many insights into a new legal culture being made. In addition, through the Internet, these *facts* are shared among activists as part of the system of global governance for several reasons. Furthermore, these *facts* that have been constructed to uphold the rule of law both locally and internationally, and these *facts* are being used in the global political economy.

The analysis of NGOs reports follows two paths. This study acknowledges that the primary evidence is significant in its documentation of historically important *facts*

constructed in the context of intense economic, political, social and cultural transition. In addition, this study is interested in the secondary use of this information and how this information may be used to support the NIE/LDM development initiatives.

1.9 Methods and Methodological Considerations

What the TAN framework shows is that transnational legal activists/NGOs spread their message through the Internet as they call for local changes. However, this message transcends the local. This section will explain how this dissertation will deconstruct transnational legal activists reports – reading for the presence of the NIE/LDM logic - to reconstruct a new geography sketching a territorial presence of the NIE/LDM logic at local, national and global scales.

This dissertation will focus on specific texts constructed during a political and economic crisis. This study will be examining NGO reports for their content. This primary evidence is significant because it provides evidence of a changing political, cultural, economic and legal landscape. These are historically important *facts* constructed in the context of intense economic, political, social and cultural transition. More importantly, this study is interested in the secondary use of this information, and how the contents of NGO reports can put pressure on a sovereign-state. The primary information that will be evaluated is based on the question - what makes the international community respond to the Head of State's abuses of power? Is it the differences in legal philosophy or the political practices used within the legal community?

Two key ideas lead this study to review the literature and analyse the empirical evidence. First, to map the politics of information. Second, to establish the politics of space and spatial relationships connected to the politics of ideas. To reveal these politics of information and their political implications, this study will review the scholarly literature to deconstruct topics such as the rule of law, judicial independence, legal space and NGO reports. In some circles, this methodology is known as the *Foucauldian strategy of textuality*, a method that examines the text for silences and omissions and seeks to reveal

how alternative ways of thinking have been marginalized in mainstream arguments. In other circles, this is known as the poststructuralist approach.

The poststructuralist approach involves three layers of analysis. At the first level of analysis – the analysis of the power relations – relationships between different individuals, organisations and institutions are identified as well as the context in which they communicate. Peet (1996: 877) defines power as the “capacity to define precisely the content, or control of tasks, of a specific project involving others...the most potent aspect of power relations lies in affecting what people know and are able to say”. The second level of analysis – the textual analysis – identifies the relationship between the text and these power relations by penetrating the text for its discourses and seeking to understand the semantic frameworks created through combinations of practices, concepts and ideas relevant in local societies. Discourses have a powerful presence, creating and altering landscapes by changing, diffusing and interacting with social contexts, and become “...an underlying, controlling social force structuring social and cultural life and forming space, landscapes and geographies” (Peet 1996: 881). The text and the power relationship are analysed at a third level of analysis – discursive structural analysis – which seeks to connect specific discourses to discursive structures and to analyse how the discursive structures create and alter landscapes, change symbolic and material circumstances and fracture space and localities through the communication shared by institutions. Because of these three levels of analysis, it is believed that that this is the best approach to take for assessing how the NIE ideas affect the politics of law in law making which in turn has changed the meaning and articulation of legal structures in Zimbabwe. For instance, NGOs’ reports about law, politics of lawmaking participate in the politics of information. These reports produce and reproduce a global social movement that seeks to bind the state with the law. This study will suggest that because NGO reports hold ideas about justice, these reports are extremely threatening to the security of the state and security of citizens. Reasons for why this study makes this statement will subsequently be offered.

This discussion of the three possible ways to evaluate the threat of the NIE/LDM logic is only a first stage in this study designed to reveal the new power relations constructing the new legal geographies. Narrating the contents of NGO reports will, at best, establish that there are North-South information politics, a flow of information and the sorts of patterns of information that flow from the South to the North. This study will also use the postdevelopment methodology to evaluate how NGOs use the NIE/LDM discourse. This study will suggest that human rights activists who use the NIE/LDM language have their activism transformed into a lever for the strategic aim acted upon by external agencies. The following sections will highlight the methodology used to examine the empirical evidence generated by NGOs during this time of crisis.

1.9.1 Discourse Analysis and Deconstruction

As the context is a developing country, the postdevelopment literature will also be used in this study. Nederveen Pieterse (2000: 180) suggests that the post development literature is characterised by its methodology – *discourse analysis*. Discourse analysis reveals dominant values, beliefs and practices such as capitalism, racism, and patriarchy and how these values are produced and reproduced through ideological power exercised in institutions. This analytical framework seeks to understand how rhetoric is used in the construction of a language and how language becomes a part of the legitimising mechanism of *truth/untruth*. This analytical framework offers a number of insights into how to challenge ideology that operates through language (as language is an essential part of discourse). Discourse analysis provides a fresh path to ask some of the harder questions such as - *who is advocating for whom* - in a theoretical/methodological manner. This dissertation will examine the text of NGOs for their use of the NIE/LDM discourses. The use of this discourse holds the power to change practices, concepts and ideas in local legal societies and can become discursive structures. As will be suggested throughout this dissertation, these structures have a political presence, which creates and alters landscapes. These structures change, diffuse and interact with social contexts, thereby creating new spatial patterns landscapes and geographies, which in turn have the power to change symbolic and material circumstances (Peet 1996).

This study will use discourse analysis and deconstruction as methodological tools of analysis. The definition of deconstruction is taken from Davies (2002:126). The essence of her argument is cited below:

Deconstruction is... a questioning or “desedimenting” of [texts/assumptions/historical facts/actions/institutions/politics]...The point of the questioning is not to challenge meaning completely, but to bring to our attention some of the conditions of meaningful communication – not to render it implausible, but to expose different possibilities. More importantly, deconstruction emphasizes the responsibility interpreters have to decide the meaning of the text. There are many layers of power, history and convention, which surround and inform every text, and the interpretation cannot avoid contributing to this context. The reader/interpreter is therefore never a disinterested commentator, but an ethically- and politically- situated contributor to the ongoing process of constructing cultural meanings (Davies 2002: 126).

1.9.2 Geographies of Ideas

The second idea is that there is a politics of space and spatial relationships connected to the politics of ideas. Said (1993: 256), under the rubric of postcolonial theory, has analysed the geographies and spatialities of the power relations, the texts written within these power relations and presented an understanding of the discursive structures changing symbolic and material circumstances. The postcolonial scholarship seeks to transform conventional methods of representation of postcolonial people, thus allowing them the political space to articulate their views, and rail against the metanarrative *progress/modernisation*. Ashcroft and Ahluwalia (1999) suggest that the main thread running through the post-colonial literature is the desire to find political projects – a postcolonial position- and dispute the cultural hegemony of western knowledges, practices and assumptions (see Ashcroft et al 1989, 1995; Ashcroft and Ahluwalia 1999). Said (1993: 252) highlights the geographies of the postcolonial position, and argues that the political project is to recover "geographical territory".

To operationalise these ideas, this study suggests that writing a dissertation is a political project defined with a political position. This study seeks to change the dominant modes of representation and will continually question *temporal and conceptual boundaries* (Mather 1996, Fabian 1999). The political position I take in this study is to reveal the power relations constructing the reality and the lives of the men and women with whom I

ran to escape the teargas. The specific power relations I am interested in are the complex interactions creating the Zimbabwean demonstrations, riot police “dressed for battle, armed with shields, baton sticks, helmets on, canisters and canister guns” (“Vengesayi” SLK-97- 05 (male)), President Mugabe's public erasure of all who had participated in the demonstration, and the international lending institutions NIE/LDM discourses which seek to restructure local politico-legal economics for the purpose of the global political economy (ZLP 1997a: 2687-2700, Z-TH 10/12/97:4).

This dissertation will use first person and third person pronouns to demonstrate positionality on certain topics. For instance, when the first person noun is used, I speak from my perspective. However, the empirical evidence presented in this dissertation is also from women and men who worked for *Chikafu Cheupenyu*, the NGO I created for the 1997/1998 fieldseason. To signify the team effort of *Chikafu Cheupenyu*, the pronouns such as *our* and *we* are used to indicate a team effort/interpretation.

This introduction to the methodological tools –discourse analysis and deconstruction – also acknowledges that deconstruction and discourse analysis have their critics. Due to length constraints, this dissertation will not re-iterate Ahluwalia (2001) and Yeoh (2001) and others who note that the methodology – deconstruction – has inconsistent results. To illustrate their point, this study has analysed some of the contemporary literature to establish whether or not this methodology will be useful to reveal the different power relations running in and through the sovereign-state, the legal and justice system and the global politico-legal economy. In some cases, analysis based on this methodology hinders rather than illuminates the issues. For instance, postdevelopment theorists who have focused on specific words such as *good governance* offer somewhat confusing results. To illustrate this point, Abrahamsen (2000) reviews the post development literature and then deconstructs the World Bank's good governance agenda. She argues that the governance discourse is part and parcel of the development intervention strategy of the World Bank in sub-Saharan African countries. Good governance is the entry point for lending agencies to propose a series of political and economic reforms. International development

has become a complex language promoting the project of democracy and economic progress.

However, Abrahamsen's (2000) analysis raises more concerns. She neglects to place the New Institution Economics (NIE) logic at the forefront of her analysis of the power relations. She also neglects to acknowledge that the World Bank proposes a number of legal reforms under the good governance agenda. For instance, the logic currently propounded by James Wolfensohn, President of the World Bank as the *Second Global Conference on Law and Justice in Russia* (2001) is that there is a

...large, significant and causal relationship between improved rule of law and income of nations, rule of law and literacy, and rule of law and reduced infant mortality...." (Z-Insider 31/07/01-O).

Moreover, by analysing legal phrases such as *governance*, through a neoclassical economic theoretical perspective, her analysis clouds rather than illuminates how economic theory drives the development policies and practices which seek to use law as an instrument to reform society, strengthen weak institutions such as formal political organisations and law and legal institutions, which in theory will create a political structure conducive to economic growth. As subsequently discussed, the World Bank development initiative attacks sovereign-state legal power. Although Abrahamsen's (2000) use of the analytical tool is appropriate, she has not made the important connection to NIE logic, which connects legal institutions with economic development. Thus, her work illustrates the danger of using a powerful analytical tool such as discourse analysis and deconstructing what are *assumed* dominant/subordinate values, practices and power relations in international development. Abrahamsen's (2000) work offers a broader lesson to postdevelopment theorists. The key point is that most postdevelopment theorists must make the connection that the World Bank is driving the vision that the legal and justice system should dominate the state. This vision is evident in James Wolfensohn's speech:

When I talk about effective legal and justice systems I am, in a broader sense, referring to the rule of law. While I recognise that a huge debate rages over the meaning of this phrase, let us stipulate that, for our purposes at this conference, the rule of law means: the government is accountable to the law (in other words, a

government by and *under law*, not above it); everyone is equal before the law and has access to the protection of the law; and there is a core of individual rights which are respected, including human and property rights (Z-Insider 31/07/01-O emphasis added).

The critical difference is that the World Bank focuses on the legal and justice system, to control the state: The enemy of the state is no longer outside national borders.

Poststructuralist analysis has proven to be a valuable analytical tool for many geographers. For example, McEwan (1998, 2000), a geographer combines feminist and postcolonial approaches in her work in the African context. She emphasizes that discourse analysis/deconstruction is useful for writing more inclusive geographies. With this methodology she has been able to reveal the dominant and subordinate values in gendered colonial landscapes. By deeply questioning the power relationship she has been able to offer a new interpretations of gendered relations during the colonial era. Geographers such as Peet (1996) and Dalby (1990,1993) and others argue that geographic conceptualisations of social structures and fluid concepts of space, based on poststructural/postcolonial methods, allow geographers to articulate complex power relations and identify complex political layers.

Postcolonial /post-structuralist analysis will allow this study to disrupt conventional ways of understanding people, ideas, and attitudes in specific places. This method will also allow this study to better understand how certain practices are constructed and legitimised. Because this study uses postcolonial /post-structuralist analysis it can reveal stories that have been marginalized in mainstream arguments. In turn, both strategies provide new ways of understanding how knowledge is constructed, including the power relations that construct legitimised knowledge. Most importantly, postcolonial peoples' views are privileged by this methodology. Post-colonial discourse analysis provides a fresh path to ask some of the harder questions - *who is advocating for whom* - in a theoretical/methodological manner.

In addition, poststructuralist analysis will highlight the power relations between the state and the legal and justice system. Three reasons justify the use of poststructuralist, rather than Marxist, analysis in this study to understand how rule of law views are made into legal power. One, rigorous poststructuralist critiques take apart the social constructs of law and legal systems. These critiques appraise and account for how law, as a discourse, alters and influences intricate power relations. An example of this line of thinking is found in Kennedy (1987) who led the USA critical legal studies movement in the 1980s (see also Noreau and Arnaud 1998). Kennedy suggests that Rule of Law is a political action, not an ethical reflection. Kennedy (1987) argues that Rule of Law is a cultural artefact which should be examined as a presence of authority, a social force, an embodiment of professional, authoritative knowledge. He suggests that scholars who identify, discuss and highlight rule of law genealogies that have constructed law lay bare the politics of law making within the courtroom. The critical legal analysis taps into *the processes of exclusion in the legal system*, whereas Marxist analysis loses the intricacies.

Two, post-structuralism offers alternatives in social sciences thinking about law and legal systems. For instance, in deconstructing legal texts, Lacey et al (1990), Priban (1997), Sarat and Kearnes (1992, 1996), Cotterrell (1996, 1998), Chesterman (1997, 1998), Wright (1998), Charlesworth and Chinkin (2000) and others have placed the master narrative of law in an intellectually vulnerable position. The sorts of critical, and difficult, questions being asked and tentatively answered include questions such as:

- How are rule of law claims used to contest other legal actors' claims?
- How does the official legal interpretation of legal agents, natural law agents and agents who use universal abstract ethics legitimate law to perpetrate the "legitimate fiction" (Priban 1997: 343) of the state to constantly reconstruct the "public world of narratives about politics and law" (Priban 1997: 343)?

These questions are just the starting point. Many critical legal theorists articulate a dynamic and fragmented conception of law, including the argument that acknowledges the failure of legal systems to accommodate the realities of post-colonial people (Man and Wai 1998, Okafor 2000).

Third, the post-structuralists' analysis also articulates that the power of rule of law originates *within* society, not within the courts. Societies choose who will govern them based on two assumptions. Some societies will often ask the question of *whether or not his/her rule of law view respected by the legal and justice system* (Allen 2001). This question is closely connected to the assumption that societal relations can, and should, be ordered and maintained by a delicate equilibration of ruler-societal relationships – bound together with collective arguments, reciprocal conventions, loyalties, cultural, political and economic forces (Hutchinson and Monahan 1987). Stated in other words, the legitimacy of law, and the government, relies on an individual's perception of the state and the legal institutions' ability to fairly administer justice. The selection of a government is based on another assumption, the assumption that lawyers can bring broader rule of law views to the court and have them heard. Often individual lawyers – who are distinctive from government by their individual legal points of view – agree or disagree on the interpretation of legal doctrines and matters of method, and solicit different participants in the legal process (Man and Wai 1998). The critical point is that the poststructuralists' analysis provides a way of thinking about rule of law as a nuanced power relationship between the individual and the legal system. This framework of analysis allows legal scholars to ask a number of deeper questions about individual legal personnel; and ask how these individuals are granted a cloak of authority – such as impartiality, higher values of ethics and morals, when in fact, such a cloak masks the real agendas, politics and personalities.

To summarise, poststructuralists represent a different approach to the cultural production of law. The poststructuralists' influence on legal theory stresses a more fragmented and fluid analysis of the authority, power and practice of law; it tends to shatter homogenous visions of justice/injustice. As well, this analytical framework offers alternative and complex ways of thinking about law and legal systems for social sciences. Whereas the Marxist framework, as an analytical tool, does not seem to provide a better understanding of what rule of law is, or how it is made into *legal power*. Moreover, the Marxist analysis leads to rather predictable Marxist conclusions about management and workers

and North-South relations, and loses the intricacies and nuances of the debate (see Mathews 1986).

As Chapter Three will argue, the intention in unravelling the power dynamics of law, rule of law and justice is to suggest that all these ideas are fragile and ephemeral. The point is reveal that *individuals*, rather than entire legal and justice systems, choose how he/she produces and reproduces a vision of social justice, articulates this vision through a rule of law view and carries this vision through to creating a re-written legal clause, which then becomes legal power. In many ways this dissertation supports the TAN framework. Individuals have a voice in constructing new legislation with their vision of social justice. Yet in contrast to the TAN framework, this discussion suggests that there are multiple ways to look at a law, to conform to a law, and that laws were not written to be inclusive. Examining the notion of justice through poststructuralist analysis acknowledges that the legal framework creates barriers for the individual seeking justice. These barriers include multiple political nuances which all play a part in excluding marginalized voices.

To conclude this section, the poststructuralist emphasis on the politics of law in law making has changed the meaning and articulation of legal structures in legal theory, methodology, analysis and practice. The general argument is germane to the study of legal and justice systems/judicial independence. This argument recognises that judges, lawyers, NGOs and citizens have had an *individual* politico-legal spatial role articulating rule of law views which have changed local notions of justice, altered the legal text and created new struggles as legal structures are challenged with new ideas of how the world *should* be.

This section has made a few points about analytical methods. It has introduced the analytical tools – deconstruction and discourse analysis – which will be used in this study. It has justified why it will use poststructuralist, rather than Marxist, analysis to understand how rule of law views are made into legal power. It has highlighted the danger of using powerful analytical tool in deconstructing the power relations running in and through the legal and justice system. The critical lesson to take from the

Abrahamsen's (2000) example is not to begin with assumptions about the underlying power relationships constructing the political structures at the global and local levels. This section concludes on the note that many geographers' rigorous analysis originates with this methodology. Based on their innovative insights into complex political, socio-cultural, economic relations in space, this study will use these analytic tools.

1.9.2 Transnational Legal Activists Reports: Complexities and Contradictions

Five different reasons justify why transnational legal activist /NGO reports will be used to illustrate the tensions among international funding agencies, international organisations of nations-states, civil society, and the state. First, the contents of NGO reports suggest a sense of the political structure of the legal and justice system and how the political structure of the legal and justice system is changed by the political practices of transnational/local legal activists who use legal discourse to attack the state. The second reason is that these alternative voices have been changing the power relations between the sovereign-state and the international community for many years. Indeed, the scholarly literature is beginning to acknowledge NGOs as important geopolitical players in international relations (see Price 1999, Kent 2001). For instance, the Transnational Advocacy Network (TAN) Framework attests to the ability of NGOs to diffuse information to ensure that norm-violating states are brought to the attention of the international community and to ensure that these international human rights norms remain part of the international agenda (Risse and Sikkink 1999). A third reason is to establish the many NGOs use the NIE/LDM discourses alongside advocating for legal and economic reform. The purpose of revealing that NGOs are using this discourse is to raise an important question – are NGOs aware of their use of the NIE/LDM discourses, and the potential political implications of this discourse? Fourth, this dissertation is deeply concerned about the relative silences of the NGOs relationship with the judiciary, a relationship that has a significant presence in defining a state's position in international relations (Tolley 1994, Dezalay and Garth 2001, Meili 2001).

The fifth reason, which will be offered, is that this study believes that this discourse is dangerous because it is used –sometimes quite innocently - by NGOs who represent the

legal and justice system to the legal order. At present two differing views exist in the literature. The first, which seems to be favoured by the state transformation/human rights/democracy legal-institution-strengthening initiatives is to consider the political presence NGOs are gaining in geopolitical circles as a positive political presence (Kent 2001). The second is the critical legal institution development, and the post development, literature which asks *who is paying for this information and why?* (Trubek 2000, Potter et al 1999). This dissertation favours the postdevelopment and critical legal institution development literature.

Moreover, this empirical evidence will reveal a number of tensions as transnational legal activists, a unique sort of social movement that works within state institutions and becomes a conduit of information for development agenda, penetrates sovereign-state power. To begin with, now that a wide array of organisations and institutions (such as multilateral development banks, international and regional organisations of nation-states, NGOs, educational institutions, and research organisations) have adopted the NIE/LDM logic to explain the problems in historical and current global political economy, the solutions are often simplistically found in any of these five categories: *good governance, anticorruption, strengthen-democratic-institutions (NGOs, the media and the judiciary), information management and private property rights*. As will be suggested in this study, NGOs are using this language and changing power relations inside and outside the legal and justice system because these discourses - used in NGO reports – have the power to capture the attention of the legal community at the risk of making the local situation volatile for the local legal community and civil right movement.

The second contention is that different literatures offer different insights into the local and global processes involved in encouraging a state to cede “some sovereignty” to the human rights movement, yet much of the literature is uncritical. The general process of sovereign-state being encouraged to “cede some sovereignty to international organizations charged with enforcement [and compliance of international law]” is as follows (Braden and Shelley 2000: 126). The international community, particularly the Euro-American countries, supports the role of the legal and justice system in curbing the

state's abuse of power, administering justice and upholding the system of governance in a nation (Russell 2001a, Tolley 1994). The Euro-American countries are generally the most willing to invest in NGOs' collection and dissemination of information and advocating for legal and economic reform, even at the risk of supporting a Eurocentric system of international surveillance of rogue states (Tolley, 1994, Potter et al 1999, Price, 1999). The sovereign-state is consistently being attacked by human rights activists (Mutua 2001). Yet, some of the literature assumes that the struggle around the civil rights movement, the international community and the state will eventually dissipate and the state will accept international norms (Risse and Sikkink 1999). The key point is that there are several political implications to all these processes, which are not being fully acknowledged. To begin with, Euro-American countries are financially supporting NGOs, specifically NGOs who have made it their business to report the *facts* and advocate for legal and economic reform. With the Euro-American nations and local legal and justice system politically supporting NGOs' activism, a complex global-local coalition - with a politico-legal economic agenda – is developing more legal architecture to protect it from the state.

The key point is that this information is being funnelled through to the legal community. Very few critical scholars are examining the political implications of these information politics. Moreover, the danger of this global/local activism in the post conflict era is that the international lending sanctions will suggest a post conflict development initiative of the NIE/LDM which benefits international lending institutions rather than the disabled, terminally ill, hungry, informally employed, poor and politically vulnerable women, men and children.

The third contention is that NGOs are in a powerful position when they report on the politics inside and outside the legal and justice system. NGOs have a unique position in this situation because they are the vociferous group, and the legal community tends to remain silent, conservative and outwardly apolitical (Sarat and Scheingold 2001a, Cain and Harrington 1994). Fourth, the biases within NGOs' reports are produced and reported at different geographic scales. For example, the state is simplistically identified as the

enemy. Much of the human rights literature tends to politicise the position of the state. In the case of NGOs reporting on the Zimbabwean economic and political crisis, few NGOs envision the individual - Robert Mugabe - hinged to shifts and changes of individuals within his administration. They tend to label the state the Zimbabwean government, the government, or the Zimbabwe African National Union-Patriotic Front (ZANU-PF) government. The critical question raised is what happens when one puts a face on the administration – the Mugabe Administration? What is seen, then?

1.9.3 Different Attempts by the State to Control the Flow of Information

The methodological issues to consider when downloading the NGOs reports are these. First, there is an overwhelming amount of security legislation. Since Zimbabwe became an independent state in 1980, the Mugabe Administration has controlled information politics, yet the Mugabe Administration still allows NGOs to exist. Why the ZANU (PF) government allows NGOs to continue their work is not fully known. The significance of the active use of legislation may affect the themes and issues that NGOs focus upon as they collect and disseminate information and advocate for change. Moreover, much of the public discussion about national leadership and governing style is likely relatively constrained (Z-FG-09/08/01-C; Z-S 17/06/01, Z-TM 06/04/01-P). For instance, with the active censorship of scholars' work, control over archival research and poor inclusion of common citizen's voices, dramatic changes may occur in the political consciousness of post-Independence Zimbabweans; but comments by the people are not often publicly offered (Z-TM 07/07/98-O, Z-TM 08/05/98; MMPZ 27/06/00). Moreover, the Mugabe Administration has tried to quell this advocacy network, creating new legislation to infiltrate NGOs. Parliament had passed the Private Voluntary Organizations Act, which would allow the Minister of Social Welfare, Labour, and Public Service to interfere with NGOs' executive bodies. In 1995, the Supreme Court ruled that the Private Voluntary Organizations Act (PVOA) was unconstitutional (USA-Z-HRR 2000/2001). Nonetheless, many NGOs boldly investigate the politico-legal structures and the Head of State's use of the law. The image that many NGOs portray is that Mugabe is the law. NGOs also question if Mugabe is an "elected" official. (AI 25/06/02, AI 03/01- Z, Z-CFU 20/09/01-

SR, ICG 26/02/02, ICG 25/01/02, USA-Z-HRR 2000/2001, N- 20/03/02- NEOM, Z-CIZC-19/06/02; ICG 22/03/02:12; Z-NCA-Reeler 2001, Z-NCA Sithole 2000).

Moreover, it should be noted that a key informant told me: “there is no freedom of speech” (“Simbarashi” male SLK-98-01). This assertion has been confirmed by many NGOs and legal scholars (Palley 1966: 320 ff, 321, Sayce 1987, Hatchard 1993: 46, 108, 119, 114-124, UK-TST 18/02/01; Z-K 19/04/02-PLS, Z- MMPZ 27/09/00; Z-TM 08/05/98; Z-TM 06/04/01-P; Z-TM 07/07/98-O, Z-CIZC-19/06/02: 30-31).

Generally, this chapter has outlined the purpose and objectives of the dissertation, and offered a few points about analytical methods and methodological considerations, with an emphasis on the need for a more sensitive analytical framework. However, before concluding this chapter, it is appropriate to acknowledge that the underlying reason for using these analytical tools is to develop the analytical framework for this study, which is sensitive to differences in gender, class, location, etc. The choice of methodology is the first step towards developing a theoretical critique of the NIE/LDM. The second step is to acknowledge that the threat of the NIE/LDM is multiscalar, spatial and diffuse. By using NGO reports, this study will re-conceptualise the threat of the NIE/LDM at three scales of analysis: the international diffusion of an idea, the different discourses used by advocates of legal and economic reform and the empirical evidence found in the text constructed during this time. The broadest scale of analysis, the international scale, focuses on the global vision adopted by organisations and institutions which believes that legal reform can create economic and political *progress*. This idea has had a global impact in policy circles. The second scale of analysis focuses on specific organisations and institutions advocating for economic and legal reform. For examples, human rights advocates play an important role in Commonwealth foreign policies and practices. The third scale of analysis acknowledges the response to rule of law advocates at the grassroots level. This multiscalar analysis highlights a critical point: NGOs bridge the local with the global.

To conclude this section which has introduced the analytical framework and the proposed methodology to collect the empirical evidence, this section has explained why this study will create the analytical framework, how it will operationalise the TAN framework to collect the empirical evidence. To be quite specific, the case study will be used to fulfil two purposes. First, it helps us understand why transnational legal activists are so powerful in the 21st century. Second, the summation chapter - Chapter Seven - draws upon the analytical framework, which will provide a reading of all the empirical evidence and evaluates the political implications of this activism. For example, this study suggests that NGOs documenting the overt activism of the local judiciary is harmful for post conflict Zimbabwean and other postcolonial, post-soviet, post-conflict and newly independent countries who may be pinpointed by the capitalist trajectory of legal activism as a nation in need of an externally driven legal-institution-strengthening initiative. In addition, this study suggests that the World Bank/Commonwealth (NIE/LDM) driven legal-institution-strengthening initiative uses the momentum of the civil rights movement, the struggle between the Head of State and the legal and justice system and the synergy of the state transformation/human rights/democracy legal-institution-strengthening initiatives to justify a World Bank good governance development initiative in the post conflict era.

1.10 Summation and Conclusions

This chapter has covered a wide number of topics, which can be broadly summarised in three points. This chapter began with primary evidence from the Zimbabwean case study to suggest that the tactics, strategies and theoretical underpinnings of international development have changed. Based on this empirical evidence, which was analysed through a multiscale perspective, this chapter established that only a few critical voices are critiquing the new Law and Development initiative. This is the second point. The third point was to review some of the post development literature and the legal/human rights/social justice geographic literature, critical legal institutional development literature and state transformation/democracy/human rights literature to establish that this is the first geographic study to investigate how legal ideas, transnational legal activism

and the political presence of local legal and justice system agitate to take legal power away from the state. The purpose and objectives of the dissertation were outlined as well as some of the characteristics of the post structural/postcolonial analytical tool - discourse analysis. This chapter also highlighted a few points about methodological considerations.

The next two chapters set the global-local, politico-legal context of the study. Chapter Two will evaluate the Transnational Advocacy Network (TAN) Framework as a theoretical model, which illustrates that different trajectories of legal activism have interacted with, and altered, the political structure of legal and justice systems around the world. This illustration is central to the concerns of this dissertation's focus on the political structures of the legal and justice system. Chapter Three will introduce the analytical framework of this dissertation.

Before turning to these chapters, this dissertation acknowledges that it bridges a wide range of literatures such as critical cultural/feminist theory, economic theory, international relations, international law, political science, critical legal theory and critical geographic thought. This dissertation may be criticised for its rather eclectic use of different literatures. Yet, to develop the analytical framework, this dissertation has had to move through many different literatures.

Analytically, this study has put the political implications of the NIE/LDM logic at the forefront of the analysis because it is serious about law, development, social justice and human rights. This study seeks to understand what happens when organisations and institutions collectively argue for strengthening the legal and justice system against the state for the purpose of protecting human rights, keeping the peace, or creating economic development. This study begins with a global vision of how the New Institution Economics (NIE) touches local places. As will be suggested with the Zimbabwean case study, this activism and logic has altered the power relations running in and through the legal and justice system. This line of questioning is of significance to geographers who have an interest in feminism, human rights, social justice, politics, law, social justice and

economic development, and who in general seek to understand how global processes affect local places (Smith 2001, Watts 2000a, 2000b, Blomley 1994, Monk, 1996).

Methodologically, this study will use critical social theory- critical race studies, feminist legal theory, legal and economic theory - to bring more cultural sensitivity to this study. This study is in agreement with post development theorists who support social, economic and ecological justice and stress the need for sensitive theories, methodologies, and multiscalar analysis (see Watts 2000a, 2000b, Potter et al 1999, Slater 1997, 1998). The results of the application of this analytical framework may be evaluated by how successfully this analysis can offer the geographic discipline new theoretical insights into global processes. In the next two chapters, this study will develop the concepts such as the space of judicial independence, a transnational legal activists network - which connects rule of law views with transnational legal activists. The next two chapters will identify that there are competing notions of the use of legal space inside the space of judicial independence. Many of these ideas are not found in geographic literature, but many themes highlight important areas for future geographic studies of law, social justice and human rights studies, and the vision that by deconstructing legal discourses and transnational legal activists social movements, we can see the new legal geographies being produced and reproduced by different stakeholders. The Zimbabwean case study will demonstrate how rule of law discourses work in practice. Thus, geographers may be able to *see* this new world order. This is the topic we turn to in the next chapter.

Chapter Two: The Context - Trajectories of Legal Activism take Legal Power from the State

2.1 Introduction: Rethinking the Non-Intervention Question

This chapter follows from the last. The argument was made in Chapter One that geographers have analytically marginalized the spatialities of international law and legal space, and tended to view the United Nations Charter in conventional terms. The purpose of this chapter is to rethink the issue of intervention in the African context in the postcold war era, and the "...strictures on non-intervention in internal affairs embedded in the Charters of the United Nations" (Olonisakin 2000:41). It will deconstruct the state transformation/human rights/democracy and the critical legal institution development literature and offer a re-reading of the literature for the presence of the political structure of the legal and justice system. This chapter will reveal how the political space and structure of the legal and justice system allows the sovereign-state to be vulnerable to the international community. Through this literature review, it will reconstruct the political structure of the legal and justice system as a political space affected by trajectories of legal activism to suggest that trajectories of legal activism intervene in the day-to-day administration of the state.

Three main strands of argument are evident throughout this chapter. First, the citation of non-intervention clauses contained in the Charter of the United Nations, which theoretically protects a domestic government from foreign powers (Olonisakin 2000: 41), is a practice in the geographic literature that tends to cloak the complex politics between the legal and justice system and the state, especially in a conflict or postconflict situation (see Murphy 1999, Braden and Shelley 2000). Second, the TAN framework maps geographies and spatialities of intervention, encouraging humanitarian legal specialists to rethink the United Nations' language of "non-intervention" referred to by international law specialists. Third, transnational legal activists/NGOs reports on conflict and postconflict justice must be considered as a form of international intervention within the legal and justice system because these reports have the power to change the political space in the legal and justice system. Moreover, because legal activists' legal

interpretations, laws and legal activism flow over and through national borders and boundaries, new legal geographies are constantly being made. The argument of the dissertation pivots around this point because it suggests that the sovereign-state's main power struggle is not with the international community, *per se*, but with the transnational legal activists mediating with international funding agencies, international organisations of nations-states, civil society, and the state in the space of judicial independence.

This chapter will move quickly to fulfil its purpose in its first section which will offer a review of the literature to illustrate that different trajectories of legal activism have interacted with, and altered, the political structure of legal and justice systems around the world. This illustration is central to the concerns of this dissertation's focus on the political structures of the legal and justice system. The intention is to review the literature that identifies why the political structure of the legal and justice system has strengthened in the post cold war era. The second section will critically evaluate the Transnational Advocacy Network (TAN) Framework as a theoretical/visual approach to understanding how human rights advocacy networks fray sovereign-state power. This framework is the closest to a theoretical framework that even suggests how a global social movement affects the legal and justice system. This chapter will identify a number of themes the TAN conceptual framework seems to have missed which raises a series of methodological issues involved in simply adopting the TAN framework for the Zimbabwe-Commonwealth-World Bank case study. This review will offer several critiques of the Transnational Advocacy Network (TAN) Framework. These include limitations in theoretical, conceptual and methodological lines, lack of sensitivity to local level information politics, local social control and social norms, and the extensions of a United States of America geopolitical view of how the human rights movement is *progressing*. This review sets the backdrop for Chapter Seven. Chapter Seven will provide a critical analysis of the role of transnational legal activists in global governance and the political implications of these activists' actions. More specifically, this chapter will suggest that because the Transnational Advocacy Network (TAN) Framework raises a number of critiques, this study must develop an analytical framework – a Transnational

Legal Activists Network (TLAN)- that connects rule of law views with transnational legal activists.

Based on this review, it is argued that this study needs to combine the TAN approach and the Transnational Legal Activists Network (TLAN) approach to understand the politics, practices and patterns of local and transnational legal activists, international organisations of nation-states and international lending agencies driving the *institutionalisation of the rule of law*, that is, the process of binding the state with the law. This chapter will begin with a narrow definition of the rule of law. The rule of law refers to the political agenda of the international community, a nation-state, organisations, institutions or individuals to bind the state with the law, with morals and ethics, technical procedures and policies (Mathews 1986). Using this definition as a point of departure, this chapter will suggest that different literatures illustrate different trajectories of legal activism developed through time and space. Individuals, organisations and institutions writing international law, domestic law, economic laws, constitutional laws and humanitarian laws around the world create these trajectories. In general, this literature articulates that economic and political organisations and institutions support the process because they can rely on the judiciary - to protect the economic and political interests of individuals, organisations or institutions - against the state. When the judiciary is granted independence from the state, the judiciary is perceived to be separate from the political and economic forces in society, therefore able to place legal limits on the sovereign-state's power (Russell 2001a).

Several reasons are offered to justify why this study develops the TLAN approach. These include the following three reasons. One, much of the state transformation/human rights/democracy literature documents the process through which NGOs advocate for legal and economic reform can change a state's position in international relations, but few examine the political implications of this advocacy. Two, NGOs are collecting information about politics of law inside and outside the legal and justice system, but few scholars are asking why this information incites the international community or how this information can become the object of conflict between the sovereign-state and the international community. Three, few studies make the connection that NGOs advocating

for legal and economic reform is dangerous to local societies (see Chandler 2001). These three reasons give credence to this dissertation developing an analytical framework.

The third section will highlight why deconstructing the state transformation/human rights/democracy and the critical legal institution development literature is significant to the critical legal institutional development literature which seeks for new conceptualisations of the threat of the NIE/LDM logic to local societies, sovereign-state power and global social movements seeking social justice. This section will also highlight the significant points of the analysis offered in this chapter.

This chapter and the next will review the critical legal institution development literature and international law/state transformation/human rights/democracy literature to develop a theoretical critique of the NIE/LDM. This chapter will focus on developing the abstraction – *trajectories of legal activism*. This chapter will use a literature review and the Transnational Advocacy Network (TAN) framework to illustrate the presence of trajectories of legal activism.

These two chapters will thematically investigate several concepts such as judicial independence, rule of law, and the political practices of legal activism to suggest that each of these concepts is highly political. This review identifies three different spatial shapes created by the power relations of the state and the legal/justice system. First, the difference between the sovereign state and the legal/justice system, a contrast defined by tracing different trajectories of legal activism, the space of judicial independence and acknowledging that transnational legal activists tend to agitate the space of judicial independence. Second, the spatial shapes of law, authority and power when legal activists are harboured by the legal architecture. Human right advocates collaborating with the legal and justice system to develop new humanitarian international laws which create new political spaces for human rights activists provide an excellent example. Third, local changes in the legal culture as NIE/LDM logic changes the power relations running in and through the legal and justice system, changing social relations at the local-national-international levels. The significance of identifying these geographies, as suggested in

Chapter One, is to connect economic theory with local political practices. As will be suggested in Chapter Five, the World Bank/Commonwealth NIE/LDM legal-institution-strengthening initiative advances ideas such as *good governance* and *anticorruption*, thereby imposing an anticorruption movement upon local communities, which has deeply affected people's lives.

The next chapter will develop the other concepts, which serve as part of the analytical framework of this dissertation and are used in further analyses in the rest of the dissertation, to illustrate the geographies and spatialities created in the wake of the NIE/LDM legal-institution-strengthening initiative.

2.1.2 Approaches to the Study of How Global Social Movements take Legal Power from the State

Ways to describe how global social movements affect the political structure of the legal and justice system are characterised by two approaches. The first is a literature review. This approach suggests that through the literature we can identify several specific events which have acted as catalysts to pull NGOs, the media, lawyers and the judiciary into international relations shaping a global social movement that seeks to bind the state with law. For instance, the international law literature emphasises the construction of international law and international institutions supported by the international community and the struggle among the international community and sovereign state, and the local legal and justice systems (Murphy 1999, Charlesworth and Chinkin 2000, Shaw 1999, Stark 1999, Okafor 2000, Ibhawoh 2000). The international law literature overlaps with the state transformation/human rights/democracy literature, which examines how organisations and institutions use the power of social movements to create legal power (Tolley 1994, Sikkink 1996). This literature emphasises the process of change as advocacy networks gain more power, which allows them to take legal power away from the state. The second set of literature is the critical legal institution development literature. This literature offers insights into the capitalist political economy of legal ideas; and emphasises the processes and policies involved in constructing economic laws

(Trubek 1972, 2000). All these literatures can be criticised for their lack of socio-spatial analysis.

The second approach that describes how global social movements affect the political structure of the legal and justice system is a theoretical model. A good example of this approach is the Transnational Advocacy Network (TAN) Framework. The TAN framework illustrates how information flows (telecommunication, faxes, etc) and local civil institutions build up their connections with international non-governmental organizations (INGO) to force authoritarian regimes to incorporate international human rights norms into their daily practices (this theoretical framework was mentioned in Chapter One). This review will identify a number of silences and assumptions in each of these approaches.

A third approach is developed by extending the TAN framework with post-structuralists' analysis to provide a better understanding of how rule of law is made into *legal power*. The Transnational Legal Activists Network (TLAN) approach connects rule of law views with transnational legal activists. It examines themes such as legal activists' political practices and NGOs - as contact zones between the North and South – who will play an important role in expanding activist lawyers' and judges' territory, visibility and activism. This approach emphasises that shifts in legal theory have empowered legal activists, and changes in legal theory continue to empower the lawyers, judges, media, non-governmental organisations and others who seek to develop more inclusive laws, policies and practices.

2.2 The Literature Review Approach

This chapter will use these two different literatures to illustrate, with empirical and historical evidence, the trajectories of legal activism separating the state from the legal and justice system. The review of the international law/state transformation/human rights/democracy literature and the critical legal institution development literature and the literature on judicial independence and political practices of legal activists will provide a rough outline of the political structure of legal and justice systems and how they have

changed through space and time. This literature review will be offered in this chapter and the next. This section has a specific objective. This section will provide a brief analysis of two global social movements in the legal community, which have created the global context in which the local legal and justice systems have evolved. The first is the state transformation/human rights/democracy social movement that seeks to strengthen politico-legal structures to help institutionalise local civil rights (more commonly known as the human rights movement). The second is the capitalist social moment that seeks to strengthen legal mechanisms to protect the material rights of the market economy (often known as the New Institutional Economic logic and/or the Law and Development Movement (NIE/LDM)).

This chapter will use the methodology commonly known as the *Foucauldian strategy of textuality*, a method that examines the text for silences and omissions and seeks to reveal narratives that have been marginalized in mainstream arguments. The analytical lens developed for this reading focuses on a very narrow point: the power relations between the legal and justice system and the state; and the point that the state is bound to a location, whereas a trajectory of legal activism has multiple places of origin. These trajectories illustrate that the location of the real struggle between the state and the legal and justice system is a struggle that occurs in abstract space. The struggle materialises as changed social relations through the application of a law in a place. The critical point being stressed is that legal activists *seek out laws that could be changed rather than focus on a specific place*. The purpose of this reading is to reveal the power relations that are often marginalized in the international law/state transformation/human rights/democracy literature and the critical legal institution development literature. The purpose of this section is to highlight what these literatures can tell us about the political structure of the legal and justice system, as well as make these insights explicit in this study.

The significance of providing a complex conceptualisation of different social movements (which have different agendas within different trajectories of legal activism) is to illustrate that there are struggles over the use of legal space. This section will illustrate that each trajectory builds a new legal scaffolding of laws, activism and ideas as it

advances a legal-institution-strengthening initiative through time and space. These trajectories of legal activism drive the legal-institution-strengthening initiatives, which affect legal and justice systems around the world. Moreover, each global social movement has permanently changed local legal and justice systems, strengthening their political structure as separate from, yet connected to, the state.

This section will suggest – with bold brush strokes - that the international law and the state transformation/human rights/democracy and critical legal institution development literatures illustrate different trajectories of legal activism developed through time and space. In both sets of literatures, similar themes arise. The first theme is the interdisciplinary nature of investigation. A second theme is the focus on details in the legal process. By this it is meant the careful documentation of how legal activists alter legal texts at the national level. As legal texts are changed through time, these hold the legal power to reshape international and domestic legal space, which in turn has been creating some legal and economic uniformity across the globe (Sarat and Scheingold 2001a, Trubek 2000, Gubbay 1997, Tolley 1994, Cain and Harrington 1994). A third theme is that both social movements tend to use a similar process of taking legal power away from the state. Each social movement seeks to change legal ideas in local societies, change legal phrases, and the occasional clause of legal text and tries to make their different rule of law views made into legal power. In addition, both social movements strengthen the legal and justice system to support their agenda. For example, the state transformation/human rights/democracy legal-institution-strengthening initiative focuses on strengthening the political structure of the legal and justice system to include issues of social justice. Whereas, the NIE/LDM legal-institution-strengthening initiative seeks to strengthen the legal and justice system to protect the economic transactions of the market economy. Thus, each trajectory of legal activism has a vision, which is driving the legal-institution-strengthening initiatives. These trajectories seek to change local social norms, ethics and morals. They seek to transform local legal systems and spaces of social order. These visions attract individuals, organisations and institutions that also seek to create change in international law, domestic law, economic laws, constitutional laws and humanitarian laws around the world.

Another theme that surfaces from both sets of literature is the acknowledgement that legal activists create friction as new visions of justice are advanced across political landscapes. Thus, the spatial transference of legal philosophical ideas is neither simple nor gentle. These activists dismantle local political and social structures, create disputes over legal practices, procedures, social norms, interpretation of legal texts, create contested territories of state/judicial dynamics, change individuals' sense of legal personality (i.e. the civil rights culture) and manipulate political, social and economic spaces (Hendley 1997).

These themes suggest that these social movements are similar. However, these two sets of literature are quite distinct because the empirical evidence that they examine covers different historical periods. The international law/state transformation/human rights/democracy literature covers a period from the 17th century to the present (Stark 1999). Whereas, the critical legal institution development literature focuses on impact of the 1960s/1970s and 1990/2000s law and development initiatives spanning some 40 years (Appendix 1.1). Furthermore, the international law/state transformation/human rights/democracy literature illustrates a trajectory of legal activism seeking to separate the state from the law for the purpose of institutionalising human rights, peace, etc. Whereas a literature review of the critical legal institution development literature illustrates the presence of a trajectory of legal activism with a distinctly different agenda. This trajectory seeks to create international and domestic economic laws that reform legal systems to clarify governmental decision-making, reduce corruption and change weak financial accounting and auditing systems. This trajectory of legal activists has an overarching agenda to ensure that the government uses the law to protect the material rights of the market economy (Mbuku 1999, Hendley 1997).

Because the international law/state transformation/human rights/democracy literature covers a longer history of activism creating international laws, this literature will be reviewed in greater length and reviewed much more thoroughly to identify themes that suggest the process through which a global social movement in the legal community has

created the global context in which the local legal and justice systems have evolved. The human rights social movement has developed a sense of identity and power. To conclude this introduction, the purpose of this literature review is to illustrate how different trajectories of legal activism have interacted with, and altered the political structure of the legal and justice systems around the world, and to identify why the political structure of the legal and justice system has strengthened in the post cold war era.

2.2.1 The State Transformation/Human Rights/Democracy Trajectory of Legal Activism

The international law/state transformation/human rights/democracy literature reveals several distinct characteristics about the social movement seeking to institutionalise local civil rights in the standing laws of the land. These include: the historical characteristics which have created the political presence of legal and justice systems; the presence of North/South relations; changes in strategies to challenge the state; a modernity/Enlightenment era/Eurocentric vision; and changes in nongovernmental organizations and legal activists' strategies to control the state. This review will focus on three themes - time, changes in strategies, and visions – to suggest how this trajectory of legal activism has changed its strategies through time and space.

2.2.1.1 Time

The international community has constructed international human rights law and changed local power hierarchies and political structures since the 17th century (Carter and Trimble 1999). The three significant historical moments are 1625, 1945 and 1986.

2.2.1.1.1 *De Jure Belli ac Pacis* (The Law of War and Peace (1625))

A region specific event initiated a global social movement, which has affected the political structure of legal and justice systems around the world. The historical catalyst was when the European countries sought to sustain peaceful relations among themselves with the *De Jure Belli ac Pacis* (The Law of War and Peace (1625)). The *De Jure Belli ac Pacis* is a semi-theological concept based on the reasonable behaviour of national leaders in international relations wherein reasonable and rational behaviour would guide

men and women in times of peace - rather than laws of war. The laws of warfare between states have been complimented with a legal treatise of peace. *The Treaty of Westphalia* (1648) closely followed the inception of this treatise. Many who trace the creation of the modern state continue to refer to the combination of the legal theory and signed treaty, and the evolution of European modern states (Stark 1999, Murphy 1999). This combination has greatly influenced the formulation, usage and practice of customary rules referred to in international law, which in turn governs the relations between nations. This literature stresses that the geopolitical history of the state and the legal and justice system (two concepts often interchangeably used by geographers) began to split. Each institution began to develop a different set of power relations. These different power relations surface in the language of international relations. For example, Charlesworth and Chinkin (2000) use the language of international law to define international relations, routinely expressed in legal terms with words such as *civil rights*, *constitutional obligations of the state*, *abuse of power by the state*, *authoritarian state*, *military state*, *women's rights*, *impunity* and *amnesty*. In the logic of international legal theorists, these terms position the state against the legal and justice system.

These different power relations can also be found threaded in historical changes in international relations. For instance, nation-states advocating for legal rather than military solutions and often advocating for legal specialists to interpret conflicts, meant that many European legal and justice systems began to develop distinct political presence (Stark 1999). Legal and justice systems within European countries took the dominant position in providing the interpretation of the meaning of peace and war. Moreover, European states continued to create institutions to administer international law. For instance, the *De Jure Belli ac Pacis* meant that different nation-states used this legal doctrine as the basis of their negotiation. Many states sought to institutionalise and formalise these negotiations in specific institutions. International organisations were constructed to maintain peace and protect human welfare, for example the Permanent Court of Arbitration (1899, 1907), the Permanent Court of International Justice (1921), which became the International Court of Justice (1946) that has been succeeded by the present International Court, have regulated the conduct of European powers for the past century. The International Court

has been supported by two permanent international organisations, the League of Nations (1919), and now the United Nations (1946 (UN)) (Shaw 1999). In this reading, the international law literature seems to provide much evidence that sovereign-states support a trajectory of legal activism to institutionalise legal procedures and empower local legal and justice systems, and further separate the state from the source of legal power.

Seen in this light, the political presence of European legal and justice systems began in the 17th century. Since the 17th century, the geopolitical histories of the state and the legal and justice system have been divided, with each institution developing a different set of power relations which are produced and reproduced through the social construction of international courts, and international organisations meant to sustain world peace. As well the language of international law which use terms such as *constitutional obligations of the state*, *military state*, *women's rights*, *impunity* and *amnesty* are meant to position the state against the legal and justice system (Stark 1999).

The significance of the history of European nations' legal and justice systems interpreting international law and being granted more independence from the state is that European legal and justice systems have very different power relationships than those seen within colonies, such as the British colonies. Palley (1966) suggests, with extensive research and much detail, that the legal and justice system and the state were closely connected in many British colonies. The legal and justice system generated laws to protect the state against the demands, and basic needs, of the people. Widner (2001) and Hatchard (1993) support Palley's (1966) assertions that the judiciary, within colonies, were restrained by the state.

2.2.1.1.2 Post World War Two (1945)

These characteristics of the legal and justice system interpreting the laws of war and the laws of peace for the state became much more powerful in the post World War Two era. Since the end of WWII, the UN's commitment to the ideal nation-state and individual human rights has been a political move. After WWII, international law held a distinctively interventionist strategy to control the state. The international community

responded to the horrors of the Genocide of the Jews. Human rights social movements have come in different forms since 1945. Some led the anti-slavery movement, others led the anti-colonization movement, the anti-discrimination of minorities' movement and other social movements; some advocated for the end of the Cold War and the practice of democracy in post-soviet countries and the presence of the UN. All of these factors have played a number of different roles in strengthen the political position of the legal and justice system (Carter and Trimble 1999).

This literature documents that human rights institutions, networks and norms increased between 1945 to the present. In 1976, the two international human rights covenants took effect. New institutions such as the United Nations Human Rights committees, and most western countries developed explicitly bilateral and multilateral human rights policies (Risse et al 1999, Braden and Shelley 2000). New legal mechanisms scripted to contain the state and protect the citizen from the state. Since the end of WWII, international institutions such as the High Commission for Human Rights, the Commission on Crime Prevention and Criminal Justice and treaty monitoring bodies such as the Committee Against Torture, Committee on the Elimination of Discrimination against women and international treaties such as Rights of Children, Economic, Social and Cultural Rights and Civil and Political Rights have been created. The common thread among all of these institutions, treaty monitoring bodies and international treaties is that these legal strategies serve one purpose: the international community seeks to create a mesh of legal strategies to protect the citizen from the legal power of the sovereign-state. The International Declaration of Human Rights (IDHR (1948)) outlined fundamental human rights that should be protected from the powers of the state, otherwise known as "negative rights" - rights of the individual need to be recognized over the rights of the sovereign-state. Subsequent covenants have been added to the IDHR as the IDHR document has been interpreted and re-interpreted. As Carter and Trimble (1999) argue, each covenant makes the monitoring of human rights almost contradictory. For instance, the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights work in opposition to one another. The latter requires positive state action for empowerment; the former requires that the state not interfere.

Reading this literature through the post structural/post colonial analytical lens, the text offers another narrative. This reading envisions lobbying for change, by individuals willing to challenge the state on moral issues. This reading offers a sense of the activism inside this global social movement (Mathews 1986, Tolley 1994, Gubbay 1997).

2.2.1.1.3 The United Nations (UN) Acceptance of the Basic Principles on the Independence of the Judiciary (1986)

In 1986, the United Nations (UN) accepted the Basic Principles on the Independence of the Judiciary (1986) and the Basic Principles on the Role of the Lawyers (1990). The concept was to develop international support for the separation of powers between the state and the legal and justice system. The concept of the independence of judiciary, jurors, assessors and lawyers has been translated into different ways to monitor the implementation of these principles. Techniques included: asking governments to ensure that judges and lawyers would not be prejudiced for performing professional duties, and ensuring them safe travel - internationally and domestically - without fear of their personal safety (Tolley 1994).

This study will suggest that the presence of the United Nations' Special Rapporteur on the Independence of Judges and Lawyers has initiated changes between the legal and justice system and the state in the postcold war era. Dynamic changes have occurred in the past 22 years. However, because this study is offering a geographic interpretation of the impact of the United Nations' Special Rapporteur on the Independence of Judges and Lawyers, this suggestion is made against Howard's (2001) rather sceptical viewpoint that this Rapporteur has had very little effect to the independence of judges and lawyers.

While these are only recommended principles, with the UN Commission's approval, advocates for the independence of the judiciary could begin the process of promoting these principles in national law. Third world jurists and public officials were encouraged to adopt the principles in national law (Tolley 1994). The key idea to take from this discussion is that the institutionalisation of the separation of powers *has changed legal*

geographies around the world. Geographic patterns of how law was practiced, politics of lawmaking, the interpretation of laws and the legal and justice system in different locations were changed, increasingly defined by the degree to which sovereign states would grant independence to the legal and justice system. The sole purpose was to make a more interactive process between the legal system, public opinion and public behaviour (see Hunt 1997).

After the UN appointed a United Nations' Special Rapporteur on the Independence of Judges and Lawyers, changes have happened at the local and global scales. This international presence offering international quasi-protection of legal and justice systems, allowed local legal activists to take more legal power away from the sovereign state, and integrate new legal structures within local societies. Tolley (1994) suggests that everyday life began to change. Legal activists became a territorial presence within national borders. Different local interest groups within civil society, the media, NGOs and the judiciary, offered their voices, and in turn, the philosophy and practices within the legal community have changed, creating new legal structures at both local and global scales. Since then, the international community has put more pressure on sovereign states to protect lawyers and judges from sovereign-state authority, and to protect legal activists who are actively changing legal culture. Internationally, a geographic pattern began to take shape. The state was surrounded by a trajectory of legal activists connected to locations all over the world who would report to United Nations' Special Rapporteur on the Independence of Judges and Lawyers when the state transgressed into the space of judicial independence. This trajectory of legal activists constantly sought new ways to create more independence for the legal and justice system and institutionalise judicial independence around the world. Their vision and determination to separate the state and legal and justice system has changed legal geographies around the world (Tolley 1994, Hunt 1997, Widner 2001).

To summarise, this section has offered a particular reading of the literature to suggest that many of the changes that have occurred in the global context have affected local legal and justice systems. This reading reveals that the trajectory of legal activism, seeking to protect human rights, circles the globe, keeping a postcolonial or post soviet state (bound

to a location) under surveillance through a Euro-American world view. In addition, this section has offered a summary of some important historical events. Many of these events have changed how legal and justice systems are conceptualised by the international community. This section provides historical and empirical evidence that suggests how the trajectory of legal activism driving the state transformation/human rights/democracy legal-institution-strengthening initiatives has changed in the past three and a half centuries. Moreover, this study suggests that with the recent changes in telecommunications, the trajectory of legal activism driving the state transformation/human rights/democracy legal-institution-strengthening initiatives have increasingly affected legal and justice systems around the whole globe. The section below will support this assertion by offering four historical events that have allowed human rights advocates to deepen and broaden the impact of this global social movement.

2.2.1.2 Historical Events Facilitating the Process of Institutionalising Human Rights and Peace

Legal activists have consistently agitated to create space to separate the power of the legal and justice system from the state. Changes in the world – such as the globalisation of technology, trade, culture, labour, economics, politics and much else - have assisted their cause, and changed how international law has been incorporated into domestic law. International law has become a complex blend of global decision making processes that represent NGOs, intergovernmental organizations, regional and international organisations of nation-states who work with interpreting and re-interpreting the jurisdiction and responsibilities of nation-states (Carter and Trimble 1999, Lauderdale and Toggia 2000).

Two major strategies have been taken by the trajectory of legal activists driving the state transformation/human rights/democracy legal-institution-strengthening initiatives. First, the broadening and deepening of the WW II human rights social movement.

Organisations and institutions mobilised to write new international laws to protect the rights of citizens. Human rights activists have worked with judges and lawyers inside national borders. Judges and lawyers could challenge sovereign-state power by lobbying

for domestic and international legislation to protect citizens' rights. This activism would legitimately fray the power of the sovereign-state and force the sovereign-state to integrate international norms into a nation's day-to-day administration (Tolley 1994, Addo 2000).

Second and more broadly, historical events created changes in the politico-legal economy, which in turn allowed legal activists to create new ways to agitate to create political space for the legal and justice system. Different literatures identify different international events that have strengthened the politico-legal structure of legal activists agitating for more human rights. The main events that tend to surface in the literature are: telecommunication advances, an increased number of legal activists, a response by the academic community, the 50th anniversary of the International Declaration of Human Rights (IDHR (1948-1998)), and the post cold war period in which democracy has become a "panacea" to the world's problems (Mutua 2001: 205). Some of these historical events will be briefly mentioned as they provide the historical context for interactions between the legal and justice system and Robert Mugabe. Each of these events also suggests how the power of this social movement has grown in the past thirty years and gained a greater political presence.

The first event is the change in technology in the past twenty years. Telecommunication advances in the 1980s have meant that ideas about social justice could circulate the globe through telecommunication systems, faxes, office memos, public statements, etc. and eventually change local thinking. The significance of this change is that new ideas were circulating the globe at a rapid pace. Since the cost of faxes, the World Wide Web, and airplanes has decreased (in real dollars) there have been an increased number of legal activists and the faster flow of information, which was materialised as a growth of human rights law (see also Brunn et al 1999).

The second event is the 1993 United States of America foreign policy, which has supported the activists' political impetus. For instance, Fenster (1999) highlights that during the 1980s, there was a growth and change in legal thought, including an awareness

of cultural and gendered differences in legal institutions. Kent (2001: 605) also offers the observation that USA foreign policy has been driving the growth and change in legal activism. After 1993, when President Clinton made the executive order to deepen the U.S. commitment to human rights based on “measurable” human rights indicators. Kent argues that the post 1993 human rights movement, while bringing more visibility to the human rights agenda, is methodologically flawed. Kent notes that in 1993, this shift to quantitative data of human rights abuses

...was ill conceived because human rights are in essence qualitative rather than quantitative. The rights of freedom of speech, press and association, the right to a fair trial, to freedom from arbitrary detention, torture, murder are rights whose existence is assessed according to their entrenchment in constitutions, in laws, in institutions, and in their realisation in the empirical application of rules. They are integral to the structure of the state and society, and cannot be evaluated according to indices, such as the number of prisoners released. The quantifiable aspect of rights is the number of rights fully observed and implemented, not the number of times the denial of a right is waived in particular cases.

The significance of the USA’s commitment to the human rights agenda is the increase of empirical evidence of human rights abuses. With the Clinton Administration committed to the human rights agenda, more NGOs had access to funding (based on the quantitative evidence they could compile in their reports). In addition, international lending institutions such as the World Bank mimicked the 1993 USA executive order to deepen the U.S. commitment to human rights, and began to support NGOs local advocacy work (Potter et al 1999).

Much of this evidence, compiled by NGOs, can be downloaded from a number of websites such as *WomenWatch* and *Child Rights Information Network*. Both sources of empirical evidence illustrate a significant point: human rights norms are not the norm in many political landscapes. Moreover, the USA’s commitment to the human rights agenda can be read on another level. With the increase of empirical evidence of human rights abuses, there has been an increasing number of questions pertaining to humanitarian law. For instance, why do people all over the world continue to suffer civil rights violations at the hands of state and non-state authorities, when there has been the

advancement of numerous formal agreements - treaties - one of the main forms of international law (Charlesworth and Chinkin 2000)?

The third event is the changes in scholars' conceptualisation of violence, which has made the human rights activists more sensitive to the psychosocial impact of the threat of violence (see Chapter Six). The changes in technology and foreign policy have brought more empirical evidence of violence to the general public. The empirical evidence of human rights abuses appears to have made an impact on recent scholarly literature, and changed the way that scholars are thinking about the violence. Scholars' analysis of human rights abuses in Africa is revealed in titles such as Dead Certainty: Ethnic Violence in the Era of Globalisation (Appadurai 1998) Not Another War Story (Nordstrom 1997), The Anatomy of Corruption (Kibwana and Okech-Owiti 1996), The Anthropology of Anger (Monga 1996) and many others. These titles suggest that many of these themes - violence, anger, war, corruption, economic mismanagement of international donor funds - dominate and direct the discussion of Africanists and Africans, and broaden the analysis of the root causes of violence in local societies. The significance of this historical event is that scholars are discussing these themes with increased theoretical and methodological sensitivity. Advances in theory and methodology are changing the way that research institutions are generating empirical evidence (see Chapter Six).

The fourth event is the landmark 50th anniversary of the International Declaration of Human Rights (IDHR (1948)) that outlines that fundamental human rights should be protected from the powers of the state (known as "negative rights" - rights of the individuals need to be recognised over the rights of the sovereign-state). The significance of the 50th anniversary is that it signals the height of the critical debate, and the raising of many questions about the international communities' commitment to individual's rights. The post 1998 debate focuses on key contradictions. For example, since the end of WWII, we have seen the UN commitment to human rights on paper. But the ability of the signatories of the UN Charter to abide by these rules highlights the gap between theory and practice (Donnelly 1998, Dillon 1998).

These historical events, which have created changes in the politico-legal economic global context, have meant that legal activists could strengthen their position relative to the state by strategically agitating for more space for the legal and justice system. The next section will offer a reading of the literature to suggest this trajectory of legal activism uses three strategies to take legal power away from the state.

2.2.1.3 Strategies to Institutionalise Human Rights and Peace

Legal activists seeking to advance the state transformation/human rights/democracy legal-institution-strengthening initiatives use a number of political strategies. These strategies can be broken into three categories: global social movements, legal discourse, and judges and lawyers agitating in the space of judicial independence. Each of these categories represents different ways to take legal power away from the state through agitating inside and outside national borders.

The first strategy is a global social movement within the legal community. This dissertation has developed the analytical term - *trajectories of legal activism* – to suggest that global social movements have interacted with, and altered the political structure of legal and justice systems around the world. The section above suggests how the reach of a trajectory of legal activism within the legal community is deepened and widened through time and space. Two examples will be offered to illustrate this point. The intention behind providing this description is to illustrate that geopolitical positions solidify when human rights activists work with judges and lawyers to create a fine mesh of international treaties, regulations, laws, etc to bind the state.

The first example can be taken from the four historical events, offered above, that have allowed human rights advocates to deepen and broaden the impact of this global social movement. These events offer a moving vision of some of dominant/subordinate North/South power relations in human rights activism. The dominant players are the USA Clinton Administration driving a new foreign policy, the United Nations, international lending agencies and human rights and legal scholars prominently located in Euro-

American states (Kent 2001, Potter et al 1999). In contrast, the subordinate players in this literature tend to be nation-states that borrow funds from international lending agencies that in theory support the civil rights movement, and academic scholars who discuss and debate the meaning of violence with increased theoretical and methodological sensitivity. Heads of State who do not seem to comply with these international norms are immediately positioned into a subordinate position. The point being made is that there is a broader politico-legal and economic context shaping the dynamics within the global social movement, which seeks to strengthen the political structure of the legal, and justice system. This context also shapes the human rights movement. As Dezalay and Garth (2001: 365) point out that

...the space of human rights then became the stakes of a political fight between the new conservative holders of state power and large coalitions of reformers from places like the civil rights movement and liberal foundations.

The second example affirms the first. The literature that examines African Heads of State's compliance with international norms tends to follow two views. One view is that many Organisation of African Unity (OAU) national leaders and human rights-based humanitarian NGOs hold different worldviews. Some argue that the International Declaration of Human Rights (IDHR) is a failure in the African context (Hatchard 1993, 2000). Another view focuses on the politico-legal historical context. For example, Odinkalu (1998, 2001) argues that Heads' of State rule of law views tend to be anchored to three historic points, rather than in contemporary events. The key three historical points are these: First, when the UN adopted the IDHR in 1948, the text had been negotiated within the international community. Yet only four African countries participated. According to Odinkalu (1998: 404) when African countries were decolonised, "the paramount concern of African countries became the preservation of their newly won sovereignty". Many African leaders did not appreciate the intrusive judicial or quasi-judicial procedures or institutions created to protect human rights. Second, the Organisation of African Unity (OAU) rule of law view is often connected to different colonial experiences. Conflicting views present at the OAU's founding in 1963 are mirrored within current conflicts within the organization. Originally many leaders who struggled to liberate their countries from colonial rule desired to create an

association that would unify and empower Africa. Whereas several other leaders -mostly from Francophone states (still dependent to some degree on France)- sought to limit the original organization's power so the OAU would not interfere with sovereign powers. The OAU emerged as a compromise between the two dominant views (Carter and Trimble 1999). Third, many African states have different priorities than North American states. This is apparent in the African Charter of Human and People's Rights (ACHPR). ACHPR has been influenced by the IDHR but that the ACHPR has a pattern of African philosophy, historical traditions, laws, social values incorporated in order to meet the needs of African peoples: one of the most distinguishing features of the ACHPR is its commitment to *people's* rights. The concept *people* has been criticised by some who argue that individual rights have been lost in this document (Odinkalu 1998). So while the ACHPR should bind the OAU members' rule of law views, the legal history of sovereign-states' integration into the global community alters the legal history of the judiciary with these states.

The significance of these two examples is that they both suggest that the global social movement within the legal community (creating a fine mesh of international treaties, regulations, laws, etc to bind the state) is affected by the broader politico-legal and economic context. Both examples affirm the argument made by Dezalay and Garth (2001:371) who suggest that funding from the USA has changed the practices, politics and geographic distribution of human rights activism. Their argument connects themes such as international investment in human rights advocacy, economic liberalization, and the production and reproduction of the field of human rights to support the global power relations in favour of the USA. At the core of their argument is a sharp criticism of the entire human rights movement at local and global level, as suggested by the following quotations:

...local organizations of human rights...no longer remember what they represented earlier. Many, for example, have converted to causes and issues such as the control of crime or the prevention of violence against women. They are much more outposts of international development assistance than activists in legal institutions challenging the state (Dezalay and Garth 2001:369).

[major human rights groups] ...gained their substantive agenda and their tactics not simply through the adoption of “pure law” and “pure enforcement” but rather through media strategies designed to gain influence in Washington (Dezalay and Garth 2001:371).

They argue that local populations have been given the legal discourse of human rights to challenge sovereign-state power, perhaps at the cost of releasing their power to the global forces. Meili (2001: 309) has also made a similar argument, albeit phrased somewhat differently: “...the extension of rule of law to newly emerging democracies may be another form of imperialism and neo-colonialism”. Taken together this literature suggests that the patterns of domination/subordination inside this global social movement need to be carefully examined.

The second political strategy that legal activists use to advance the state transformation/human rights/democracy legal-institution-strengthening initiatives is their use of legal discourses (such as the International Declaration of Human Rights) to politicise the legal culture and alter politico-legal geographic imaginaries of a future world. This is not a simple strategy. Moreover, this technique, much like the global social movement seems to penetrate local legal cultures with an explicit purpose. For instance, Mutua (2001) comments on the global political framework built on legal and quasi-legal institutions and its use of a specific discourse to further a particular economic/human rights agenda. Sarat and Scheingold (2001b: 11) have labelled this process with a specific term - the “[human] rights industry”. This industry uses the human rights agenda to perpetuate the political and economic power of the North over the South. Many formal and informal institutions and organisations use the human rights rhetoric to politicise local-global landscapes. Although globalisation of the human rights discourses is differentiated locally - each location accepts and or contests the abstract promise of humanitarian principles differently – what is not different is the political implications of ignoring this discourse. As Mutua (2001: 205, 243) rightly identifies, the language of “democracy”, “constitutionalism”, “social and economic rights” ‘self-determination’ is intensely political in the global community, particularly if a country is a postcolonial, post-soviet, post-conflict or newly independent country seeking support from Euro-American nations.

The threads to follow in this line of argument are that the human rights movement is driven by the tenets of *modernity/Enlightenment era/Eurocentricism* and that international lending institutions have used the democracy rhetoric extensively in the postcold war period (Dezalay and Garth 2001). Lending institutions had taken on a particularly controversial position, forcing many countries to shift from “military or other dictatorships to multiparty democracies” in the post cold war era (Z-Insider 31/07/01-O). Moreover, many developing countries are willing to pretend to mask their ideological differences and conform to an externally imposed human rights agenda based on the condition that they would have more access to international funding (CS-4/5/2001-PI, Sarat and Scheingold 2001a). The significance of the human rights/democracy discourses is that these discourses tend to construct deeper power inequalities “among and within cultures, national economies, genders, religions, races and ethnic groups and other societal cleavages” (Mutua 2001: 207).

This trajectory of legal activism uses a third strategy. It encourages judges, legal activists and NGOs to agitate within national boundaries. This point will be discussed in Chapter Three. To summarise, the human rights legal activists use these three strategies –global social movements, legal discourse and agitation by the legal and justice system within the state – to take legal power away from the state.

To conclude this review, this reading of the literature has suggested that the trajectory of legal activism driving the state transformation/human rights/democracy legal-institution-strengthening initiatives has five distinct characteristics. First, the political presence of legal and justice systems has been developed through time. Three critical historical moments were mentioned: the creation of the *De Jure Belli ac Pacis* (The Law of War and Peace (1625)) which changed state and legal and justice system relations (Stark 1999, Murphy 1999); the United Nations’ commitment to the ideal nation-state and individual human rights has been a political move in the post World War Two era (Charlesworth and Chinkin 2000); and the United Nations acceptance of the Basic Principles on the Independence of the Judiciary (1986) and the Basic Principles on the Role of the Lawyers

(1990) (Tolley 1994).

Second, this global social movement is shadowed by the presence of North/South relations in the “[human] rights industry” (Sarat and Scheingold 2001b: 11). Some of the literature acknowledges that the human rights industry uses the human rights agenda to perpetuate the political and economic power of the North over the South. Moreover, the differences between the North and the South are deepened because the tenets of *modernity/Enlightenment era/Eurocentricism* deepen power inequalities, dividing national economies, genders, races, religions, etc (Mutua 2001). Third, the shift to “measurable” human rights indicators in the post 1993 human rights movement, which sought to provide quantitative data of human rights abuses, has changed the way that scholars and human rights practitioners think about state condoned violence (Kent 2001: 605). Fourth, the trajectory of legal activism driving the state transformation/human rights/democracy legal-institution-strengthening initiative seeking to separate the state from the law for the purpose of institutionalising human rights, peace, etc. is being driven by a *modernity/Enlightenment era/Eurocentric* vision. And fifth, nongovernmental organizations and legal activists have developed a strategy to contain, alter and manipulate the sovereign-state’s legal and justice system to integrate more human rights norms. Part of this strategy is to create more treaties, institutions, treaty monitoring bodies and international treaties. All of the strategies serve one purpose: create a mesh of legal strategies to protect the citizen from the legal power of the sovereign-state. Postcolonial African leaders seeking to preserve their “sovereignty” and who challenge the judicial, quasi-judicial procedures, and institutions created to protect human rights have been identified as forcing the issue and raising serious questions about sovereignty and intervention (Odinkalu 1998: 404, Olonisakin 2000, Addo 2000).

2.2.2 The Capitalist Trajectory of Legal Activism

The critical legal institution development literature reveals several distinct characteristics about the social movement driving the New Institutional Economics /Law and Development Movement (NIE/LDM) legal-institution-strengthening initiative. These characteristics include following three points. One, the logic that the market economy can

only function efficiently through the transformation of legal institutions and the enforcement of the law. Moreover, the logic is difficult to unravel because the complex authoritative language intermixes law and economics. Two, international lending agencies such as the Asian Development Bank and others are financially supporting this logic. Three, the trajectory of legal activists driving the NIE/LDM legal-institution-strengthening initiatives tend to focus on the procedures and practices of law rather than the social justice. Because of this, when western models of democracy and law were exported to developing countries and applied, these ideas tended to fail when imported.

This review will address all of these points to suggest how the capitalist trajectory of legal activism thinks, articulates and envisions a better world for those in postcolonial, post-soviet, post-conflict and newly independent countries.

This section will suggest the presence of a very different global social movement affecting the political structure of the legal and justice system. This social movement is unique because it began in the 1960s under the rubric of the human rights movement. In the 1990s this capitalist legal-institution-strengthening initiative was revitalized as the new development initiative (see Appendix 1.1). In the 1960s individuals leading the anti-slavery movement, the anti-colonization movement, the anti-discrimination of minorities' movement and other social movements made the assumption that the United States legal model of a modern legal framework would bring economic development to postcolonial, post-conflict and newly independent countries (Widner 2001, Trubek 2000, Rose 1998).

In the 1990s, the outside world was changing, and international lending institutions, such as the World Bank, had to change their approach to development. There was an increased globalisation of the world economy and the deepening and broadening of the human rights movement. Moreover, many post-socialist and developing countries had begun the arduous process of initiating a transition toward a market economy. Some countries adopted western legal mechanisms, such as private property rights and contracts to attract foreign trade and investment. Although there are different actors driving the 1960s and 1990s social movements, the underlying vision has remained the same. This vision argues

that *law = modernisation/progress*. The logic of entwining law and economics is framed on one idea: the market economy can only function efficiently through the transformation of legal institutions and the enforcement of the law. Because this social movement has shifted from civil rights lawyers to international lending agencies, many of the strategies used by the trajectory of legal activism driving the state transformation/human rights/democracy legal-institution-strengthening initiative are often invoked (Trubek 2000).

The literature which has noted these points of intersection is the critical legal institution development literature is led by Trubek (1972, 2000) who emphasises that lessons from the 1960s/1970s law and development project need to be extended to the present. The critical legal institution development literature acknowledges similar patterns in the 1960s/1970s and 1990/2000s law and development initiatives wherein western models of democracy and law have been spatially transferred to postcolonial, post-conflict and newly independent countries. The purpose of the LDM has been to alter legal and justice systems to manipulate and deepen *progress/modernisation* programs for economies in transition (i.e. post soviet and postcolonial countries). More specifically, this literature identifies three unique characteristics of the social movement driving the 1990/2000s New Institutional Economics /Law and Development Movement (NIE/LDM) legal-institution-strengthening initiative.

First, the intellectual justification to revitalise the 1960s LDM is based on the theoretical work of the Nobel Prize winning economists - Douglass North and Ronald Coase, who have made the New Institutional Economics very popular among social scientists (Cameron 2000). The New Institutional Economics theory has quickly become established in the discipline of economics and in the practice of development (Bates 1995, Weaver 2000, forthcoming). In the post-Cold War era, the New Institutional Economics (NIE), although a thinly veiled version of 1960s modernisation theory, has become increasingly popular among development economists. Development economists re-wrote development policies to curb corruption, support good governance, and to protect private property rights as well as information (North 1995, Keefer and Knack 1997,

Hendley 1997, Cameron 2000). International lending institutions, such as the World Bank have adopted legal development initiatives. These institutions could use the apolitical language of legal reform, with very little critique from the human rights groups. Many, according to Trubek (2000), have operationalised the new economic development theory as a multibillion-dollar legal development initiative.

As Hendley (1997) argues, the simplicity of the modernisation logic is appealing. Western academic economists' logic, argues that the law can offer a technical solution for social problems. By changing local legal frameworks, altering unclear policy frameworks, empowering human rights groups to report local government's transgressions of the law, eradicating local problems of corruption and misspending, these technical solutions will create *progress/modernisation* for local communities (Clement and Murrell 2001). Trubek (2000) and Weaver (2000) argue that the simplistic equation *western law = western capitalist development* framed on one idea: *the market economy can only function efficiency through the transformation of legal institutions and the enforcement of the law*. Formal political organisations, law and legal institutions have an important role to play in development. These organisations and institutions focus on securing property rights and developing contract rights which will create a political structure conducive to economic growth (Webb 1999). The main argument is this: as countries modernised, they would construct legal institutions and cultures similar to those in the West. As they were on the same unidirectional path to modernisation, post-soviet and developing countries integrate western techniques, ideas and attitudes toward economic exchanges and legal thought. In doing so, their economies will evolve and they will become modern/progressive. External assistance, provided by the West, will hasten the process.

The logic is difficult to unravel because the complex authoritative language intermixes law and economics. The basic idea is that building capitalist legal institutions would foster economic development in transition economics such as post-soviet European countries. In this literature, we see the language of the predictability of rule making; weak institutions inhibit economic growth, proper constitution making and new laws and

institutions maximize opportunism. The critical idea is that this is a business point of view of institutions (Cameron 2000, Chhibber 1999, Harrison 1999). The arguments made suggest that if one limits the government constitutionally to reduce the opportunities by political elites, and limit state power, the business sector can increase its capability and the willingness of the political order to strengthen market institutions. By manipulating institutional arrangements between the state and markets and private entrepreneurs, one can change the reliability of judicial enforcement, ensure freedom from corruption, prevent corruption scandals, crimes against persons and property and construct the perception of political stability. All of this in turn will improve the economy (Keefer and Knack 1997, Ayittey 1999, Schneider 1999, Harrison 1999, Cameron 2000).

This logic stresses the importance of installing democratic systems, establishing independent institutions such as a free and independent press, a professional army; strengthening legal infrastructure to facilitate faster economic growth and institutional capability. Yet, this language should *not* be read as if it is an emancipatory language. It is not. Rather, this language originated with lending institutions' economic interests, interests that are becoming increasingly global through spatial processes as local societies are affected by externally driven legal reform initiatives (Trubek 2000).

Moreover, this discourse should be read as if it serves an overarching purpose: *ensure debt repayment to lending institutions*. The deeply embedded agenda is to reform legal systems to create transparency, clear policies and regulations, clarify governmental decision-making, reduce corruption, rent-seeking, weak financial accounting and auditing systems. In short, laws will ensure economic efficiency of the country and in turn these laws will stabilise legal and financial institutions, which in turn will create economic growth for the lending institutions. This critical analysis suggests the need for caution.

On the surface, lending institutions appear to be invoking real empowerment for the people when they cite *good governance* and the need for institution building. For example, James Wolfensohn, President of the World Bank, made reference to all these points in his keynote speech entitled "Rule of Law is Central to Fighting Poverty" at the

Second Global Conference on Law and Justice in Russia, which uses the language of “...freedom, on rights, on equity, and on social justice... equality of opportunity and the protection of rights” (Z-Insider 31/07/01-O). During this conference, the World Bank exposed itself as “wanting to improve... the legal and justice system”. This is an indication of what the World Bank needs us to believe - that by changing “a legal framework... human and property rights” will be respected. This vision is compelling. But after the failure of ESAP, such rhetoric highlights the need for cautious and critical reflection before moving forward (Weaver 2000, Z-Insider 31/07/01-O).

The second distinct characteristic about NIE/LDM legal-institution-strengthening initiative is that it is being driven by international lending institutions. Trubek (2000) argues that lending agencies such the Asian Development Bank and others are financially supporting the new law and development movement. Others scholars have noted that the international lending agency community, such as the Inter-American Development Bank, Asian Development Bank and others has adopted the New Institutional Economics (NIE) logic. The logic that is being extended through time and space is that *more laws = more modernisation/progress* (Tshuma 1999, Weaver 2000).

The third characteristic of the NIE/LDM legal-institution-strengthening initiative is how the NIE/LDM is being operationalised. The trajectory of legal activists driving the NIE/LDM legal-institution-strengthening initiative tends to focus on the procedures and practices of law rather than the social justice of law. Moreover, legal reforms tend to mirror the western ideological agenda, a western technocratic style of law, despite the conflicting agendas of different legal advisors and different theories of law. Tshuma (1999) argues that the narrow interpretation of rule of law held by the World Bank is inappropriate for the unique historical, cultural and political experiences of many developing countries. The NIE-inspired-ideas of information, management, private property rights, law and economics have been imposed on many local politico-legal-economic systems. International lending institutions offer funding and legal advice to *fix* local legal and justice systems. Moreover, economic development lawyers within many post-socialist and developing countries have begun to play a role in reconstructing the

local legal order. Lawyers work in projects and support policy makers who determine what reforms should be pursued. Judges and lawyers, through the litigation process, play a significant role in policymaking, and as a result, have the power to influence policy, which in turn can reform property registry, courts, regulatory agencies, or other legal institution. Overall, these actors in the new development initiative focus on “fixing” political, judicial and economic institutions to thereby encourage socio-cultural change, which in turn will become more *modern*.

International lending agencies adoption of the NIE theory in the mid 1980s has changed the practices, tactics, strategies and even the theoretical underpinnings of international development in the postcold war period. Yet, the shift in the economic theoretical underpinnings of international development has not had positive results. The impact of these new development policies and practices has been seen in many post-socialist and developing countries that are in transition, as they move toward a market economy. Many have used the United States legal model of a modern legal framework and felt the challenges of adjusting to legal institutional development. However, Keefer and Knack (1997) report that despite the high ideals to import models of advanced, modern institutions, these ideas have failed when imported. Paradoxically, the presence of institutions within developing countries serves to reinforce the notion that developing countries can be “fixed” with development strategies constructed on NIE logic. Without minimising the potential of the NIE that Bates (1995) and Cameron (2000) identify, another set of literature suggests that many postcolonial people in Asia, Africa and Latin America perceive the law and the state as coercive, exploitive and dangerous, with a patriarchal and urban bias (Widner 2001, Meili 2001, Man and Wai 1998, Man 2001, Ibhawoh 2000, Hatchard 2000). Furthermore, the complex set of changing relations has taken place between colonial and postcolonial legal systems as postcolonial people have become more *modern* (see Chapter Four, *Section 4.4 Advocating for Legal Reform*, especially *Section 4.4.2 Second Reason: Legal Personality*). Postcolonial people’s vision of *modernity/progress* in the legal and justice system includes asserting the right to be heard and the right to participate in the political process. Generally, citizen’s groups agitating for their rights, and locations where the rights discourse radicalises the legal

system and society - producing multiple wants, agendas and positions - are not welcomed by the state (see Odinkalu 1998, 2001).

To conclude, the critical legal institution development literature reveals that the social movement driving the NIE/LDM legal-institution-strengthening initiative at first glance appears to be quite different from the social movement driving the international law/state transformation/human rights/democracy legal-institution-strengthening initiative. Yet there are some important similarities. Both share a modernity/Enlightenment era/Eurocentric vision. Both perpetuate the political and economic power of the North over the South, use nongovernmental organizations and legal activists to create a mesh of legal strategies to protect their activism, and challenge the sovereign-state's legal and justice system to integrate their specific agenda. Both trajectories of legal activism follow a vision to create a fine mesh of laws to bind the state. One seeks to institutionalise human rights, peace, etc. Whereas, the capitalist trajectory of legal activism seeks to create economic uniformity across the globe and penetrate the sovereign-state's legal space with laws for economic transactions.

However, the critical difference between the two is the historical circumstances that have created these two social movements. The international law/state transformation/human rights/democracy literature covers a period from the 17th century to the present. The trajectory of legal activists driving the state transformation/human rights/democracy legal-institution-strengthening initiatives have developed much more sophisticated strategies to challenge the state over a much longer period. This study will argue that because of the similarities between the two social movements, the human rights activists often unknowingly advance the agenda of the NIE/LDM legal-institution-strengthening initiative. This argument has been stated, albeit somewhat differently by Dezalay and Garth (2001), and Trubek (2000) who acknowledge that human rights activists are a strange paradox of activist and interventionist agendas driven by the political economy of Euro-American funding patterns.

This section has offered the literature review approach to describing how different trajectories of legal activism have interacted with, and altered, the political structure of the legal and justice systems around the world. This literature suggests that we can identify several specific events, organisations and institutions use the power of social movements to create legal power, the process of change as advocacy networks gain more power which allows them to take legal power away from the state, and the capitalist political economy of legal ideas and emphasises processes and policies involved in constructing economic laws, in an era of Euro-American legal, economic and cultural domination. This concludes the introduction to two different trajectories of legal activism, which have changed the political structure of the legal and justice systems around the world.

The section below will offer the second approach. The Transnational Advocacy Network (TAN) Framework describes how different trajectories of legal activism have interacted with, and altered, the political structure of the legal and justice systems around the world. This analytical framework describes local civil institutions connection with international non-governmental organizations to force authoritarian regimes to incorporate international human rights norms into their daily practices.

2.3 Theoretical Model Approach to Transnational Advocacy Networks

The Transnational Advocacy Networks (TAN) framework developed by Sikkink and collaborators is an attempt to answer in part the question *how does international humanitarian law work?* (see Keck and Sikkink 1998a, 1998b, Risse and Sikkink 1999, Sikkink 1999, 2002). This section will examine the TAN framework for what it can tell us about how a sovereign state is threatened by legal activists creating and negotiating new legal spaces. The key political institutions that actively work to take legal power away from the state are the transnational legal activists (judges, lawyer, NGOs and the media) who collect empirical evidence (Tolley 1994). This section follows the earlier critique of the TAN framework introduced in Chapter One which argued that the TAN framework has the tendency to essentialise political structures rather than represent politico-legal structures as negotiations negotiated within specific contexts (Meili 2001);

it fails to problematise socio-spatial processes of individuals and intragroup negotiations over what constitutes human rights norms in a location; it does not include a multiscale analysis of subtler processes of inclusion and exclusion as a wide variety of institutions and organisations demand a new legal order; and it does not suggest the complex territorial patterns that a wide variety of institutions and organisations try to gain more legal power over the state.

Contemporary studies completed on state transformation tend to take their inspiration from Sikkink and various collaborators (see Keck and Sikkink 1998a, 1998b, Risse and Sikkink 1999, Sikkink 1999, 2002) and argue that the TAN framework illustrates how authoritarian regimes incorporate international human rights norms into their daily practice (see Figure 2.1). Sikkink, a political scientist, has conceptualised how TANs initiate a process of behaviour change of the state through two general processes. Information flows -through telecommunication, faxes, etc - transmit norms to shame a nation-state into conforming to international law. Additionally, local civil institutions build up their connections with international non-governmental organizations to create positive changes for civil liberties on the ground. Local civil rights activists' demands are blocked by a state, which does not respect citizen's rights. Domestic groups then make contacts with international NGOs to promote human rights in their country: the *boomerang effect* (meaning that local human rights groups sidestep interacting with the state, connect with international NGOs, international organizations and other states through the internet, faxes, and telephones). With information collected directly from domestic NGOs, international NGOs (INGOs) are able to bring pressure on human rights violating states. At the international level, international and domestic NGOs collaborate with other international organizations and norm abiding states to create more pressure on the norm violating state. States that violate local civil liberties slowly begin to incorporate and implement international norms in the day-to-day functioning of the state. The negotiation between the state leader - whose leadership allows the violation of local civil liberties - and NGOs is often reliant on the international community threatening the state with sanctions and international ostracism.

This idea has been developed in more detail in Figure 2.1 - the *Five-Step Spiral* -, which suggests that negotiations between the state and NGO become a circular action-reaction pattern. In the TAN framework, the state becomes more responsive to incorporating some international human rights norms into the administration of the state through a series of steps. In the first step, a state will repress its citizens. In many cases, there is little international outcry. At the international level, often little is known about conditions in the country. In the second step, international NGOs provide evidence of human rights violations. A state may deny the violations, but the evidence acts as a shaming device. Groups internal and external to national borders know that the evidence and events are real. The evidence provokes domestic human rights groups to mobilize and advocate for change. The presence of international groups (who provide an umbrella organization for domestic groups) increases diplomatic pressure on the state. In the third step, the state evaluates the situation. Some states may make tactical concessions. They question - should they stay with the international community or to endure the label of a state no longer welcome in the UN community? Some states formally acknowledge arbitrary uses of power, therefore commit to improving local civil liberties. In the fourth step, some states formally accept international norms to gain international acceptance, and initiate changes to legislation to include these norms. Finally, in the fifth step state leaders fully support legislation that supports international norms and administer the law to respect human rights.

This is a very general outline of TAN, which does not include the authors' various qualifying statements. Figure 2.1 - the *Five Step Spiral* - divides legal space into three columns: society, state and international/transnational. This multiscalar image provides geographers with a point of departure to see the sorts of geographies that unfold from these negotiations. The distinct analysis of local-global processes is important. This rough outline of how transnational advocacy networks work in practice suggests that the International Declaration of Human Rights (IDHR) is changing many politico-legal landscapes. We can visualize how political power flows from the citizen through to the international community to bring political pressure on the sovereign state. Figure 2.1 offers a little more clarity to the generally confusing and contradictory diplomatic

situation - because it distinguishes different systems of legal norms at different geographic scales.

A general understanding of how humanitarian law works in practice can be summarised in one crucial point: the individual is *not* powerless in the increasingly global world. In particular, the urban elite can give voice, and use her/his political power and take steps toward connecting to the international community to bring about change in the national legal arena. In sum, the TAN framework gives the individual agency at three levels. The individual makes a choice of what institution to speak from, or act from: a local and somewhat fragmented social movement, posting some text on a website, participating in the "fact gathering" mission of a human rights organization, approaching a lawyer who will present their case to a judge. Each and every one of these actions provides evidence of local mobilization, articulating diversity within civil society. Additionally, the TAN framework acknowledges women and men's voices are often funnelled through NGOs. As a conduit to connect local voices with global activism, NGOs tend to bridge the local with the global in two ways: political activism and economics. As Sikkink (1999) notes, many NGOs derive their funding from the developed world and re-politicise spaces of the developing world. Price (1999) offers a more critical view: because NGOs are geographically located elsewhere, they retain a certain independence from their international funding partners: NGOs are changing the political landscape of the international community, which was once reserved for the voices of state leaders.

Finally, the TAN framework suggests how an individual finds a political opening, offers "voice" to the debate to make a difference in the outside world. Thus the TAN framework disputes stereotypical images of civil society-state relationships in Africa provided by many political theorists. As Ahluwalia (2001) argues, many theorists tend to focus on African states as failed states. The irony of African states is that many African Heads of States are acutely aware of their legal space and legal rights as sovereign-state. This is underscored by how many Heads of States will sign international treaties such as the UN Charter (whereupon a country grants other nations the legal privilege of surveying domestic legal space of the signing country), yet insist on the point that their national

borders and boundaries are protected under international law (Odinkalu 1998, Gubbay 1997, Hatchard 1993). Moreover, many African Heads of State will insist upon their right to expect other countries to respect the "...sovereignty and territorial integrity of each State and for its inalienable right to independent existence" (OAU 2001). The term *sovereignty* is a key concept in international law:

[the] right of a state in regard to a certain area of the world to exercise jurisdiction over persons and things to the exclusion of other states (Carter and Trimble 1999: 1020).

The TAN framework provides a rough framework to envision how international human rights law works. This rudimentary template is offered to geographers who are unfamiliar with international law (see Charlesworth and Chinkin 2000). With Figure 2.1 geographers can envision how local level activities break down national and international boundaries, particularly as international attention is drawn to human rights networks at the local level. The notion that political power can be drawn from the local up through and into the international sphere to direct diplomatic power onto a nation state disrupts the politico-legal geographic framework of impenetrable national boundaries. Indeed, for every instance an abuse of civil liberties is cited on the Internet, the TAN framework suggests that there is an erosion of sovereign-state territoriality over its citizens.

Figure 2.1 The “Spiral Model” of Human Rights Change

Source: Risse and Sikkink 1999: 20

2.3.1 Criticisms of the Theoretical Model Approach to Transnational Advocacy Networks

The TAN framework raises a number of critiques. These include: 1) It is limited in theoretical, conceptual and methodological lines. 2) It lacks sensitivity to local level information politics. 3) It is insensitive to local social control and social norms that differ from western beliefs and social norms, particularly in contexts where the law is used to suppress, exploit, differentiate and divide classes, races, gender and others. 4) The TAN framework initiates a further round of searching questions rather than answers about how NGOs investigate alleged human rights abuses and use the voices of individuals and report to the international community. 5) The TAN framework extends a United States of America geopolitical view of how the rights movement is *progressing*. Each of these critiques will be discussed in some detail as these criticisms are necessary to understand why using the TAN framework for the Zimbabwe-Commonwealth-World Bank case study raises a number of methodological concerns.

One, while the TAN framework has become increasingly popular, and political scientists use it to theorize shifts and changes in human rights norms acceptance by sovereign-states (see Risse et al 1999), Meili (2001) also criticises it for being limited in theoretical, conceptual and methodological lines. While the TAN framework provides a general sense of how international law works, it is very silent on the issue of how international human rights norms are actually drawn into the administration in the day-to-day practices of the state. Moreover, this framework does not address the deeper questions such as *whose* information are we relying on? The TAN framework implies that NGOs, social movements, national opposition groups and international NGOs link up with transnational advocacy networks who in turn convince donor institutions, powerful western states, and international human rights organisations to put pressure on oppressive states. Risse and Sikkink (1999: 22) argue that the “production and dissemination of information about human rights practices in a target state” is an initial stage of the socialization process and that “information politics” i.e. promoting change by reporting evidence of abuses of civil liberties and communicating these abuses through the internet,

faxes, telephones, etc. is a key strategy within creating, empowering and legitimating domestic and transnational organisations within the networks. Filling in how the information is collected or how the information has been contested at the local level where the IDHR is gradually introduced into the day-to-day administration of the state is much more difficult. This silence suggests there are a number of general assumptions embedded in this framework.

Two, the TAN framework seems to rely on the assumption that information at the local level does not have its own politics. Moreover, this flaw in the TAN framework becomes apparent when examined through the eyes of a Zimbabwean. For a woman or man to believe in the value of breaking the silence, to go to an NGO requires a huge leap of faith. And this faith means overcoming the politics of information in their day-to-day lives. Law has been used as a political and economic tool during the settler era. This fact is well documented (Phimister 1988, Palley 1966). In addition, the post-Independence socialist rhetoric (1980-1991) became a familiar foundation that could hide the nuances of the law (Shelley 1996, Jenkins 1997). By 2001, the gap between legal rhetoric and legal reality became increasingly apparent (see ZW-News 15/02/0, ZW-News 24/04/01, UK –TT 1/12/01, Z-I 18/05/01) this point will be subsequently discussed in more detail.

Bates (1995) argues that laws are violent. With the law being used to suppress, exploit, differentiate and divide the rich from the poor, the black from the white, women from men, children from adults, urban residents from rural peasants, Bourdillion (1991a, 1991b), Wild (1997) and others have documented that Zimbabweans have their own code of social control and social norms that differs from western beliefs and social norms. In theory, social control is supposed to be through the state. However, as Brogden and Shearing (1993) suggest, the point of origin of social control is not fixed by the state but varies according to individual “traditional” belief systems and perceptions in the context of his/her social and economic milieu. In light of van Zijl de Jong (1995), Palley (1966) and Hatchard (1993) and others’ arguments, the TAN framework is overly optimistic for the Zimbabwean context. The critique will be limited to the argument that the TAN framework extends a critical silence on how landscapes change with legal activism.

Given that law is supposed to be an interactive process between public opinion, public behaviour and the legal system, when there is a perception that law is no longer interactive, this perception has a decisive influence on who will make the public claim that their rights have been violated.

Three, the TAN framework's focus on the individual is significant, particularly when reading previous works exploring the politics of international law (see Carter and Trimble 1999). Nonetheless, changes captured in the TAN framework are based on empirically observable trends, rather than representing some deep explanatory framework (Risse et al 1999, Meili 2001). Furthermore, the process outlined is often contingent upon particular locations. For instance, what amounts to a genuine process of international "norm" adoption suggests that nation-states are not passive recipients of international norms, but actively engage with norms through governmental institutions, creating a new politico-legal structure. Set against the ideas of Hatchard (1993), and Okafor (2000) and primary evidence which will be presented in Chapters Four and Six, the TAN framework initiates a further round of searching questions rather than answers.

In an ideal situation, as Sikkink and co-authors suggest, NGOs investigate alleged human rights abuses and report to the international community. If this is the case, why does the question continue to rise – what is the legal landscape that NGOs navigate within? Other questions that are raised are as follows:

- How can NGOs remain in country hostile to the very work they do?
- How is political power shifting in different geographic spaces and places: between executive governments and the judiciary; between non-governmental organizations and the international community; between citizens and the state?
- How can transnational advocacy networks secure the resources, information and freedom of information needed to support the civil rights movement rising against an authoritarian government?
- How is the government silencing local movements with laws, abuses of power and censorship?
- How is the local administration narrowing the possibilities for civil rights activism?
- How are legal activists using the few protective legal mechanisms that exist for civilians to protect their civil rights?

These questions raise a number of deeper concerns expressed over international law in general - how can we see the effects international law is having on local legal cultures and how can we prevent the international elite from dominating what *should* be democratic institutions, such as the media, the judiciary, and NGOs? The sorts of questions scholars need to ask and have answered, according to international law feminist scholars Charlesworth and Chinkin (2000), are the sorts of questions that ask *who is being excluded and why?* Reading Charlesworth and Chinkin (2000) alongside the TAN framework suggests that there are a number of critical silences. For instance, who is writing all these international treaties, participating as treaty monitoring bodies and institutions, and what makes them an “international community?” Other questions that have been raised include:

- Who seeks to create a mesh of legal strategies to protect the citizen from sovereign-state powers?
- What are their shared values and sense of understanding of how international treaties are supposed to work?
- What makes them believe and/or desire to create profound changes in the politico-legal culture and structure, including a reshaping and nurturing of trust in the executive government and the justice system (which are how norms are incorporated into domestic law)?
- Who are the legal activists who built the legal framework for human rights advocacy?
- Who scanned international and domestic legal documents, found the technical loophole needed to build a new legal space for social movements that needed to be empowered by state institutions, such as the legal system, to affect deeper changes?
- How are new legal ideas being advanced through time and space through activists in the legal profession work in this framework?
- Why are certain laws written, for whom, and why?

Four, Sikkink established the foundational ideas of the TAN framework, at the University of Minnesota. She makes the distinction that the TAN framework works for the environmental, women’s and human rights movements, but that this framework could be more broadly understood for understanding how a nation-state incorporates international norms (see Risse et al 1999). This fundamental assumption needs to be rigorously examined in the context of the geography embedded in this assumption. One assumption is based on her USA position. As Kent (2001: 585ff) argues, the way that the USA monitors how the rights movement is *progressing* is distinctly different from Western

European, Australian and Canadian views that tend to have a social democratic viewpoint. The USA, with its competitive liberalist world view, views the “cooperation” from other countries through a “results oriented, short-term, and media dominated perspective”. Whereas the more stable and pragmatic European/Australian/Canadian viewpoints that “design long term human rights policies” tend to have longer term results. The crucial point is that these location-specific processes of adopting IDHR norms are open in the sense that the future of how these norms are incorporated into local societies, states, economic, political, cultural institutions is also open to interpretation.

Other assumptions apparent in Sikkink’s work are that the institutional presence of judicial independence/legal order is granted the political space to entertain these liberal views. In other words, the TAN framework allows only one reading of multiple stories to be told about how an outside nation-state relies on NGO reports to evaluate another country’s incorporation of international norms (Kent 2001). Thus, conceptualising legal space based on this framework offers a limited vision of social justice movements’ *progression* (Dezalay and Garth 2001). In addition, while the TAN framework speaks to the general process of drawing social justice into the legal system to create new legislation, it has not explained the process. Nor does the TAN framework explain the interplay between justice, rule of law and law (see Mathews 1986). Thus, with this key silence, many geographers will have some difficulty envisioning the interconnections and spatial relationships of international law and domestic law through time at a particular node, such as through the activism of an NGO changing the interactive processes between the legal system, public opinion and public/private behaviour.

This study firmly believes that the TAN framework is useful, although the TAN framework has been strongly critiqued by Dezalay and Garth (2001: 354-55) who suggest that this is an...

...optimistic story...[that] only offers a partial picture of complex phenomena. It depends on a particular reading of cause lawyers, human rights and the law; and it works better for the 1980s than the 1990s...

The TAN framework offers a conceptual framework, a springboard to better understand global-local spatial relationships of legal institutions, legal activists and legal discourse, the central themes of this thesis. Even though the TAN framework does not tell the story of real struggle for economic resources “...since those who invest in idealism must find ways to get attention, resources and power in competitive fields” (Dezalay and Garth (2001: 355), this chapter will use it as a point of departure to explore the politics inside and outside the global-local legal structures. Furthermore, the TAN framework highlights the spatialisation of legal space, and suggests that legal space is fluid. All of these points direct this study toward the argument that challenges rigid interpretations of economic law and human rights law as well as homogeneous views of social justice.

2.4 Choice of Approach

The literature review of international law/state transformation/human rights/democracy literature, the critical legal institution development literatures and the Transnational Advocacy Network (TAN) Framework provides a number of theoretical and empirical insights into how transnational/local legal activists take legal power away from the State (Tolley 1994, Murphy 1999, Charlesworth and Chinkin 2000, Shaw 1999, Stark 1999, Okafor 2000, Ibhawoh 2000, Trubek 2000). Combined, they offer a better understanding of the political structure of the legal and justice system. Combined they suggest what sort of coalitions help construct a global imaginary of what the world *should* be like.

However, both approaches appear to have missed a number of key themes. These themes have been phrased as a series of questions, which include:

- How do transnational legal activists make the rule of law into *legal power*?
- Who holds the power of rule of law to interpret the justice in a law in contrast to who has legal power?
- Does a rule of law view have a socio-legal spatial presence that can be viewed as political with practical implications for individuals' daily lives?
- Who is radicalising the space of judicial independence and to what end?
- How do the day-to-day politics of administration of justice alter this space, what are the politics of law making in this space?
- What sorts of power struggles exist among those who can interpret the law and administer this as justice?
- Who is politicising the justice being drawn into the legal system?

- How is legal discourse creating and recreating new meanings, and indeed, creating a territorial grid of meaning connecting international law and domestic law?
- How are these meanings spatially produced and reproduced on the ground, through electronic advocacy networks and among discussions on the street corner?

In light of the assumptions that both approaches have, and considering the methodology adopted for this dissertation, a synthesis of the two approaches will be used for this research. Yet, this study suggests that these two approaches must be combined and further extended with additional literature if we wish to understand how transnational legal activists take legal power away from the Zimbabwean State. The need for additional literature is to better understand the interactions among civil society, the state and the legal and justice system and different trajectories of legal activism. This line of questioning is directly relevant to the Zimbabwe-Commonwealth-World Bank case study. Robert Mugabe has been able to control the legal, political and regulatory framework of the state, relatively uninhibited by the civil rights movements since 1980. More specifically, Mugabe has maintained a public silence throughout Zimbabwe's politico-legal culture. Mugabe has used various legal mechanisms such as the 1987 "Unity Agreement", the Presidential Powers (Temporary Measures) Act 1986, the Presidential Power of Power and Clemency (1953), the Emergency Powers (Maintenance of Law and Order) Regulations (1965), the Emergency Powers (Censorship Publications) Order (1965), the Presidential Powers (Temporary Measures) Act (1986). Mugabe has also used the quasi State of Emergency laws - which have been a daily part of Zimbabweans' lives since the 1960s - to legally silence, suppress and deny civil liberties such as mobility, public voice, written texts and airwaves, freedom to demonstrate and freedom of speech. The Mugabe Administration has even gone so far as to charge journalists and the opposition under Public Order and Security Act (POSA (Z-CIZC-19/06/02)).

The intention is to understand the broader implications of Mugabe's use of these laws, as well as attempts by civil society and transnational/local legal activists and externally driven legal-institution-strengthening initiatives to challenge Mugabe *outside* of the courtroom. Because the Mugabe Administration is creating many new legal instruments

in the hope to quell the rising social movements, the literature on legal philosophy and social movements of judges and lawyers and nongovernmental organisations will be reviewed to identify the themes that the historical and descriptive approach and the Transnational Advocacy Network (TAN) Framework appear to have missed. Also, because the concepts for legal theory and legal activists are universal, irrespective of location, this literature will be examined in some detail. This review of the literature will assist in developing the Transnational Legal Activists Network (TLAN) approach, which builds on the TAN approach.

Three reasons justify building upon the TAN framework. First, the argument made here is that the TAN framework can be rethought. From the discussion above, it seems that the TAN framework reads spatial local-global relationships in an innovative manner. However, the TAN framework has tried to produce a general model, closing off the more interesting questions about the role of legal institutions, legal activists and legal discourse intersecting, entwining and shifting global-legal relationships. The next chapter will extend many of the original arguments made in the TAN framework. The TAN framework - which has the tendency to fix a social/economic justice rule of law view across the globe - can be rethought with a poststructuralist perspective. Chapter Three will provide an alternative view of the TAN framework, which will be drawn forward into the analysis of the Zimbabwe case study which will examine NGO reports for their political ambitions and political implications.

Two, Figure 2.1 - the TAN framework - is a good starting place. This framework helps us understand dimensions of space and time as defined by national borders and boundaries. This framework provides this study with a multifaceted, multi-institutional conceptualisation of legal space through which information, individuals, ideas and institutions interact in this space. This approach to space-time enables a general understanding of the global institutions producing legal discourse (such as the United Nations) and changes the space-time of domestic law, which begins to integrate international norms. The geography to this theoretical struggle is both explicit and implicit in this framework, which illustrates the territoriality of nation states, global legal

activism and changing local values. For those of us struggling to understand how multiple layers of legal space through which new ideas, utopian worlds, and visions are articulated, while holding the power to change local thinking, the TAN framework provides a key.

Three, the TAN framework allows for a rethinking of spatial relationships around legal discourse and legal activism. Nonetheless, a new emphasis needs to be made, particularly if this study uses it as a point of departure with which to examine how transnational legal activists take legal power away from the Zimbabwean State, and how transnational legal activists have become increasingly important in global governance.

2.5 Significance of this Analysis

This analysis reveals a number of assumptions about the geographies and spatialities of trajectories of legal activism. Three assumptions have been identified. 1) Legal cultures are not location specific. 2) Local and global forces construct the political structure of the legal and justice system – for example, the NIE/LDM logic intervenes in the day-to-day administration of the state, encouraging us to rethink the United Nations’ language of “non-intervention ” referred to by international law specialists (Olonisakin 2000:41). 3) NIE/LDM and the identification of these assumptions gives credence to the empirical, conceptual and methodological approach of this dissertation.

2.5.1 Legal Cultures are Location Specific

Much of the critical legal institution development literature tends to produce and reproduce the assumption that only the geographic locations in which NIE/LDM development initiatives have been applied have been affected by the NIE/LDM logic. The reason offered is this: much of the literature offers aspatial analysis. Moreover, much of the literature neglects to offer poststructuralist analysis of the multiscalar and multi-institutional interactions changing the authority of international law. Nor does the literature provide an analysis of the conflict and tensions created as new ideas affect local legal cultures and shift local patterns of activism, which may change a nation’s position in international relations.

However, by deconstructing the literature, this assumption has been challenged. The reconstruction has tried to provide an explicit illustration of the politics and practices of the different global social movements as each trajectory of legal activism interacts with a place. The intention of this line of investigation is directly relevant to the purpose and objectives of the dissertation, that is to re-conceptualise the threat of the NIE/LDM logic in a manner that acknowledges that local and transnational legal activists, international organisations of nation-states and international lending agencies are attacking state sovereignty.

In sum, the critical legal institution development literature offers a fragmented understanding of the geographies created as Euro-American development theorists and economists argue for the need to standardise economic laws in order to sustain a local market economy which may participate in international trade regimes (Hendley 1997). This chapter has begun fill in some of the gaps in the literature on how geographies of law, human rights, social justice, economics, development, foreign policy and international relations overlap and meld. For example, the concept - *trajectories of legal activism* - allows us to look at the impact of a trajectory of legal activism from several different angles: as a global social movement empowering political structures of the legal and justice system, challenging a Head of State and creating tensions and conflict in a location. The intention is to suggest that multiple trajectories of legal activism, such as the global social movement driving the New Institutional Economics /Law and Development Movement (NIE/LDM) legal-institution-strengthening initiative and the social movement driving the international law/state transformation/human rights/democracy legal-institution-strengthening initiative circling the globe, keep a postcolonial or post soviet state (bound to a location) under surveillance. Moreover, the Zimbabwe-Commonwealth-World Bank case study will allow this dissertation to offer a more thorough analysis of the impact that the idea of NIE/LDM has had upon local communities, the legal and justice system and the sovereign-state, and offer an analytical framework that can be used for other case studies. Because of this analytical framework, this study can sidestep the fragmentation presented by other location-specific studies.

2.5.2 International Law is Separate from Domestic Law: Rethinking the Intervention Question

Another assumption that has been revealed in the critique of the TAN framework and the literature review is the assumption embedded in the language of the United Nations Charter's "non-intervention clause" referred to by international law specialists (Olonisakin 2000:41). For a geographic study, this chapter has deeply questioned the international legal specialists' ability to make transparent the complexity of local-national-international political processes.

The significance of this line of questioning is that it has revealed that the literature is not adequately connecting global and local processes to the political structure of the legal and justice system. Conceptually, this gap in the literature has been revealed through this review. An excellent example is found in visualising the presence of the NIE/LDM logic as a form of intervention into sovereign-state power. More concretely, from its inception, the NIE/LDM was seen to have an international dimension because of the overarching agenda to *fix* the institutions of post soviet, postcolonial or developing countries, especially the legal institutions. Judges and lawyers made overtures to bilateral donors such as Ireland, Denmark, Canada, Britain and the United States (US) to train constitutional lawyers, expand legal education, promote an understanding of the rule of law, and to modernise the local economy and many laws passed by previous governments (Widner 2001: 198, 202-213, 230). These North-South interactions make it difficult for the changing legal culture to be seen solely as an internal legal and justice issue. For example, the US Department of Defence "provided human rights training and legal education for military lawyers in Africa" (Widner 2001: 207, also see Tolley 1994). The positive outcomes from these international interactions can be found in efforts to ensure that the International Declaration of Human Rights is interpreted from a local perspective (Ibhawoh 2000), and efforts that seek to support a universal desire of all individuals who agree that

...no individual wants to be killed. We all want to live. We resent torture and enslavement. We like to be free and not to be imprisoned and detained. We all

like to have a say in the governing of our various countries (Zimbabwean ex-Chief Justice Dumbutshena in Widner 2001: 172).

Nonetheless, the NIE/LDM method to attain social justice overshadows these positive outcomes. The NIE/LDM logic assumes that a certain level of material well-being must be achieved before safeguarding political and economic liberties. Such an attitude is flawed, as this vision allows the *greater cause of economic progress* to justify the suppression and silencing of voices of those wishing to have a say in the local economic and political affairs (Tshuma 1999). Thus, while the NIE/LDM logic on the surface appears to intervene on behalf of the individual to attain economic/social justice, a deeper evaluation is required.

Initially, human rights advocates providing legal education for the masses has been an attempt to intervene on humanitarian grounds (Addo 2000). However, Chandler (2001: 700) argues that what began as a humanitarian attempt has contributed to an agenda with a less benevolent motivation:

The politicisation of humanitarian aid has led to even greater leverage over non-Western societies as NGOs and international institutions increasingly assume the right to make judgements about what is right and just, about whose capacities are built, and which local groups are favoured. Where humanitarian aid started out as an expression with common humanity, it has been transformed through the discourse of human rights into a lever for strategic aims drawn up and acted upon by external agencies.

The critical legal institution development literature argues that what began as an attempt to educate the masses about their rights and expand legal education degenerated into a need to induce “progress”, economic growth, and political participation with an improved standard of living (Widner 2001: 202, Dezalay and Garth 2001).

However, because of the assumptions that the international community cannot legally intervene in the affairs of the sovereign-state, the transnational character of the NIE/LDM marks a beginning to what could be a dominant trend in the new form of intervention in sovereign-state affairs through the legal and justice system. Because the complex interactions that create the integration of domestic and international law are not made

transparent, a number of assumptions remain intact. In theory, the NIE/LDM will improve and strengthen institutions to create political and economic *progress* (Mbuku 1999). In practice, the assumption that different groups can negotiate with one another inside and outside the courtroom, and the government will treat everyone the same is dangerous. Both of these assumptions have been contradicted by contemporary evidence, which illustrates that postcolonial and western governments tend to ensure that the law serves the elite and state officials rather than civil society (Widner 2001, Rose 1998, Goldberg-Hiller 1998).

The literature, which is the most critical of the NIE/LDM reasoning which argues for economic progress before the rights of the individual, argues that these global-local processes empower the global capitalist system, threatens state sovereignty and represses local societies, as suggested by the following quotation:

...homogenous agendas and practices of social and policy sciences and hegemonic emergence of law are seen as instrumental to the creation of “rational order” in society... The creation of “rational order” entails the construction of homogenous nation-states, national identities, centralised bureaucracies, unified legal systems with a set of formal laws, and the institutionalisation of market capitalism as “the” rational economic system (Lauderdale and Toggia 2000: 160-161).

The significance of this analysis is that it opens up the issue of day-to-day international intervention within the space of judicial dimension, the space in which the legal and justice system can call upon international law. But more importantly, it reveals a number of silences and assumptions about the political presence of trajectories of legal activism.

Olonisakin (2000) and much of the humanitarian legal literature is useful to explicate the historical circumstances that have created the laws connected to military intervention, justice and peace. Yet, much of this literature is problematic for two reasons. First, the analysis focuses on the law as a political structure. Yet much of the literature suggests, rather than makes explicit, the point that international laws are meant to promote, rather than enforce, human rights and fundamental freedoms (Carter and Trimble 1999). Second, the phrase “non-intervention in internal affairs embedded in the Charters of the

United Nations” is contradictory if one traces how international law is drawn into domestic law by individual judges and lawyers, and how the discourse of international law is called upon by NGOs, individuals, nation-states, institutions and many others in everyday life. Third, if read through a poststructuralist analytical lens that seeks to reveal the power relations of authority and identity, the United Nations Charter, as a political presence of legal discourses is used to resist, fray and challenge sovereign-states’ legal power. As Widner (2001) documents, the domestic implementation of human rights norms takes place in domestic culture through changes in domestic law and society, domestic judicial enforcement, international treaty application and constitutions that partially guarantee the rights covered by international human rights instruments (see also Hatchard 2000). All of these processes circle around the powerful authoritarian presence of the international community.

More generally, this literature review and critique of the TAN framework has been a re-examination of some of the processes that allow international intervention in local institutions on a day-to-day basis. These examples suggest that these new forms of intervention use a wide spectrum of strategies. They range from the NIE/LDM logic to the overt human rights advocacy networks. This chapter has attempted to clarify and extend previous critiques of the assumption that the United Nations does not intervene in the internal affairs of nation-states. The pivotal point that has been made is that by signing the United Nations’ Charter, a sovereign-state has opened up its sovereign-state right to control its symbolic and material resources, as well as the terms of its relationship with the international community. By opening up this relationship, the sovereign-state has become vulnerable to the international community through its legal and justice system. Thus, this chapter has attempted to suggest an alternative view that implies that the day-to-day activism of trajectories of legal activism (who provide legal education, re-write economic laws, etc.) has an impact on sovereign-state power. In general, multi-scalar and multi-institutional analysis - developed in this dissertation - provides an entirely different way of looking at how the legal community intervenes in the internal affairs of a nation-state using global and local power relations within the legal and justice system to strengthen the political structure of the legal order.

This analysis also reveals an important theoretical critique of the traditional international law literature, which has been reproduced in the TAN framework. Because much of this literature begins with an assumption that the reader has an understanding of the political structure of the legal and justice system the analysis tends to produce and reproduce a number of assumptions about the political structure of the legal and justice system, the political practices and strategies of transnational/local legal activists, different legal communities and the politics and even the processes and spatial patterns created when different stakeholders struggle to control legal power. While some of the critical legal institution development literature identifies that North-South relations are being changed, as the North demands that economic transactions in the South be standardised and formalised in the new financial architecture, there is very little critical legal institution development literature that asks what are the geographies and spatialities created as different stakeholders adopt the NIE/LDM logic.

As will be noted in the Zimbabwe-Commonwealth-World Bank case study the NIE/LDM reasoning that economic progress is more important than the immediate needs of the people has allowed the state to silence the voices. Moreover, empirical evidence offered in Chapter Four through to Chapter Seven will also provide an analysis of the human tragedy that results from civil society learning about their rights, how to re-enforce their rights in court and the state trying to maintain political stability and law and order. The case study will suggest that because the state faces global economic and political forces as well as major changes in the legal culture, the state is forced to suppress demonstrations, riots and freedom of speech and association with violence legitimised by the courts (Mathews 1986, Tshuma 1999, Z-TH 10/12/97:1&5, ZW-P-Mutsakani 1998: 3 and 25, AI 25/06/02: 10).

2.5.3 The Political Structure of the Legal and Justice System

Given these assumptions of the political structure of legal and justice system, including complex political spaces inside and outside the legal and justice system, this dissertation will offer several suggestions of how to examine the political structures of the legal and

justice system. First, against the critical legal institution development literature and international law/state transformation/human rights/democracy literature reviewed in Chapter One, this chapter suggests that the power relationships between the legal and justice systems and the sovereign-state illustrate different struggles over the use of legal space.

Second, with the understanding that the political structure of the legal and justice system is often implied, rather than made explicit, this dissertation will make the political structure explicit by suggesting the sorts of geographies and spatialities as new ideas affect legal cultures and change international relations, creating conflict and tension at local-national-international scales. The political presence of two trajectories of legal activism has been identified: the state transformation/human rights/democracy legal-institution-strengthening initiative and the NIE/LDM legal-institution-strengthening initiative. More importantly, this is the first geographic study to identify that the two blend to shape new political geographies.

This geographic interpretation is an important extension of the legal literature because this dissertation has revealed that the social movement driving the New Institutional Economics /Law and Development Movement (NIE/LDM) legal-institution-strengthening initiative is not that different from the social movement driving the international law/state transformation/human rights/democracy legal-institution-strengthening initiatives. The literature review has identified a number of similarities. These similarities include using nongovernmental organizations and legal activists to create a mesh of legal strategies to protect their activism, and challenge the sovereign-state's legal and justice system to integrate their specific agenda. Both have idealist visions. Both are driven by a modernity/Enlightenment era/Eurocentric vision. And both have the power to perpetuate the political and economic power of the North over the South and deepen existing political hierarchies and inequalities, both locally and globally. As also suggested in this chapter, the critical difference between the two is the historical circumstances that have created these two social movements. The trajectory of legal activists driving the state transformation/human rights/democracy legal-institution-

strengthening initiatives has developed a very sophisticated set of strategies over a much longer period. Because this study is serious about human rights, development, social justice and law, this study believes that in order to identify the positive outcome of the human rights advocacy, it is necessary to develop a deeper understanding of legal philosophy as well as a better understanding of legal practices used within the legal community to take legal power away from the state. This study suggests that a multiscalar and multi-institutional analysis of the state- international community-legal and justice system- NGOs-civil society interactions will reveal a very different vision of a state managing the different forms of day-to-day intervention being imposed by the international community.

Third, this chapter will develop several terms to suggest that the foundations of the legal and justice system are the objects of this study.

- *The legal order* means the multiscalar legal order, a global social construct produced and reproduced by legal institutions and global social movements of lawyers, judges, human rights advocates, economic development lawyers, legal theorists and many others.
- Trajectory of legal activism is a social movement of activists who follow a vision of what the world *should* be like.
- Externally driven legal-institution-strengthening initiatives, such as the World Bank/Commonwealth New Institutional Economic /Law and Development Movement (NIE/LDM) driven legal-institution-strengthening initiative, which has the politico-legal agenda to bind the state with the law for economic development.
- Transnational/local legal activists (judges, lawyers, NGOs and the media) who agitate in a location to make changes at the international level (Note: this study will use the terms legal activists, transnational activists, transnational/local legal activists interchangeably as this study envisions that activism at the local level will have an impact globally, and vice versa.
- Legal power is the power wherein an individual is granted the authority to interpret the legal text, which will be administered as the justice of the state.
- The legal and justice system. This term is used for a specific reason. *Justice* is often location specific socio-spatial power, often lacking specific organisation. Whereas the *legal* institution is a hierarchical, bureaucratic system filled with key players who embody the role of agents of the law, and cite rule of law views, and participate in the day-to-day construction of *the justice system* and *justice* administered by the legal system. When this study uses the phrase ***legal and justice system*** it is highlighting the politics inside and outside the courtroom.
- Democracy defined in this dissertation is democracy in a legal sense, that is, “a state bound by law” (Linz in Dodson and Jackson 2001: 252).

These definitions are central to the concerns of this dissertation's focus on the political structure of the legal and justice system.

To ensure that there is a sense of the political structure of the legal and justice system, this dissertation will suggest that NGOs advocating for legal and economic reform have an important political role. NGOs participate in the day-to-day construction of the political structure of the legal and justice system.

In light of NGOs role in reinforcing the democratic political process in conflict and postconflict societies, the Zimbabwe-Commonwealth-World Bank case study will suggest that information about law as an interactive process between the legal systems, public opinion and public behaviour, the politics of lawmaking, the interpretation of laws and the legal and justice system collected by NGOs/transnational legal activists holds the power to incite the international community. As this information can become the object of conflict between the sovereign-state and the international community, this study will be examining NGO reports for their content. The primary evidence is significant because it provides evidence of a changing political, cultural, economic and legal landscape. These are historically important *facts* constructed in the context of intense economic, political, social and cultural transition. More importantly, this study is interested in the secondary use of this information, and how the contents of NGO reports can put pressure on a sovereign-state. The primary information that will be evaluated is based on the question - what makes the international community respond to the Head of state's abuses of power? Is it the differences in legal philosophy or the political practices used within the legal community?

This study will focus on several themes found in NGO reports:

- The politico-legal superstructure of the state
- The political practices and patterns of lawmaking
- Violence
- Torture
- The anticorruption movements
- Economic crisis
- International law
- Domestic law

- Quasi-emergency laws
- Challenges between the Supreme Court and the Head of State
- Struggles of ideas about justice among members of the legal and justice system
- Information about civil society's demonstrations and activism
- The Head of State's response to transnational legal activists
- Details about legal mechanisms/ emergency legislation
- Lack of separation between the elected government and the judicial system
- Tacit understanding among civil society and law enforcers being broken
- The ever-present threat of violence currently condoned by the justice system and the state, militia bases.

The purpose of reviewing the breadth of topics was to understand from a contemporary case study – what makes the international community respond to NGOs' information? This study will also trace how specific texts are constructed during a political and economic crisis, and how the international community will use these to put pressure on a sovereign-state. This study seeks to understand what is the critical text that the international community focuses on?

2.6 The Transnational Legal Activists Network Approach

The approach developed in the next chapter will be based on several silences found in the other approaches. This study identifies that the critical silences are

- Rule of law
- Legal activists' political practices
- NGOs as contact zones between the North and South which are able to expand the territory, visibility, activism, and pedagogy of legal activism
- Geographies of judicial activism

Each of these points suggest the need for more research which directly connects rule of law views with transnational legal activists. The approach developed in this chapter and the next will do so, suggesting that a post-structuralist analysis rather than Marxist frameworks provides a better understanding of how rule of law views are made into *legal power*.

This study will combine the Transnational Advocacy Network (TAN) approach and the Transnational Legal Activists Network (TLAN) approach to understand the politics, practices and patterns of local and transnational legal activists, international organisations

of nation-states and international lending agencies driving the *institutionalisation of rule of law* with little interference from specific sovereign-states. The TLAN approach will offer deeper understanding of legal philosophy as well as a better understanding of legal practices used within the legal community to take legal power away from the state.

This study develops the TLAN approach because, as suggested in this chapter, the Transnational Advocacy Network (TAN) Framework needs to be extended for a study that examines the empirical evidence that NGOs collect in a time of rapid change. This study is interested in NGOs/transnational legal activists' collection of evidence pertaining to the politics of law inside and outside the legal and justice system. Yes, the human rights/democratisation/state transformation literature describes the processes through which human rights activists fray sovereign-state power. Sikkink and contributors have described this geographic phenomenon. The TAN framework also illustrates that the state, legal and justice system and the legal order can be visualised as overlapping and intersecting socio-political cultural spaces. The main contribution this conceptual framework makes to the literature is that it illustrates trajectories of legal activism moving through time and space. This framework also describes how the state transformation/human rights/democracy social movement begins to drive externally driven legal-institution-strengthening initiatives in locations across the globe. But, because the focus of this study is on law rather than gender or environmental issues, this dissertation will use the TAN framework as a point of departure.

The argument is made that considering the methodology adopted for this dissertation and the Zimbabwe-Commonwealth-World Bank case study, a synthesis of the literature review approach and the TAN framework approach will be used for this research, but that this study must develop a third approach that closely investigates how legal activists relocate the sovereign-state power. This third approach is developed by extending the TAN framework with post-structuralists' analysis to provide a better understanding of how rule of law is made into *legal power*. The Transnational Legal Activists Network (TLAN) approach connects rule of law views with transnational legal activists. Moreover, this study will offer a conceptualisation of legal space, dramatised by Paasi's

(1986, 1991, 1996) treatise on *institutionalism*, to illustrate that the ideas shared within different legal communities (i.e. civil society, judges, NGOs, the media, the state and the international community) are accepted, contested or rejected by local societies.

The contribution the TLAN will make to this literature is that it offers deeper understanding of legal philosophy as well as a better understanding of legal practices used within the legal community to take legal power away from the state. Through the TLAN approach which focuses on how externally driven legal-institution-strengthening initiatives affects local societies, this study can evaluate how the NIE/LDM logic creates changes in the global structure, participates in the capitalist political economy of legal ideas, processes and policies and constructs laws to further Euro-American legal, economic and cultural domination, and the capitalist political economy.

2.7 Conclusion

This chapter has identified two approaches to illustrate how different trajectories of legal activism have interacted with, and alter, the political structure of the legal and justice systems around the world. One approach was to review the literature to illustrate, with empirical and historical evidence, the trajectories of legal activism separating the state from the legal and justice system. These trajectories illustrate that the location of the real struggle between the state and the legal and justice system is in abstract space. Another approach was to use the Transnational Advocacy Network (TAN) Framework as a Theoretical/Visual approach to illustrate how human rights' advocates empower the political structure of legal and justice systems. This illustration is central to the concerns of this dissertation's focus on the political structures of the legal and justice system. These illustrations suggest the presence of the political structure of the legal and justice system.

This chapter has argued that TAN framework does provide a superficial analysis of how externally driven legal-institution-strengthening initiatives, transnational legal activists and the legal and justice system take legal power from the state and of how political power flows from the citizen through to the international community to bring political pressure on the sovereign state. While partially agreeing with this approach, this chapter

has presented the argument that TAN framework has tried to produce a general model. The TAN framework also raises some conceptual and methodological concerns.

However, because both of these approaches raise conceptual and methodological concerns, it has been suggested that this study needed a deeper understanding of legal philosophy as well as a better understanding of legal practices, local social control and social norms used within the legal community to take legal power away from the state. For this reason, this chapter suggested developing another approach. This study will develop the Transnational Legal Activists Network (TLAN) approach to understand the politics, practices and patterns of World Bank/Commonwealth New Institutional Economics /Law and Development Movement (NIE/LDM) legal-institution-strengthening initiative and state transformation/human rights/democracy legal-institution-strengthening initiatives

To study how transnational legal activists take legal power away from the State, a synthesis of the literature review approach and the Transnational Advocacy Network (TAN) Framework approach and the TLAN will be used. This approach will allow this study to investigate how transnational legal activists seek to change the day-to-day minutiae of legal ideas - changing legal texts, words, phrases, and the occasional clause of legal text. This is the process by which rule of law views are made into legal power. This is the focus of the next chapter.

Chapter Three: Philosophical Positions and Practical Politics of Legal Activists

3.1 Introduction

The last chapter identified that the Transnational Advocacy Network (TAN) Framework is a useful theoretical framework to conceptualise how trajectories of legal activism affect specific locations. However, for this study to understand why NGOs' collection of evidence pertaining to the politics of lawmaking, the interpretation of laws and the legal and justice system incites the international community, and why this empirical evidence can become the object of conflict between the sovereign state and the international community, a deeper understanding of legal philosophy as well as a better understanding of legal practices used within the legal community to take legal power away from the state is needed.

This chapter will develop an analytical framework – a Transnational Legal Activists Network - which connects rule of law views with transnational legal activists, and trajectories of legal activism to understand how legal activists' rule of law views are made into legal power. As suggested in Chapter One, post-structuralist analysis rather than a Marxist analytical framework provides a better understanding of how rule of law is made into *legal power*. This chapter will examine themes such as the function of the legal and justice system; rule of law as a legal philosophical/political position, NGOs' role in expanding the territory, visibility, activism, and pedagogy of legal activists as contact zones between the North and South; political practices inside the legal and justice system; the space of judicial independence; judicial independence in developing countries; the Transnational Legal Activists Network (TLAN) approach; and the rule of law. All of these themes highlight the characteristic politics within the transnational legal activists movement that make it distinct from other social movements. This investigation will reveal how transnational legal activists take legal power away from the State (Tolley 1994, Miller 2000).

This chapter will make the politics, practices, philosophy and political geographies of trajectories of *legal activism* explicit so that the reader can view how a state, legal and justice system and civil society - which are all bound to a location – interact with a

trajectory of legal activism. The concepts introduced in this chapter serve as the analytical framework of this dissertation and are used in further analysis.

The first section will focus on the characteristics of the legal and justice system. These characteristics include the different meaning of the rule of law (as a philosophy, a political space and a political practice) and the political practices of international and local legal activists. This study suggests that three specific characteristics distinguish the legal and justice system from the state: the connections among judges, lawyers and NGOs, the rule of law and the space of judicial independence. The second section, will focus on the space of judicial independence, and give emphasis to the socio-cultural spatial politics in the space of judicial independence. The third section will draw forward a number of ideas and sketch the analytical framework of this dissertation, including a description of the spaces in which legal activists are harboured. It will conclude by explaining how the ideas developed for the analytical framework have direct applicability to the Zimbabwean case study. The fourth section will connect the global social movements in the legal community to Paasi (1986, 1991, 1996) treatise on *institutionalism*. Making this connection should illustrate that institutions in a location create marked territorial patterns. These patterns can be more broadly interpreted as territorial patterns created in the wake of the capitalist global legal-institution-strengthening initiative and the human rights global legal-institution-strengthening initiative seeking to separate the justice and legal system from the state.

Initially, the issues will be treated rather separately. But in sections three and four, the four threads will be tied together through an analysis of space and social relationships running in and through legal and justice systems.

3.2 The Intellectual Context of Legal Activism

To be able to understand the nature of the political structure of legal and justice systems in Zimbabwe and other countries, and the changes that legal and justice systems have undergone since the end of World War Two, it is necessary and important to recognise the context of legal activism and its effect on the political structure of legal and justice

systems around the world. The context of legal and justice systems refers to the different global movements seeking to institutionalise the rule of law; and within these global movements, country-specific legal and justice systems have developed their unique political structure. The institutionalisation of rule of law is the political agenda to bind the state with the law. In this sense, the term *the institutionalisation of the rule of law* refers to the political agenda of the United Nations, the international community, nation-states, organisations, institutions or individuals seeking to bind the state with the law and with moral responsibilities, technical procedures and policies (Mathews 1986). In general, this literature articulates that economic and political organisations and institutions support the process because they can rely on the judiciary to protect the economic and political interests of individuals, organisations or institutions against the state. When the judiciary is granted independence from the state, the judiciary is perceived to be separate from the political and economic forces in society, therefore able to place legal limits on the sovereign-state's power (Russell 2001a).

Chapter Two established the context of legal activism by illustrating the history and vision of two different trajectories of legal activists. These trajectories have interacted and altered the political structure of legal and justice systems around the world. The significance of this description was to emphasise that a Head of State responds to several global coalitions of transnational legal activists – the media, nongovernmental organisations (NGOs), lawyers and judges advocating for legal and economic reform - seeking to take legal power away from the State.

Chapter Two also suggested that in order to appreciate the global manifestations of specific processes on the Zimbabwean legal and justice systems, an assessment and understanding of the global context within which legal and justice systems have developed is critical. In fact, the political structure and transformation of legal and justice systems in any country can only be appreciated if such is couched within the context of global social movements in the legal community and a clear understanding of the meaning the rule of law. The next section will focus on highlighting several characteristics of legal and justice system such as different meanings of the rule of law

and the political practices used within the legal community to take legal power away from the state.

The legal literature reveals several distinct meanings of the term – the rule of law. These meanings include the rule of law as a function of the legal and justice system which interprets the law for the state (Mathews 1986); as a legal philosophy (Shklar 1987); as an ethical reflection (Weinrib 1987), as a political position on the justice administered by the courts and as a political agenda seeking to separate the state from the law (Tolley 1994). This review will address each of these meanings to define the distinct meaning of each of these terms. The intention is to suggest the sorts of evaluations the international community might make of a Head of State when he/she transgresses into the political space of the judiciary and/or makes extra-judicial decisions; or for an NGO to strongly advocate for human rights or offer a review of a legal and justice system that does not rule in favour of the civil rights movement. The point being made is that these are deeply felt philosophical positions and because of these differences each individual holds a political position on what he/she thinks that the rule of law *should* be.

This section has several subsections. The first will highlight the different ways that this term is used by many individuals and many contexts. The next will focus on the meaning of the rule of law when it is connected to the day-to-day function of the legal and justice system interpreting the law for the state. Different examples are offered to suggest to the reader the differences among justice, rule of law and law. The distinction is also made between the rule of law as a legal philosophy and the rule of law as an ethical reflection of the role the legal and justice system should take in administering the law in a particular legal case. The significance of this discussion is that the rule of law, justice, injustice and the law are important characteristics of the legal and justice system shaping its political structure.

3.2.1 What is *The Rule of Law*?

The focus on the term *the rule of law* is to suggest that to create a definition of the term is quite difficult. Generally, the identification of the meaning of the rule of law is problematic, as the following comments suggest.

Clement and Murrell (2001: 2) assert that, “...the demand for the rule of law is ... an economic [and political] phenomena”. A version of this logic is found in the following newspaper quotations: “Development begins not with external aid, but with the rule of law” (Z-TDN 11/03/02-O); “...[the] rule of law is fundamental to economic and social stability in the [Southern Africa] region and it is indivisible” (ZHR-NGO SR 09/01: 36). Whereas Mathews (1986: xxviii) argues.

...politicians view the rule of law as synonymous with their politics and its violation as a description of their opponent’s actions. The result is that the rule of law is both confused and politicised by this group.

Yet, Tolley (1994:71, 75-76 emphasis added) notes that the International Commission of Jurists (ICJ) defined the rule of law in 1955 through the following definition:

...fundamental political and civil rights – of speech, press, worship, assembly, association, free elections, and equal protection – to be enforced by *independent judges and lawyers in domestic courts*...

[The rule of law includes] two groups of substantive rights:

- well established civil liberties of speech, press, religion, assembly, democratic elections and
- undefined rights of economic justice including education

The ICJ also progressively defined four procedural mechanisms to limit arbitrary state power [to protect the rule of law]:

- An independent judiciary to restrain the executive
- a popularly elected legislature
- a responsible bar committed to social justice, and
- international law enforced by regional courts.

In contrast, Hutchinson and Monahan (1987: 99) suggest that the rule of law,

...has been used to legitimise and galvanise a challenge to entrenched power; at others, the ruling elite have used it to sanction its power and resistance to would be usurpers. Like any ideal, it only exists in the political consciousness and conscience. But, like any other ideal *it exercises a tenacious grip on the*

imagination and actions of its adherents. Indeed, its ideological attraction and political durability are largely attributable to its historical plasticity, the facility to accommodate itself to changing governmental situations and political forces (Hutchinson and Monahan 1987: 99 emphasis added).

Apart from these different perspectives, three strands of thinking are apparent within these quotations: 1) The rule of law is idealistic/philosophical perspective. 2) The rule of law is a political space that the sovereign-state gives to the legal and justice system to draw civil society's idea of justice into the law. 3) The rule of law is a multiscalar, multi-institutional political agenda to bind the state with the law.

3.2.1.1 The Function of Legal and Justice System

The meaning of the rule of law is connected to the day-to-day reality that the legal and justice system performs a basic function for the state. The legal and justice system cannot be separated from the state as the state is structurally entwined with the legal and justice system. However, the critical difference between the two institutions is that the legal and justice system offers an ethical reflection of the legal case and interprets the law for the state through rule of law views. Thus, the power relationship between the state and the legal and justice system is that the legal and justice system is *perceived* to be carefully weighing the evidence provided by NGOs, key witnesses and experts, interpreting the law and carefully evaluating how constitutional law, legislative law and quasi-emergency laws and many other laws are woven into the political landscape of a country. The perception that the legal and justice system is separate from the state is central for civil society to trust the justice to be administered by the courts. The responsibility of the legal and justice system, as a social and political institution, is to ensure that the justice being drawn into the legal and justice system is just (Weinrib 1987, Hatchard 2000, Russell 2001a, 2001b).

The concepts of justice and rule of law are central issues in legal literature. Justice implies local understandings of justice. It often lacks a specific organisation. Justice is social power. Mathews (1986: xxviii) points out that "...justice, while being a much broader idea, incorporates the rule of law as a fundamental part of its meaning" Whereas rule of law implies that an interpretation of justice has been administered through the

legal institution. A legal institution is a hierarchical, bureaucratic system filled with key players who embody the role of agents of the law. This institution is an embodiment of the notion: *justice*. A judge is granted the legal power to choose to interpret a law through a rule of law view to pursue a political, economic or social agenda. This is legal power. In this way the authority of the sovereign-state is legitimised and the legal right of the state is re-asserted, even if the interpretation of rule of law is coercive and forces social order against local notions of justice. Sarat's (2001) study of the death penalty in the United States provides a useful example. The distinction between justice and rule of law suggests why the state has the legitimate use of means of violence.

In other words, *justice* is often a location specific socio-spatial power, often lacking specific organisation. Whereas the *legal* institution is a hierarchical, bureaucratic system filled with key players who embody the role of agents of the law, and cite rule of law views, and participate in the day-to-day construction of *the justice system* and *justice* administered by the legal system (hence the phrase *legal and justice system*). In addition one's view of justice, once formally debated inside the legal system, is a rule of law view being extended through space and time. To create justice in a legal system, judges will focus on small incremental changes to the legal text. These small changes allow subgroups the opportunity to participate and deepen and broaden their agenda through the political landscape. Thus, the rule of law is understood to be a conservative interpretation of justice. This is one meaning of the term rule of law, based on the basic function of the court (Mathews 1986).

Thus, the debate that often arises in a debate over justice and rule of law stems from the political influence that the state may/may not have over the legal and justice system (Widner 2001). Generally, the purpose of having judicial independence is to find a balance between these two institutions, which share a similar political agenda – to gain legitimacy from civil society (Dodson and Jackson 2001). Because judicial independence is structurally and politically almost impossible, the rule of law is often cited as if it is a political statement about the quality of justice being administered through the legal and justice system (Mathews 1986: xxviii).

3.2.1.2 The Legal and Justice System Interprets the Law through a Rule of Law

View

To clarify the difference between law and rule of law, an example will be offered.

Canadian legal scholar, Weinrib, who has a geographer's sensibility, clearly distinguishes role of law and rule of law in a legal and justice system:

If Rule of Law is to be an ideal or a virtue, its desirability must be ascribed to the reformist side of this conception. But from this standpoint the Rule of Law could only be a watery ideal at best. As an ideal it can represent only one value among many, and it therefore "has always to be balanced against the competing claims of other values"...the Rule of Law has no values of its own to throw into the scales and thus must always be dependent on values, which are external to itself. On this conception the Rule of Law is intelligible only instrumentally; *it has value only in so far as it forwards the values favoured by the reformer*, its status is hostage to his assessment of its usefulness (Weinrib 1987: 67 emphasis added)

[in contrast, the space of a legal jurisdiction shifts and changes depending who has the power to have his/her interpretation of rule of law administered as justice in this geographic location]

...law is merely an empty form, which can serve as a receptacle for anything, there is no point to rummaging around within the law in search of content. Such requirements as are to be found there – its "internal morality" to use Fuller's term – are nothing more than the considerations which make the social control exercised through law effective and which accordingly confirm the law's instrumental character. What is central to reflection about law is not the recognition of content adequate to the articulation of its structure from within, but the projection from outside on the empty form of law of a purpose which is independently desirable. Because this purpose takes its validity from the realm beyond law, it is not constrained by law but law by it; the *law is at most a thesaurus of technical considerations*, which are subservient to the most effective realization of some particular purpose. The paradigmatic legal actor is the wise legislator who, like an architect, forms in his[her] mind a plan for a structure which [she/]he conceives from the top down, with law analogous to the plumbing, necessary for the supply of water and the removal of waste but not something to glory in (Weinrib 1987: 67-68 emphasis added).

In this quotation, the rule of law is aptly captured as a fluid essence. This passage illustrates that a rule of law view has a socio-legal spatial presence which can be viewed as political with practical implications for individuals' daily lives; and that rule of law views pass through legal texts and rule of law views are spatial. The clarity is significant

because other scholars have referred to the point that *rule of law views are the justice* administered through the legal system, and this justice is rarely just. For instance, Kearns and Sarat (1996) and Sarat and Kearns (1992) argue that justice is injustice, and law is violent. Berman (1992), Tshuma (1999), Man and Wai (1998) agree on the point that rule of law is not justice, but understanding rule of law holds the key to understanding social/economic justice, and social justice movements. Justice is always being remade alongside societal, political and economic change, whereas rule of law is a value, which may remain static in government institutions, a community, a human rights organisation, and an economic development institution. In contrast to these overlapping descriptions, Weinrib (1987) clearly emphasises that law is a technical mechanism and the rule of law is an ethical reflection by an individual. Some individuals are given the authority and power and politico-legal responsibility to interpret the law for the rest of society, i.e.) a judge.

To clarify the differences in and among law, rule of law, justice and injustice in day-to-day life, another example will be offered. Mathews (1986) provides the following explanation for the division between justice and the rule of law in South Africa during the height of the apartheid regime. Mathews (1986) suggests that many different types of rule of law views shape a justice system. Mathews (1986) proposes that for a rule of law view to be accepted by a society, which in turn shapes their public/private behaviour, the rule of law view must fit within a society's sense of justice. Working in South Africa (SA) in the 1960s through to the mid 1980s, the key issue Mathews identifies is that the SA legal system did not generate a notion of justice in this context. In other words, rather than assuming the new legislation empowers the people (a vision often generated by USA legal scholars and activists (see Hatchard 2000, Goldberg-Hiller 1998) is the reality that in many contexts the state uses the law as a political and economic tool to privilege the state (Bates 1995).

Mathews' (1986) efforts to distinguish justice, rule of law and law underscore the complex political situation of a legal and justice system interpreting the law with a rule of law view that is not supported by the state. The legal and justice system in which a judge

must make his/her ruling is set against a broader politico-legal-economy backdrop. Against this broader backdrop, a judge will interpret a woman's or a man's every day reality, and may/may not attempt to draw a broader vision of justice into the legal and justice system through the ruling. When the state is opposed to allowing more inclusive viewpoints into the legal system, a judge's ability to manoeuvre within this situation is decidedly constrained. The practical issues constraining a judge are translated as interpretations of the law. Although this interpretation is supposed to uphold public opinion's vision of justice, if a Head of State has a very strong rule of law view which dominates the local legal and justice system, in all likelihood a judge will consider the practical politics involved before directly challenging the Head of State's rule of law view. The net result is that the legal system serves the Head of State rather than popular opinion, thereby de-legitimising the moral authority of the legal system in the public opinion (see Phillips 1997).

Mathews (1986) provides one of the clearest examples of legal scholars differentiating justice, rule of law and law into distinct categories because he offers a concrete example of Black South Africans' rule of law views, desiring a world of equal rights, the right to vote, the right to economic empowerment, healthcare, etc, etc. Moreover, the Black South African rule of law view is shared by other individuals, underground political systems, the Organisation of African Unity Heads of State and transnational communities fighting against the South African apartheid regime. This *community* shared a vision of what the world *ought* to look like. This vision materialises as sanctions against apartheid. As Hutchinson and Monahan (1987: 99) state: the rule of law legitimises and galvanises "... a challenge to entrenched power.... it only exists in the political consciousness and conscience...[and in] the imagination" *These* are powerful visions created outside the courtroom. A community, that may be differentiated by class, race, gender, sexuality, disability, education and other axes of difference, may share these visions. Yet, these individual voices become unified when they become a trajectory of legal activism. A trajectory of legal activism, when offering its view to the court and being evaluated by the court judge - even with a different set of biases - makes the judgement of whether or

not these views are in the interest of society as a whole. This is how social power is made into legal power.

Weinrib (1987) suggests that the focus is on *who* has the authority to interpret the law with a rule of law view which will be administered as the justice of the nation. The international community will legitimise the authority of a judge to interpret the law and administer this view as the justice of the state. However, as noted in Chapter Two, there is an increasing social movement to prevent the Head of State from interpreting the law (see Chapter Seven). Thus the international community has begun to dominate this space.

This section has highlighted that justice and rule of law are different, yet intrinsically connected. This is one meaning of the rule of law. Another meaning of the rule of law is that the rule of law is a philosophical/political vision constructed by the state defining the function of the legal and justice system for civil society.

3.2.1.3 Rule of Law as Legal Philosophical/Political Position

There are many different archetypes of the Rule of Law, as Man and Wai (1998) suggest, but only three different legal philosophies underlying rule of law views are provided here. The intent of this review is to understand why transnational legal activists are driven by different world views and what the political implications of these world views might be for the disabled, terminally ill, hungry, informally employed, poor and politically vulnerable women, men and children.

This section will establish that individual judges, Heads of State, NGOs, the media, civil society, international organisations of nation-states hold a philosophical/political position when she/he/they envisions the “ideal” relationship between the state and the legal and justice system. Many individuals will legitimise the legal and justice system (which upholds the system of governance) based on his/her perception of the justice being administered by the legal and justice system. The critical point is that these are deeply felt philosophical/political positions that are sometimes non-negotiable. The South African case study is a useful example. These philosophical/political positions are often the

critical feature underlying which doctrine of justice will be used when interpreting legalisation, which has direct repercussions for real people. These doctrines of justices are the topic of the next section.

One archetype of rule of law, *Rechtsstaat*, is often characterised with examples from Eastern Europe and apartheid South Africa. The *Rechtsstaat* view of Rule of Law focuses on the “law based state” which envisions that the norms and laws created by the government are to govern the people by law. This view assumes that the highest power is the state, and there are no laws from a source outside of the state (Berman 1992). Nonetheless, the state is not supposed to abuse, or inconsistently use, their legal right to use the law (Mathews 1986). The second is that attributable to the work of Aristotle. The Aristotelian view of Rule of Law focuses on the basic standards of polity and serves several vital political services such as providing a principled and fair legal system including harsh criminal laws to control sources of danger and threats to the public (Shklar 1987). Montesquieu provides the inspiration of the third. The Montesquieu view of Rule of Law has one aim: to protect the governed against the government’s aggression: “...is meant to put a fence around the innocent citizen so that she may feel secure in these and all legal activities” (Shklar 1987:2). Shklar (1987) argues that the Montesquieu view of Rule of Law view focuses on the freedom from fear. Legal procedure ensures that the court is the place where individuals are protected – where the executive government and their allies are prevented from imposing their persecutions, interest and power upon the judiciary.

Shklar (1987) clarifies the difference between the latter two. She suggest that the Montesquieu view of Rule of Law is compatible with the theory of individual rights, whereas the Aristotelian view focuses more on corrective justice. Shklar argues that both rule of law views underlie the work of more recent legal theorists such as Friedrich von Hayek, Ronald Dworkin and Roberto Unger. Additionally, she argues that the distinctions between the two archetypes have become blurred. Both the Aristotelian view and Montesquieu view focus on three pivotal state-civil society relations: fear of violence, insecurities of a government using arbitrary powers and the indiscrimination of injustice,

whereas the Rechtsstaat view focuses on the laws created by government to govern the people (Mathews 1986).

3.2.1.4 Doctrines of Justice: Visions of the Role the Legal and Justice System in Society

Doctrines of justice are the professional language of judges and lawyers. This is a way to articulate different positions on matters of justice. Most elected officials speak the language of law. In contrast, judges and lawyers speak the language of justice, rule of law and law. The critical difference is that judges and lawyers discuss the multitude of positions one could take on a legal case. Whereas many elected officials/ politicians will voice rule of law views from a singularly political position. This section offers the reader analytical tools to work through the changing meaning of “justice” in the legal and justice system as well as by the international community in such a way that it emphasizes the fragility of the word.

Lawyers, judges, human right activists, men and women in society and others interpret legal texts through five general theoretical frameworks. Each interpretation is judged by the hierarchy of the local legal system and then the ruling is reviewed by the international community.

Mathews (1986) and Kearns and Sarat (1996) provide five categories of rule of law theories:

1. Law enforcement theories
2. Theories of the rule of law as procedural justice
3. The rule of law as justice in the material or substantive sense
4. Theories of the rule of law as the protection of the citizen’s basic rights through definite rules administered by independent tribunals
5. Rule of Law as a gap between Law and Justice (Justice/Injustice)

The first two of the above perspectives on *rule of law* share three commonalities. First, there is no reference to the content of the law of the society being governed. Second, these lines of thinking make no reference to the social and political goals of the society; and third, they both focus on the direction of the form and administration of the law rather than the local response to these laws (Mathews 1986). In short, the silences and

assumptions of these perspectives make them potentially dangerous to civil society who has to assume that the sovereign-state's justice system will interpret the notions of justice widely enough to include civil society's idea of justice.

The first body of legal scholarship: *law enforcement theories*, is basic and uncomplicated. It strictly follows the word of the law and contains the notion that there is a valid law that the government is required to conform to and act by. These rule of law theories allow a sovereign-state to rule *by* law rather than rule *under* law, based on the assumption that government rule will not be lawless or lack moral values. These legal writings have a narrow interpretation of the law which makes them potentially dangerous. Unfortunately this body of scholarship legitimises the rule of the most authoritarian governments whose actions are, in principle, protected *by* law (Mathews 1986, Cotterrell 1996).

The second body of legal scholarship: *theories of the rule of law as procedural justice* differs. Being somewhat more sophisticated, these rule of law theories illustrate a meticulous crafting and writing of the form and manner of administration of the laws. Documents that are the instrument to this rule of law view avoid mentioning any principles about the conflict of laws. Such legislation is freed to forbid or command as it pleases. The central weakness of laws formulated in this manner and administered according to definite procedures is that laws constructed and administered through such a lens assume that the *rule of law* and these laws can anticipate and chart the direction of all human conduct, and therefore assume how to administer the law (Mathews 1986). In reality, humans are unpredictable. The key element to this body of scholarship is that it is based on the assumption that the government is *under* law. A common critique of this body of literature is found in an argument suggestive that these theories neglect to ask the deeper question of whether or not the government might differ from the people it governs, or whether or not the government can assert the validity of the law within the interests of the majority.

The third body of legal scholarship *the rule of law as justice in the material or substantive sense* ambitiously tries to achieve social justice for all by incorporating

prescriptions covering the content of laws. One of the main exponents of this approach is the International Commission of Jurists (see Tolley 1994). The common critique of this body of theories is that there is no just society, and the *rule of law as justice in the material or substantive sense* is a totally unrealistic role for law and courts in a society. These theories which, when attempted to be put into practice, illustrate that theories have unrealistic expectations of the legal and justice system. These theories are unrealistic for two reasons. First, social tasks devised for courts (for example housing, jobs, etc.) are beyond the resources and powers of the judicial branch of government. Second, the judiciary is an institution of right and wrong. It seems utterly unfeasible that the courts could deal with all pre-established standards, rules, or rules to specific problems. In short, social tasks are only partially susceptible or not at all susceptible to the rule-making machine. This perspective has an over-corrective attitude about correcting all the ills of the society, as suggested by the following quotation:

...rights fell into the categories of luxuries that meant little to peoples in societies in which basic needs had yet to be satisfied. Freedom of expression, for example, has a relatively low appeal to a subject whose stomach is empty... (Mathews 1986: 11)

The fourth body of legal scholarship, *theories of the rule of law as the protection of the citizen's basic rights through definite rules administered by independent tribunals* fills the need for a theory "...that will respect legality by restricting its operation to areas of social concern in which it is both relevant and workable" (Mathews 1986: 15). These theories advocate legal protection of substantive rights. The over arching concept in this line of thinking is that the law can facilitate rather than immobilize social development. It differs from the three previous perspectives, insofar that this perspective runs along a parallel line of thinking as the Marxist literature so it is not as vulnerable to the Marxist critiques of the *rule of law*. The Marxist assessment of state and civil society interactions highlights the outcome of economic and social policies. *Rule of law*, in this sense, connects legal thought with the social reality (Mathews 1986) that the division between management and workers is produced and reproduced with low wages, paid locally and that the fruits of production are imported by developed countries.

The fifth and most recent and body of legal scholarship reflects the post-structuralist paradigm within legal studies and *deconstruct the legal system and modern law through a critical commentary of the rule of law*. In deconstructing the master narrative of law, law has been placed in an intellectually vulnerable position. Many argue that an enduring feature of the legal and justice system is that justice is injustice, law is violent, and the law is a mechanism through which rule of law views achieve a specific purpose.

This study has made the language, legal philosophy and the political practices of interpretation of the law explicit by reviewing a wide array of literatures. Some of this literature has been philosophical. Some has been applied with specific case studies. The purpose of offering this review is to appreciate that injustice, justice, rule of law, and law are taken very seriously by the legal community. Moreover, a philosophical approach of the rule of law seems to be a distinct characteristic of the legal and justice system that makes it different from the state (which often has more pragmatic issues to attend to). This study will suggest that the different positions on the rule of law can assist in illustrating the struggle among civil society, the state, the legal and justice system and the international community.

This section has identified several different approaches to the rule of law. These include: a political position on the justice administered by the courts and as a political agenda seeking to separate the state from the law, a function of the legal and justice system; who interprets the law for the state, an ethical reflection; and a political/philosophical position about the rule of law view that the sovereign-state supports. However, a central theme in this dissertation is that *individuals* choose a rule of law view to follow/advance part of a local or global social movement. Each person takes a position.

Much of this literature suggests that the courts are clusters of institutional practices, structured by the politics inside and outside the courtroom (Palmer 2000, Goldberg-Hiller 1998, Phillips 1997). However, this study envisions that individual rule of law views flow into the space of the courts. The courts are meant to allow for this interaction. This point is better illustrated with a focus on the struggle between the state and the international

community, in which the legal and justice system is to ensure that the law is an interactive process between the legal system, public opinion and public behaviour (Mathews 1986). Oftentimes, the only way that the law can become interactive is if the sovereign-state gives some political space to the legal and justice system to draw civil society's idea of justice into the law. Thus, the space of *judicial independence* allows judges to carefully weigh the evidence, consider different legal theories, evaluate different laws and create small incremental changes to the legal text that allow subgroups the opportunity to participate and deepen and broaden their agenda through the political landscape. A rule of law view, then, is a political position about the political space the sovereign gives to the legal and justice system to interpret the law for the individual, or a political position on the rule of law view a judge should have used in a specific case. The legal and justice system is to perform their basic function – interpret the law (which is a reflection of their, economic or social agenda to turn social power into legal power). Judges focus on small incremental changes to the legal text that allow subgroups the opportunity to participate and deepen and broaden their agenda through the political landscape.

Three critical points have been revealed through this review. First, a judge is given the legal authority to interpret the law for the state. However, the political space in which a judge can make this ruling is often defined by the states' philosophical/political position on how the legal and justice system should uphold the system of governance and administer justice. The state may take any of the following position - the Montesquieu view of Rule of Law (individual rights), the Aristotelian view (corrective justice (Shklar 1987)) or the Rechtsstaat view (laws to govern the people (Mathews 1986)). Against this political reality, a judge may consider the array of comparative legal theories s/he may use when making a ruling. However, the practical politics, as Russell (2001a) and others have argued, are very real. A judge will often be very aware of the sort of ruling the state would prefer.

However, the politics over the administration of justice move up into another realm. Questions of justice are asked and answered in the courtroom and discussed in a

multiplicity of ways by individuals such as academics, judges, and members of the press, representatives of civil society and others. Each and every one of them has the power to interpret rule of law through their individual worldviews, inside and outside the courtroom. Moreover, when NGOs collect evidence pertaining to law as an interactive process between the legal system, public opinion and public behaviour, the politics of lawmaking, the interpretation of laws and the legal and justice system, the purpose is to change the general perception of quality of justice administered through a legal and justice system. The purpose is also to influence individuals and advocate that historically specific configurations of complex power relations and political hierarchies that exploit and create even more injustice.

Second, rule of law is political space the sovereign-state gives to the legal and justice system to draw civil society's idea of justice into the law. The space of *judicial independence* allows judges to carefully weigh the evidence, consider different legal theories, evaluate different laws and create small incremental changes to the legal text that allow subgroups the opportunity to participate and deepen and broaden their agenda through the political landscape. A rule of law view, then, is a political position about the political space the sovereign-state gives to the legal and justice system to interpret the law for the individual, or a political position on the rule of law view a judge should have used in a specific case. The legal and justice system is to perform their basic function – interpret the law (which is a reflection of their economic or social agenda to turn social power into legal power). Judges focus on small incremental changes to the legal text that allow subgroups the opportunity to participate and deepen and broaden their agenda through the political landscape.

Third, the different trajectories of legal activism, the international community, a nation-state, institution, organisations, individual academics, judge, policy researchers, politicians, law reform commissions, single issue pressure groups, non-governmental organisations (NGOs), religious groups, artists, writers and many others who advocate for rule of law are pursuing a political agenda: to bind the state with the law. This has become a global process affecting local place. It is for this purpose that NGOs collect

evidence pertaining to the politics of lawmaking, the interpretation of laws and the legal and justice system incites the international community. NGOs use this evidence to bind the state with the law.

In the section below, this study will begin to examine the literature that highlights the relationship between the NGOs and the legal and justice system. This relationship is unique because it can restructure local communities, nation-states and international relations.

3.3 Political Practices of Legal and Justice Systems at the Global and Local Levels

Political practices, to a large extent, are common to all legal and justice systems. These political practices will be analysed in general terms rather than for specific countries. The first is the political practices in nongovernmental organisations at the global level. The second is the practical politics at the local level.

3.3.1 Nongovernmental Organisations

Two schools of thought on the role of NGOs in changing legal space exist in the literature. The first view is that global bars such as the International Bar Association, or the Commonwealth Judicial Colloquium work as a coalition to advance Human Rights Principles in Commonwealth countries and alter sovereign-state protectionism. Many work together to attempt to bring innovation to local laws and use judicial decisions from other jurisdictions. Many have developed a number of informal and formal contacts. Many do so in cases of economic development, rule of law, peace and order (Gubbay 1997).

This view tends to celebrate NGOs' global political position. For instance, Backer (2001) asserts that the ethical and strategic efforts by NGOs to promote civil society, good governance and rule of law in transitional and authoritarian political system constructs new political spaces thereby creates new institutional transformation. Along a similar line of argument, Lovell (2001) argues that citizens of post-communist states rely on informal institutions such as industry and trade organizations and public interest

groups rather than formal political groups to resolve their differences, and that for the process of democracy to deepen, the formation of NGO lobby groups helps create better laws and legal practices. Others also acknowledge that NGOs work with community and special interests groups to bring subtle changes to legal and regulatory agencies' thinking. NGOs hold the power to transform new policies and practices (see Ghai 1997, Tate 1997, Russell and O'Brien 2001, Cheema 2001, Opeskin 2001). Hammami (2000) also supports this argument, albeit somewhat more critically. He argues that most NGOs in Palestine are sheltered by the presence of international donor aid agencies brought in to shadow the peace process, contributing to a deeper political crisis within the local community.

Chandler (2001) suggests that NGOs roles are shifting and changing. Multilateral human rights organizations have been monitoring human rights in developing countries, typically through bilateral, rather than multilateral channels and evaluating whether or not countries are upholding their commitment to the international human rights treaties they have signed. Kent (2001: 591) suggests that NGOs play a major role in bilateral monitoring: producing information and exerting pressure, and establishing links with "dissidents still inside" the country. Her point is significant. Many states view NGOs as dissidents.

The second view holds a more critical view of NGOs political presence. For instance, Bayart (1999) acknowledges that NGOs are part of the capitalist system: they seek funds from the international community. They perform certain functions that enable capital accumulation, which in turn legitimises the information they produce. Bayart (1999) works towards unravelling some of practices that shape notions of modernity. Mutua's (2001) analysis of the human rights industry mirrors the concern Bayart (1999) raises. Mutua (2001) argues that NGOs' documentation of human rights abuses, tends to reproduce stereotypical images and assumption of state/civil society relationships. The specific images Mutua (2001) refers to are the violent images, which often signal the failure of the state. State condoned violence, brutality and torture provide ample evidence that states – particularly under barbaric/savage/uncivilized leadership - cannot govern

themselves. Paradoxically, perhaps, NGO reports that can be downloaded from websites also serve to reinforce popular attitudes of the *savage* state and the need for outside intervention to “save” the victims. These tendencies to produce human rights agendas as *civilising* constructs weave all sorts of assumptions about Western/Non-Western hierarchies into the process of domination/subordination. At the same time, these images reproduce a number of assumptions about other state-civil society’s relationships, creating the justification for the global economy to intervene on behalf of local human rights movements.

This critical literature is asking a number of deeper questions about the underlying logic and tendencies of NGOs activism as an ongoing process of transculturation and transnationalism (Meili 2001). As Sikkink (1999) and others suggest, NGO websites such as Amnesty International and Human Rights Watch can be seen as a contact zone between the North and the urban elite in the South. Those who have access to a computer – the curious, researchers, students – can visit these public spaces, engaging in the wider networks of information. This literature suggests that NGO websites are a particular kind of contact zone, within which the social and spatial distance of websurfer, nation-state, victim, NGO mandates, international development initiatives and other individuals, institutions and ideas are diminished (Mohan and Stokke 2000). Yet, as Marsten et al (2002) suggest, websites themselves embody economic inequalities and political hierarchies. These are spatial environments through which the harsh stories of women and men abused by the state can be transposed into middleclass homes in Canada or the USA. These are cultural and literal collisions of different worlds.

However, whatever the longer-term implications of NGOs agitating to change legal space, it is important to acknowledge the process through which they do it. The INGO – for example, the International Commission of Jurists (ICJ) – provides a useful example. The ICJ was created specifically to work with governments that used legal mechanisms to further a political agenda and military power to legitimate violence (Mathews 1986, Tolley 1994, Hatchard 1993, Odinkalu 1998, 2001). The ICJ has worked in jurisdictions where new governments – that have just come into power through peace negotiations

after a guerrilla warfare - try to establish a boundary delineating government accountability for past war crimes and the need to protect human rights in the future (see Dodson and Jackson 2001, Meili 2001: 320-325). Such governments may need externally driven legal-institution-strengthening initiatives and global bars such as the International Commission of Jurists (ICJ) to alter the political space between the legal and justice system and the state, thus to legitimise the government both locally and globally. The ICJ has been redrawing the lines between the state and the judiciary in locations, communities and jurisdictions all over the world, for example in the Commonwealth. Russell (2001b), Gubbay (1997) and Hunt (1997) suggest that global bars hold the power to change how domestic law is imagined, constructed and administered.

The ICJ is a useful example with which to illustrate the global political practices of legal activists; particularly lawyers and judges tend to use covert political strategies. The ICJ political practices are spatial, public, historical, international, local and revolutionary. This coalition of individuals has a powerful public presence in global politics. Moreover, the strategy through which the ICJ achieves its political agenda offers many insights into the global power of legal activists, who at the local level, are often much more subtle and strategic.

The ICJ, based in Geneva, Switzerland, is one of the most influential and most respected human rights organizations. The ICJ was created to protect human rights defenders, independent judges and lawyers defending political dissidents from elected government's orders (Tolley 1994). It developed a number of political practices such as working with NGOs. This community of judges, lawyers and NGOs exchange ideas, legal rulings, and information and maintain regular contact. The purpose of this information flow is to ensure that independent judges and lawyers and human right defendants could draw social power from the international community. The global social movement was aware that local judges and lawyers (at times constrained by local political, social, economic and cultural structures) needed to be closely connected to the transnational community which had other resources and tools available to them. The identity politics of this organisation has had the power to shift and change legal space, legal thinking and legal

activism around the world. It has been an important “...agent for mobilising the legal profession” (Tolley 1994: 66).

Three points highlight the ability of the ICJ to create effective political practices that could change international relations in the legal community. One, this NGO began with the idea that it was going to “create a new political and legal order” through the activism of the legal profession (Tolley 1994: viii). This global social movement of legal activists focused on empowering the legal and justice system in order that legal activists can take legal power away from the state. The purpose of this social movement was to embed *judicial independence* in countries around the world. Thus, from *within the nation*, the ICJ has been embedding judicial independence in specific places – to attack a sovereign state’s power. The globalisation of ICJ’s social movement can be measured by its geographical spread, locations of legal activism/ organizations, which act as a conduit for local voices, and patterns of articulating abuse of power through the law. In other words, naming the power few could see (Tolley 1994).

Two, the global reach of the ICJ extends to many geographic regions. The ICJ has regional affiliations in every geographic region – Asia, North Africa and the Middle East, South America, Europe, North America, Australia, New Zealand and Africa including Southern Rhodesia/Zimbabwe (Tolley 1994: 59, 160, 253, 283-285). The ICJ has built a global coalition of NGOs to create global change between the East and West. The ICJ recruited chief justices, former ministers, legislators, and judges, bar association leaders, law school deans, published scholars and successful practitioners from a wide geographic representation of countries. Internationally, this is a global social movement of activists seeking to further separate the legal and justice system and the state. Through time, this group has shifted the legal profession into an abstract space of being separated from, yet connected to, the state. The ICJ has become, in part, a “...citizen initiated transnational movement that challenged state sovereignty with the intent to create a new world order” (Tolley 1994: 42).

Moreover, global politics have changed as a result of individual activism across the globe, challenging the law, legal system and advancing broader interpretations of rule of law. Individuals in local legal institutions have played a part in tightening the legal mesh of international treaties and deepening the presence of the UN (United Nations). The ICJ's influence, as a geographic pattern, can be broadly mapped as an abstract space which allows legal systems throughout the world a certain level of autonomy in relation to other government structures. This has brought lawyers and judges into a unique political position. Moreover, because the ICJ is interested in altering the microfoundations of rule of law, that is, the local legal culture, the ICJ has been very effective at establishing judicial independence in a wide array of locations. In these locations, individuals and organisations begin to challenge the state to institutionalise the IDHR norms and change the local legal culture. Further details about the legal ideas, personal values, and legal systems that this NGO was extending across the globe will not be discussed. However, there is a much more critical analysis of this NGO offered by Mutua (2001) and Mathews (1986).

Three, the ICJ's international influence extended to lobbying the United Nations (UN) to accept the Basic Principles on the Independence of the Judiciary (1986) and the Basic Principles on the Role of the Lawyers (1990) (Tolley 1994). The international changes have made a difference in specific locations. Local judges and lawyer were now in theory protected by the UN. Lawyers and judges could use their careers to advance broader ideas of justice, considering issues of difference such as generation, class, gender, sexuality, disability, etc. throughout local societies, as new social justice issues were brought to light in the legal and justice systems, rewritten as legal power, this in turn has created the framework for other social movements (Tolley 1994: xv, Mutua 2001, Dezalay and Garth 2001).

To summarise, this section has acknowledged the political practices of NGOs in changing legal space. The views tend to differ. Some case studies are written in a manner that celebrate NGOs' global political position, particularly when NGOs collaborate with global bars such as the International Bar Association (Gubbay 1997, Sikkink 1999).

Whereas others are more critical, asking a number of deeper questions about NGO activism (Meili 2001). For instance, Bayart (1999) and Mutua (2001) offer some very sharp notable criticisms of NGOs. Hammami (2000) offers an important case study that links international donor aid agencies working with NGOs to deeper political crises within the local community. Their arguments should be considered when thinking through the longer-term implications of NGOs, such as the International Commission of Jurists (ICJ), agitating to change legal space. The section below will offer a closer examination of political practices within the legal community in a location.

3.3.2 The Political Practices of Legal Activists and the Legal Community

...Judges, law professors, and practicing attorneys have challenged a state system whose sovereign governments choose to be a law unto themselves. Their goal is to create a new political and legal order that prevents historically sovereign governments from kidnapping, torture, murder and arbitrary detention (Tolley 1994: viii).

Sarat and Scheingold (2001b), Scheingold (1994), Cain and Harrington (1994) argue that there has been little analysis or debate regarding legal activists. With this said, the current literature on legal activists reveals a number of unique characteristics about these sorts of social movements. Individuals, who participate in this social movement, generally work for the state. Those who advocate and/or participate in challenging specific laws use a number of strategic political practices. These practices include keeping their activist agenda invisible and/or only slightly visible to the state.

This literature, which will be reviewed in this section, is traditionally known as the “cause lawyers” literature. Sarat and Scheingold (2001b:13) characterize cause lawyering as lawyers who

...deploy their legal skills to challenge prevailing distributions of political, social, economic and/or legal skills and resources...[choosing] clients and cases in order to pursuing their own ideological and re-distributive projects...as a matter of personal engagement

For reasons given in Chapters One and Two, this dissertation has expanded the definition and the community to include *legal activists*: lawyers and judges who work directly with

the media and NGOs to politicise a case or to circulate an idea to the general public. As will be discussed in this section, lawyers and judges rely on the political practices of NGOs to change legal space. NGOs and the media and the legal community have developed a symbiotic relationship, because NGOs and the media are willing to be visible, and judges and lawyers tend to wish to remain invisible.

This study suggests that there are four main facets to legal activists' identity politics. First, the critical point that this study draws from Sarat and Scheingold's (2001b) definition is *personal engagement*. Second, these are individuals who are personally engaged in a legal issue, who use "legal strategies for political ends", to take legal power away from the State (Dezalay and Garth 2001: 356). Third, these individuals follow a vision of what the world *should* be like; and seek to change social power into legal power (Russell 2001a). Four, the political practices in the legal community are connected to the shifting identity politics of the individual (Dezalay and Garth 2001, Spohn 2002).

The focus of this section is on the local legal activists' political practices. Four sets have been identified. The first set of political practices can be found in the covert activism. These individuals have a professional identity, but follow a personal agenda and focus their professional activities and professional role to support some form of activism, which usually includes challenging an economic imperative or the state on a moral issue (Shamir and Ziv 2001). These women and men are professionally situated to play a part in changing the legal system. They play an important role in creating a legal culture within the legal and justice system as they provide advice, network, complete research, participate in a legal literacy program on economic empowerment or civil rights and quietly challenge the authority of the state in their daily workday (Cain and Harrington 1994).

The second set of legal activists' political practices is connected to working with the state. These activists seek to make real politics legitimate in the legal and justice system. Many do so subtly, changing the legal culture. These are judges, lawyers, and members of the international legal community, specific national leaders, NGOs and the media.

Each individual has helped shape new legal landscapes within the state, the courtroom, the legal text, and the media by politicising legislation passed by the state and abuses of sovereign-state power (Tolley 1994).

The shaping of the new legal landscape is made slowly, because many of these activists work for the state. This position grants the judges and lawyers an important point of access to government documents, internal affairs, current struggles between the state and civil society, etc. Many lawyers and judges are encouraged to work in subtle ways. In theory, because of the United Nations' Special Rapporteur on the Independence of Judges and Lawyers, lawyers and judges when performing professional duties should not fear their personal safety (Tolley 1994). However, in practice, many are aware that they walk a delicate line. Most judges are aware that they pose a counterpoint to the state. A decision made by a judge has the power to liberate civil rights activists who in turn will lead social movements against the state (see Mathews 1986, Hatchard 1993, Phillips 1997, Goldberg-Hiller 1998). Thus, the political strategies inside the legal and justice system tend to be very covert. For instance, judges in theory cannot be jailed, dismissed, silenced or quelled, as most work with the state on a daily basis.

The subtle forms of activism may be through a judge. A judge will daily find ways to carve out more political space so she/he can make more "independent" rulings from the state. Other forms of activism are somewhat more overt. For instance, lawyers who work for the human rights movement and directly attack the state.

The significance of these forms of activism lies in the long-term *intention* of the individual. Lawyers and judges seek to engage in the debate to change the law of the land. However, inside the legal community, this sort of activism is disparaged, because activism is generally disparaged within legal institutions. The significance of this conservatism is that legal activists within the legal community who chose to represent political or moral agendas in traditional litigation contexts can, and will, carefully subvert state legitimacy from inside and outside national borders (Dezalay and Garth 2001: 356). The intention is to downplay the politics so as to ensure that this social movement is

given more political space by the state. Outside of the legal community, many will mimic the lawyers and judges' activist constraint and conservatism. Some will even go so far as to suggest that the state, justice and legal system are one and the same (Sarat and Scheingold 2001b, Cain and Harrington 1994).

Some of these individuals challenge the state. They will choose a specific agenda for their activism - such as the global capital forces or undemocratic institutions (Scheingold 1994). Many challenge powerful institutions including the state. Many face opponents who seek to crush their cause with finances or rumours. And many work in their professional capacity to represent a contentious issue and challenge powerful institutions (see Boon 2001). Many legal activists are lawyers or judges,

.... convincing judges that they have the authority to take a more active role in protecting the rights of disenfranchised groups and previously marginalized cases (Meili 2001: 324).

The third set of political practices is strategic visibility/invisibility. The visible groups in transnational legal activists are NGOs and the media. For the most part, the literature suggests that judges, lawyers, members of the international legal community such as legal scholars continue tend to remain invisible. Their activism focuses on the minutiae of legal ideas and changing legal texts. Some will become strategically visible to change words, phrases, and the occasional clause of legal text. Challenges to the state surface gradually. Meili (2001) argues that the challenge to the state that surfaces within the community will often reflect the methodology used by lawyers. Traditional forms of lawyer-client relationships tend to focus on litigation and lobbying, whereas change-oriented lawyers tend to focus on citizen empowerment and organizing the community. For example, many individuals offer counsel to local dissents who want freedom to speak, the right to change a government, formal employment, healthcare, food and housing. The methodology chosen often reflects the specific context. In contexts in which the judicial and political systems are corrupt, the latter method is more effective at changing the current configurations of power relationships shared by the state and civil society.

The invisibility is seen in the way that the politics in the legal community are silenced and considered to be neutral. For example when lawyers or judges cite a doctrine of justice in court, they are advancing a particular worldview. However, many will not publicly acknowledge that these views are really political positions (Spohn 2002, Shapiro 2001).

The overt strategy used by legal activists includes revealing injustices. For example, a local legal community will work with international and local nongovernmental organisations (INGO or NGO) to politicise legislation passed by the state and abuses of sovereign-state power. As shall subsequently be discussed, each judge in a location is connected to the global community through a complex weave of local, national and global alliances. There are many intricate political relationships at different geographic scales because lawyer and judges try to remain invisible so that they can remain an invisible extension in the human rights movement.

The visibility of NGOs is useful to lawyers and judges. NGOs expand the territory, visibility, activism, and pedagogy of judges and lawyers at the local and international level. For example, the ICJ history suggests how a global bar works hand in hand with NGOs. When the ICJ strategically developed a global network of activists through legal and political elites, NGOs helped advance the ICJ short-term strategy - to advocate for human rights through four strategies: information, law, embarrassment and confrontation and constituency influence and pressure. Associated strategies include litigation, publishing legislation, voting records, campaign contributions, legal research, personal lobbying, influential constituent appeals and committee testimony. Thus, NGOs have the power to make a global impact. As well, NGOs have the power to make an important impact locally. NGOs will often document a local judge's activism in a report. This report may be disseminated locally or internationally. For example, NGOs supporting the agenda of judges may focus on the state – judiciary's interactions, and whether or not the state supports judicial independence or the state provides the structural support for dissident voices to be heard and judged by the legal and justice system (Tolley 1994: 69, 162).

Further, NGOs advocating for judicial independence are sometimes rewarded by activism within the legal and justice system. For instance, in return for NGOs willingness to be in the public eye, judges and lawyers build the legal framework for human rights advocacy. Judges and lawyers will scan international legal documents, find appropriate symbols and advocate for NGOs cases in court. In turn, new legal text is written, and these documents create a legal space for local social justice movements to gain more legal power. The significance of these forms of overt strategies used by legal activists means closely examining the minutia of the legal text and examining who was willing to speak and challenge the state. Small changes, according to Scheingold (1994) have had a coercive effect on sovereign-state power.

The fourth set of political practices is the production and dissemination of information. Many legal activists will use the telecommunication system to broaden and deepen social networks. Many seek to put pressure on the state through a global network of NGOs, lawyers, judges, third world activists, social-economic and political elites and international organizations.

The flow of information about the politics of lawmaking, specific laws, the interpretation of law, economics, and politics connected to the legal and justice system and the international networks is a critical factor. This information will ensure that the focus is on the state, judiciary and legal profession interactions. In this way, the judiciary and legal profession can be protected. This evidence has the power to attract some of the most powerful bodies. For instance, the international community will use this empirical evidence to judge a sovereign-state leader. The empirical evidence provides a way for understanding the differences, divisions in and among society, the courtroom, the state, international relations, and legal theories; and highlights the reality of contestation, friction and negotiation in and among different visions of justice held by society, the state and the international community (Tolley 1994).

To summarise, this section has acknowledged the literature that highlights the main characteristics of the political practices of local legal activists. These include: the covert activism of a professional identity/personal agenda challenging an economic imperative or the state on a civil rights issue (Shamir and Ziv 2001); individuals working for the state and being a powerful counterpoint to sovereign-state power in their daily workday; the strategic visibility/invisibility of judges and lawyers who will often allow NGOs or the media to speak for them; and the production and dissemination of information. The significance of this section is that the focal point continues to return to the space of judicial independence, which will be the topic of the section below.

3.4 The *Space* of Judicial Independence: The Legal and Justice System is Separate From, Yet Connected To, the State

To relate the legal context specifically to the Zimbabwe-Commonwealth-World Bank case study, and to understand the power relations between the legal and justice system and the state, the focus must remain on the space of judicial independence, and the connection between judges and nongovernmental organisations. The critical power relationship between the sovereign-state and the legal and justice system is at the point of intersection between these two political institutions. This space, as noted in this chapter and Chapter Two, is the place in which new laws are debated, influenced by civil society, the sovereign-state, externally driven legal-institution-strengthening initiatives, and the local legal community. Thus, the connection between the global and local can be found in this space.

Chapter One has described the context in which human rights' based humanitarian NGOs' advocacy evolved in Zimbabwe. This will not be repeated here. Nonetheless, the Zimbabwe-Commonwealth-World Bank case study is unique insofar that there are certain structural differences among the sovereign-state, NGOs and the legal and justice system in Sub-Saharan Africa, which distinguish them from the North. Because of these distinguishing structural features, the literature on judicial independence will be reviewed to identify the general socio-spatial patterns that reflect the legal and justice systems relationship to the state, and to appreciate the complexity of NGOs allied with judges and

lawyers and institutions and organisations seeking to institutionalise the rule of law. This review is general and applicable to legal and justice systems around the world.

3.4.1 Judicial Independence

Judges have become involved with real politics struggling to become legitimate through the legal system. To the extent in which the judiciary is granted independence in different jurisdictions, the judiciary has the ability to focus on citizen empowerment and organizing the community.

Dodson and Jackson (2001: 57) provide a list of the important reforms needed to protect the judiciary from the political influence. They argue that structural features such as methods of selection, tenure of office, removal for misconduct and financial resources are meaningless unless there is a

...legal and political culture supportive of the rule of law. All the other elements may be inadequate if there is no broad cultural agreement that *all* individuals and groups are under the law and will abide by judicial decisions (original emphasis)

Judicial independence in many nations is quite recent. Unlike the US, Canada, Britain and others, many post-soviet, post-colonial, Muslim and other countries do not have a long history of judicial independence (Palmer 2000, Sarat 2001, Hirschl 2000a, 2000b). The concept of judicial independence supported by the UN is very much connected to the post cold war era, as suggested in this chapter and Chapter Two (Tolley 1994). Thus, judicial activism in many countries occurs alongside intense economic, social and political transition. The geography of judicial activism has broadened across the globe because of global bars and NGOs connecting social movement to judges. Although judges are supposed to be independent, many of them nurture relationships with NGOs and find ways to advance NGO's agenda through their rulings. The two interrelated activists' agendas tend to be building a bridge between the public and the justice system, based on trust. In theory the justice system is supposed to be strongly connected to society's political and economic reality, whereas in practice, this is rarely the case (see Gubbay 1997, Williams 2001, Russell 2001b, Scheingold 2001, Shapiro 2001, Spohn 2002). The paradox of the judiciary and civil society's relationship does not end here.

Although the judiciary are supposed to be independent from civil society inside national borders, many face a certain level of uncertainty about just how independent they might be when making their rulings. If the government has not guaranteed the judges the sort of independence they need, each judge must find his/her political space between and within the judiciary. This means that within the hierarchy of courts are many small political spaces and opportunities to agitate for and/or dismantle a unified attempt to include broader rule of law views, redefining the boundary between the judiciary and the state (Russell 2001a: 2). Moreover, many will collaborate with NGOs and extend legal mechanisms to support local social movements.

The activism of many judges in many countries is constrained by the state that has the economic and/or political power, even though the human rights movement is proceeding at a rapid pace. Although in theory, as a government institution, the judiciary is supposed to be free from the influence of elected individuals, in practice this is rarely the case. Dodson and Jackson (2001: 57) provide a list of the important reforms needed to protect the judiciary from the political influence. They argue that structural features such as methods of selection, tenure of office, removal for misconduct and financial resources are meaningless unless there is a

...legal and political culture supportive of the rule of law. All the other elements may be inadequate if there is no broad cultural agreement that *all* individuals and groups are under the law and will abide by judicial decisions (original emphasis)

Activist lawyers encourage members of the judiciary to incorporate IDHR into their rulings (which many perceive as a political judgment rather than an interpretation of the law see Goldsworth 2002). Shapiro (2001) and Gubbay (SA-TST 08/07/2001-Gubbay) argue that this is a political judgment.

3.4.2 The Judiciary: Visible Centres of Power

Tradition classification of judicial independence suggests that the judiciary and judicial rulings are largely apolitical, judges' use of different legal theories is a theoretical rather than political debate, and that there are no politics in lawmaking (Mathews 1986, Spohn 2002). Legal analysts, particularly in terms of human rights cases, have seriously

reconsidered these views. The contributions of Shapiro (1981) have been important catalysts in understanding the politics in law making.

Within the political science tradition, the definition of judicial independence is changing, reflecting the politics of the lawmaking and the politics of legal interpretation. For instance, Russell (2001a: 2, 6) defines judicial independence in the following quotation:

Judicial independence is first and foremost a concept about connections – or, more precisely, about the absence of connections – between the judiciary and components of the political system....

...Judicial independence [is used to refer] to two concepts. One of these is the autonomy of judges, collectively and individually – from other individuals and institutions. Used in this sense, it is a relational term referring to the crucial features of the relationship the judiciary ought to have with one another and that the judiciary as a whole should have with other parts of the political system. Judicial independence is also used to refer to judicial behaviour that is considered indicative of judges enjoying a high measure of autonomy [so that they might]...“render decisions that appear independent”

Russell (2001a) acknowledges that by suggesting that judicial independence is contingent on the *appearance* of autonomy from the state and civil society, the notion is paradoxical. The contradictions implicit in this definition highlight the need for studies that critically examine the points of intersection inside and outside triangulated power dynamics connecting the state and civil society to the judiciary. Russell's (2001a) definition highlights some of the spatial politics connected to the judiciary.

The quotation below also suggests the nature of current debate surrounding the role of the judiciary in liberal democracy and points to some of the deeper questions about the politics of lawmaking.

...Judiciaries have become visible centres of power not only providing credible adjudicative services for increasingly litigious societies but also exercising considerable leverage on controversial issues of public policy. This...[creates] an ironic trade-off. A judiciary cannot be powerful unless it enjoys a high level of institutional independence and its individuals are free from internal as well as external direction of their decision-making. [By internal, is meant that within the judiciary itself; by external, is meant by government, nongovernmental, public and private sectors]. But the price to be paid for such power is close and

continuous public scrutiny and continuous debate about what judges do...
(Russell 2001b: 307, see Russell 2001a: 11)

The significance of this quotation is that Russell (2001a, 2001b) has turned attention to the social processes through which the boundaries between different groups are negotiated. Implicit in this shift is a different view of the legal culture itself. The legal system has been defined as an objective system of laws. Most conventional legal scholars would insist that the legal system is apolitical, and that the judiciary differs from any other professional organisations insofar that this institution functions based on the assumption that the judiciary are apolitical. While this assertion is being increasingly contested by political science and legal studies as a whole, the politics in, and of, judicial independence are not widely talked about (Spohn 2002). Thus, the politics are often undefined, covert, informal and therefore seem to lack an *essence* as an institutional quality. In contrast, Russell (2001a, 2001b), Palmer (2000), Goldberg-Hiller (1998), Phillips (1997) and others argue that the legal and justice system should be conceptualised as a framework of politics, values, individuals, institutions and organisations. As Marxist and post-structuralist legal scholars have argued, it is this lack of *essence* that is problematic (Mathews 1986,). As will subsequently be discussed, the silences in this space pose different constraints on chiding the capitalism project for co-opting this space of moral authority. In addition, such silences provide a barrier for scholars seeking to reveal the broad political backcloth of lending institutions and human rights politicising the space of judicial independence.

In this study, the political science analysis of politics of the lawmaking will be used because this analysis suggests blurred boundaries, but boundaries nonetheless, dividing civil society, the state and the judiciary and organisations and institutions. To develop an analysis of the power relations between the state and the legal and justice system to understand why the New Institutional Economics logic and/or the Law and Development Movement (NIE/LDM) threaten state sovereignty, this section will deconstruct the space of judicial independence to evaluate how different alliances at difference geographic scales renew the cultural politics within the legal system, more specifically, the cultural politics within the space of judicial independence.

This examination of judicial independence is to identify the informal and formal political alliances in and among civil society, the government and the judiciary and organisations and institutions that threaten a Head of State, to evaluate how a judge and her/his alliances have the power to take legal power away from the state. At this point, the purpose of the discussion is to introduce the complex layers of the global-local structure of judicial independence rather than to engage in a debate of *whom* the judicial independence concept serves.

3.4.3 Formal and Informal Alliances in the Space of Judicial Independence

The first is the judge's political space, her jurisdiction granted to her by the state. This is her space through which she tries to shape the future legal culture (Widner 2001, Gubbay 1997). When a judge seeks to advance a right such as *cultural rights* or *freedom of speech* typically found in regional or international covenants (such as the Economic, Social and Cultural Rights Covenant), she will often find herself thrust into the frontline of a highly politicised human rights issue – particularly when she decides on the clauses that fall under national constitutional or statutory provisions. Such a classic case embodies two types of politics. The politics connecting the judge and civil society separate them from the political line that connects the state to the judge. The emotional and political issues of human rights tend to create the perception that judges are activists, and that some judges are taking strong positions on human rights in general. Further, there is a growing literature that emphasises the importance of legal activists where economic development lawyers, and human rights activists/lawyers play an integral part in radicalising the legal institutional setting (Sarat and Scheingold 2001, Cain and Harrington 1994, Scheingold 1994). However, in contrast to these emotional and political layers, to sustain the professional relationship between the state and judiciary, the political line between the judge and elected officials of the state must be carefully observed. In the interpretation of the law, the judge must be viewed as if she is performing her professional duties without bias. She must be perceived as a judge interpreting human rights clauses much like any other law, rather than making a political judgement (which elected officials do (Spohn 2002)).

The second is connected to the first insofar that a local judge may borrow another judge's approach to a human rights issue – drawing upon international covenants (such as the Economic, Social and Cultural Rights Covenant) and cite that judge's ruling to support his/her case. This phenomenon of transplanting one countries' approach into one's own has become commonplace in recent years. Judicial rulings transferred from the international to the national (and vice versa) and from national to national jurisdiction are part of the process of ensuring that legally based human rights values are protected and furthered in one nation-state based on rulings from another. More specifically, Gubbay (1997, SA-TST 08/07/2001-Gubbay), Goldsworth (2002) and Shapiro (2001) suggest that a judge can draw upon the rulings of other judges who have in turn drawn from their constitution and the constitutional human rights protecting the Bill of Human Rights. The key idea is that the Bill of Human Rights written into current legislation in one country holds the power to affect the drafting of new laws in another country. While the constitutions of most post-World War Two Commonwealth countries are different, a similarity can be found in the core of human rights provisions written into each constitution. These human rights provisions often come from the International Declaration of Human Rights. In such case, borrowing legal decisions from other countries becomes quite complex (see Bhattacharya and Smyth 2001). The activist judge who draws from the transnational knowledge of other judges' rulings creates new laws and new forms of legal activism, which have become encapsulated in legal texts. These texts are passed from one location to another. As Gubbay (1997) notes, this allows legal activists to advance the human rights movement's agendas in different geographical locations. Individuals holding key positions in civil rights organisations have often been protected by local judges' activism. The critical point is whether or not a judge has the space of judicial independence granted to him/her by the government in power to advance these sorts of rulings. With the political space of judicial independence being used in this manner, ideas and ideals of social justice being advanced by NGOs, citizens, judges, lawyers, and the media flow from the space of *judicial independence* to challenge the sovereign-state with a variety of tactics and strategies. Tactics include forging alliances between lawyers, judges and heads of state, in many ways extending the essence

of the legal profession as activists into controversial places and politicising institutions to assist the human rights movement.

The third is the “extrastatal” institutional space created in 1986 when the United Nations (UN) offered public support to the notion of judicial independence. The United Nations Special Rapporteur on the Independence of the Judiciary and Lawyers acknowledges the need for individual lawyers and judges to have a political space within the state, separate from the state, to make rulings on cases that the state has a vested interest to suppress (Bibler Coutin 2001: 135, Tolley 1994). Since the 1980s, the political presence of *judicial independence* has been growing. This space penetrates all nation states as a form of global legal power and this space is produced and reproduced by local socio-spatial relations which support the global social movement of human rights activists, often in the name of liberal democracy, that is, “a state bound by law” (Linz Dodson and Jackson 2001: 252, see Hatchard 2000). There are several layers to this space, which suggest that a wide array of social networks seek to protect this space. At the international level, this abstract space is protected by the surveillance of the United Nations Special Rapporteur on the Independence of the Judiciary and Lawyers and members of global bars such as the International Bar Association (Z-CIZC-19/06/02: 28, Tolley 1994). At the level of the Commonwealth, the World Bank/Commonwealth coalition focusing on good governance in the Commonwealth confers with the Commonwealth Law Ministers to protect judicial independence (CS-4/28/99-PI). At the nation-state level, a Commonwealth country such as post-Independence Zimbabwe illustrates the tensions, contradictions and continuities of legal activism when the Zimbabwean Judiciary is faced with a number of highly politicised cases (Z-K 19/04/02-PLS, SA-TST 08/07/2001-Gubbay, ZW-News 24/04/01, ZW-News 15/02/01, SA-TS 08/01/01, ZHR-NGO SR 09/01). The intricate political relationships at different geographic scales suggest that the local judiciary’s activism intersects with the UN’s broader post-World-War-II agenda to protect citizen’s rights.

The fourth is the space that popular culture, the media and human rights NGOs have constructed to interact with the local judiciary. As these local democratic institutions speak for the local judiciary, this wide array of comments reconfigure state and judicial

boundaries, which in turn becomes the text for international democratic institutions such as the media to review and criticise. The connection between the media and human rights NGOs surfaces when looking at this space. For many in the human rights movement, judicial independence is the reference point for the human rights movement to place emphasis on the political space sympathetic to their agenda. Many NGOs are advancing a mainstream vision and a contemporary manifestation of the liberal democracy agenda. NGOs document the politics of law making, the legal and justice system and judicial independence to ensure that this information feeds into the global processes of global politics. Moreover, the territorial presence of NGOs is broadened and deepened through their relationships to individuals seeking social justice. Popular culture allows individuals to develop a number of strategies to legitimatise their movement with legal power. Furthermore, because many of these reports are constructing the politics connected to legal power, these reports demonstrate that abstract ideas materialise in real life, which affect the lives of real women and men. These reports also document how members of the judiciary are developing allies inside and outside national borders, re-inventing political identities, re-interpreting global development initiatives, calling upon myths and metaphors in a coded language that seeks to ridicule, de-legitimate and challenge state authorities. Thus the global processes connected to the political economy of information surrounding NGOs' production of this information notion are extremely important (Risse et al 1999, Price 1999, Kent 2001, Chandler 2001).

The fifth type of judicial independence is a view offered by international lending institutions that advocate for greater separation between the judiciary and the state. This argument is based on the premise that legal uniformity across the globe will create stable economic transactions, dis-empowering national leaders' nepotism and corruption. Many lending institutions have borrowed the idea that this approach is the best to *modernise* economies in transition around the globe. Lending institutions participating in the broad application of worldwide legal reform are advocating for judicial independence (Webb 1999). Many argue that a strong legal and justice system eliminates corruption among political elites. National leaders, denied access to legal power, no longer have the power to intervene in private exchanges. This logic supports a vision of establishing laws and

institutions to minimise opportunities and to secure property rights, information rights and enforce contracts, bound by constitutional guarantees of economic freedom and freedom of information. These laws and institutions are believed to make economic growth possible. In short, lending institutions seek to strengthen the legal structures and create a denser infrastructure of institutions that support and construct the legal system of police, investigators, legal aid programs, bar associations, law schools and public defendants (Dodson and Jackson 2001, Mbaku 1999).

The sixth type is based on the institutionalisation of rule of law through the judiciary. Rule of law is based on the triangulated, complex relationships shared in and among the state, civil society and the judiciary. Rule of law often is legitimated inside civil society when civil society perceives that the judiciary is separate from political and economic forces in society. Stated more simply, civil society trusts that the judiciary can place legal limits on the state's power. As the judiciary is in theory supposed to be the third party adjudicator to settle disputes between the state and civil society, this perception legitimises the judiciary's authority (Russell 2001a). Legal organisations will often speak for civil society. Legal organisations will voice their concern if political alliances between the judiciary and Head of State are correlated with Supreme Court rulings, or if the legal culture makes a sharp turn away from advancing or upholding the Bill of Rights in the Supreme Court. Legal organisations will suggest that such alliances are delegitimising the justice and legal system (Z-K 19/04/02-PLS). Moreover, if general perception is that the judiciary does not function independently from other government branches, many in civil society question the legitimacy of the legal and justice system. In short, scepticism of the judiciary's independence generally reflects the legal system's lack of legitimacy within society. This scepticism may originate from society's perception that the judiciary is taking bribes, is politically connected to elected officials, or that the judiciary remains silent in the face of massive human rights abuses. The silence bears a close resemblance to condoning a culture of impunity wherein the military has direct political control over citizens and hears no objections from the judiciary (Dodson and Jackson 2001).

To summarise, the political tensions and alliances in and through the space of judicial independence, as outlined above, are universal irrespective of the part of the world under investigation. Judges who advance a civil right - typically found in regional or international covenants of the International Declaration of Human Rights (IDHR) - are thrust into sovereign-state politics and civil society's politics. Judges, who draw from another judge's approach to a human rights issue, are transferring legal power from another jurisdiction as they transfer a judicial ruling from the international to the national (and vice versa) and from national to national jurisdiction. Judges, who draw political support from the United Nations Special Rapporteur on the Independence of the Judiciary and Lawyers and global bars such as the International Bar Association, do so to challenge the sovereign-state. Judges use their alliances with the media and human rights NGOs to ensure that their vision of justice becomes a part of the global processes of global politics. Judges use their alliances with international lending institutions that advocate for stable economic transactions, and advocate for greater separation between the judiciary and the state. Judges also draw power from civil society which believes that the judiciary can place legal limits on the state's power. These socio-spatial patterns suggest each judge in a location is connected to the global community through a complex weave of local, national and global alliances.

To conclude this section, three key points are being made. One the space and spatial relationships of a judge with other legal activists is significant. The intention of this review is to suggest that when a judge challenges a Head of State's rule of law view, s/he draws political power from this space, which is a complex array of alliances and political layers. Two, a local judge never makes a wholly independent action, particularity as an activist. S/he is a part of a global coalition seeking to take legal power away from the state. Three, the judge is protected by the space of judicial independence, and within this space, because the political structure of the legal and justice system is spatially separated from (yet connected to) the state. The legal and justice system can use three lines of attack: legal discourse, local agitation by legal activists and global social movements to take legal power away from the state.

3.5 The Transnational Legal Activists Network Analytical Framework

The focus of this section is on how the global processes and politics in the legal community affect specific locations. Chapter Two offered a re-reading of the critical legal institution development literature and international law/state transformation/human rights/democracy literature to suggest that different global social movements affect local legal and justice systems around the world. The purpose of Chapter Two was to offer a layered vision of different global social movements trying to create some uniformity in legal cultures around the world.

Chapters One and Two made three important arguments. One, this study needs a way to make the politics and practices of the different global social movements explicit. Two, this study need to trace this process in action in order to evaluate how the NIE/LDM idea can affect specific locations. Three, this study needs to use the TAN framework to map the intersection of activism of democratic institutions, economics, law and state-society interactions. Chapter Two also offered several reasons to justify why this study develops the TLAN approach. All of these reasons are directly relevant to the purpose and objectives of the dissertation, which is to re-conceptualise the threat of the NIE/LDM logic in a manner that acknowledges that local and transnational legal activists, international organisations of nation-states and international lending agencies are attacking state sovereignty.

In the context of arguments made in Chapters One and Two, this section highlights the key ideas that shape the analytical framework of this dissertation. These ideas help provide a more complete analysis of the relationship between the sovereign-state and the legal and justice system for several reasons. First, the abstraction - *trajectory of legal activism* - is used to describe the global social movements as the basis of change in the local legal culture. These external sources bring in new ideas about justice. These ideas that have the power to reposition legal activists, lawyers, judges, media, non-governmental organisations and others who seek to develop more inclusive laws, policies and practices. The point of developing the concept *trajectories of legal activism* is to create an analytical term and a way to view how a state, legal and justice system and civil

society - which are all bound to a location – interact with a trajectory of legal activism. Second, the distinction between the state, legal and justice system and civil society and a trajectory of legal activism is that trajectories of legal activism are bound by a common vision of justice/rule of law rather than to a location is extremely important. The general argument made is that the legal community can intervene in the affairs of the state, raising the question – *who is this intervention for?* Although some of the more critical literature argues that the social movement originates from Euro-American locations, this study will suggest that this social movement has multiple places of origin seeking to change laws, legal practices, interpretations of laws rather than focusing on a specific place. For example, Amnesty International focuses on the death penalty used by nations around the world (Tolley 1994).

Third, to determine the relative impact of a trajectory of legal activism on a place, this study will suggest that there are three focal points to examine the political presence of a trajectory of legal activism in a place. Trajectories of legal activism will advance ideas about justice in a society (visionary ideas that hold the power to restructure societies). In addition, trajectories of legal activism will use the political structure of the legal and justice system to advance their own agenda (because they are protected by the legal architecture). Lastly, trajectories of legal activism will collaborate with transnational/local legal activists with whom they will attack the legal power of the state with three methods- legal discourse, encouraging judges, legal activists and NGOs to agitate within national boundaries and support other global social movements to agitate from the inside and outside national borders. These focal points are important concepts, which serve as the analytical framework of this dissertation and are used in further analysis in the rest of the dissertation.

3.5.1 The Presence of Trajectories of Legal Activism

Chapter Two and this chapter suggest that the literature on judicial independence, rule of law, the critical legal institutional development literature and international law/state transformation/human rights/democracy literature provides empirical evidence of the political structure of legal and justice systems.

Generally, the literature highlights the historical events that have created the circumstances that support global legal-institution-strengthening initiatives that strengthen the political space of local legal and justice systems. Each of these initiatives has had a global impact on the local legal and justice systems. Two global legal-institution-strengthening initiatives have been identified in Chapter Two: the *De Jure Belli ac Pacis* (The Law of War and Peace (1625)) which led the way to the post World War II human rights movement which continues to write new international laws to protect the rights of citizens and seeks to protect the space of judicial independence; and the 1960s/1990s capitalist legal-institution-strengthening initiative which seeks to strengthen legal mechanisms to protect the material rights of the market economy (Keefer and Knack 1997, Hendley 1997, Braden and Shelley 2000, Charlesworth and Chinkin 2000). Each of these legal-institution-strengthening initiatives is being driven by internal and external forces to intersect with local legal and justice systems. This process, while unique to the legal community, is creating some similarities in legal cultures across the world (Falk 2000).

The judicial independence literature reveals the much more complex power relationships among the state, NGOs and the legal and justice system at the local level (Russell 2001a, 2001b). At the same time, these relationships are being altered by the presence of externally driven legal-institution-strengthening initiatives. The local socio-spatial political relationships change as an individual judge builds allies with the International Bar Association, or associates with the Commonwealth Law Ministers, or sends a report to the United Nations Special Rapporteur on the Independence of the Judiciary and Lawyers. Taken together, this literature suggests the rough outline of the political structure, politics and political geographies in and through the legal and justice system (see Murphy 1999, Stark 1999, Tolley 1994).

The intention of this study is to use this literature review to support the argument that the NIE/LDM has political presence. By giving it a presence, through the analytical concept - *trajectory of legal activism* – this study can evaluate how different organisations,

institutions and individuals advance the NIE/LDM logic across different political landscapes. In addition, this study can evaluate how the NIE/LDM logic rides on the momentum of the human rights movement, and uses the relationship between the NGOs and the legal and justice system to deepen and widen its agenda. This study suggests that it is appropriate to study this relationship as NGOs are using the NIE discourses to incite the legal community and the international community. This study will suggest that if we examine the relationship between the NGOs and the legal and justice system we can see how the NIE idea can restructure local communities, nation-states and international relations.

3.5.2 Trajectories of Legal Activism Move Through Space

The second general impression gleaned from the literature is that the presence of a trajectory of legal activism can be found in the space of judicial independence. This space, as noted in this chapter and Chapter Two, is the place in which new laws are debated, influenced by civil society, the sovereign-state, various organisations and institutions, and the local legal community. Thus, the connection between the global and local can be found in this space (see Hunt 1997). Trajectories of legal activists can alter the point of intersection between the legal and justice system and the state. Against the literature on judicial independence, rule of law, the critical legal institutional development literature and international law/state transformation/human rights/democracy literature, this study offers a few suggestions to redefine legal space as layers of legal space. This study will suggest some of the political implications of a trajectory of legal activists' ability to move through different space. First, however, a general definition of *space* must be offered.

Space - in this study - is generally defined by the points of intersection among the legal and justice system, the sovereign-state, transnational legal activists and externally driven legal-institution-strengthening initiatives. The presence of this space can be found in the space of judicial independence. Judicial independence, as has been discussed, is a very important characteristic of the legal and justice system (Russell 2001a, 2001b).

Moreover, the literature on judicial independence is sensitive to the shifting and changing

power relationships of different stakeholders. These relationships change on a daily basis because legal and justice systems, the state, civil society, organisations, institutions and externally driven legal-institution-strengthening initiatives are all territorial about legitimating their claim to material and symbolic resources through the law.

Legal scholars tend to subtly acknowledge the presence of this space: the imagined spatial relationship the law has with the sovereign-state. For instance, Bibler Coutin (2001: 135) suggests that the legal structure is “extrastatal”, disconnected, yet connected, to the state. Linz (in Dodson and Jackson 2001: 252) suggests that “a state [is] bound by law”, suggesting that the law dominates the state. Whereas Russell (2001a: 2, 6) suggests that this is a space of *oughts* and *shoulds*:

...Judicial independence is...a concept about connections...about the absence of connections – between the judiciary and components of the political system.... collectively and individually – from other individuals and institutions...the relationship of.... *ought*...*should* (emphasis added).

The key point these scholars make is that the local legal architecture is assumed to be separate from, yet connected to, the state. They argue that the points of intersection between the sovereign-state and the legal and justice system is where the power relations between the state and the legal and justice system can be found. Furthermore, the assumption that there is a separation between the two local institutions legitimises legal and justice systems around the world. This is an interesting geographic discovery. But there is little known about how the extrastatal space is being used by whom or for what end. Only Trubek (2000) seems to consider the political implications of this space; should this space be dominated by international lending agencies?

With this said, this section will now turn to ways to envision the political implications of trajectories of legal activism moving through space.

Space is constantly being constructed by different stakeholders, who constantly seek to alter the point of intersection between the state and the legal and justice system. For instance, the process of constructing this space, as suggested by this study, is through transnational/local legal activists understanding these points of intersection, and using

these to take legal power away from the state. The process of taking legal power away from the state is a temporal accumulation of individuals, ideas and different forms of activism agitating in this space. Some transnational/local legal activists politicise the legal and justice system, others create legal texts that empower legal activists, others work inside and outside national borders to daily challenge the sovereign-state legal power and authority. Consequently, the definition of space differs from most other geographers (see Dalby 1990, Paasi 1991, Agnew 1994 and others). The distinct characteristic of legal space is that the legal and justice system is connected to, yet separate from, the state, allowing the constant changing of socio-spatial patterns among the state, civil society and the legal and justice system. This study will focus on points of intersection among the legal and justice system, the sovereign-state and various organisations, institutions and individuals.

To appreciate why a trajectory of legal activism moving through the space of judicial independence has the power to renew the cultural politics within the legal and justice system, one must appreciate the significance of the *space* of judicial independence. The space of judicial independence is the space in which local and international struggles are being played out. This is the space in which the state is the most vulnerable to the international community. This is the space in which the legal community (at any spatial scale) speaking about justice within the legal and justice system can challenge the legal power of the state. The legal community tends to use three lines of attack: The first is using legal discourses (such as the International Declaration of Human Rights) to politicise the legal culture and alter politico-legal geographic imaginaries of a future world (see Chapter Four). The second is to subtly encourage the political practices of transnational/local legal activists to agitate within national boundaries to create more political space for judicial independence. For instance, a judge may also be encouraged to draw from international law such as other judges' interpretations of the law (from another jurisdictions) to control the state from intruding into this space (Gubbay 1997). Moreover, in this space, each trajectory of legal activism can find allies to build new legal scaffolding of laws, ideas and activists strategies (Charlesworth and Chinkin 2000).

Many will seek to widen the space of judicial independence for their agenda (SA-TST 08/07/2001-Gubbay).

The third line of attack is supporting global social movements to agitate from the inside and outside national borders. For example, the struggle between the state, the legal and justice system and trajectories of legal activists and civil society creates disputes, friction, changes local political-economic and social structures, legal personalities and the local legal culture, and draws a number of challenges towards the interpretation of specific legal texts. The point is that these new visions of justice being advanced across political landscapes come at a cost. In the court of law, the judge decides who is the winner and who is the loser. Sometimes a judge will use the political presence of the human rights social movement, or the International Declaration of Human Rights to support an individual's claim to justice (Donnelly 1998, Felice 1998, Okinkalu 1998).

The space of judicial independence allows the legal and justice system to have a unique political structure. This political structure is protected locally and internationally. This is what gives the legal and justice system its unique characteristic. For instance, when the sovereign-state transgresses into the space of the legal and justice system, conflict is created. This space under surveillance by the United Nations Special Rapporteur on the Independence of the Judiciary and Lawyers, International Bar Association, Commonwealth Lawyers Association, Law Society of Zimbabwe and the Zimbabwe Lawyers for Human Rights, Commonwealth Lawyers Association, the Zimbabwean Supreme and High Court Judges and many others. Different stakeholders evaluating this space also make this space a significant threat to the state (Z-CIZC-19/06/02, AI 25/06/02: 26-27). Other characteristics of the legal and justice system include: the political culture within the legal and justice system; the legal and justice system is separate from, yet connected to, the state; covert political strategies; intricate political relationships at different geographic scales, the spaces of judicial independence and many others.

The intention of emphasising the role of trajectories of legal activists moving in and through this space is to suggest that trajectories of legal activism have mobility and political presence in international relations. Moreover, the international economic and human rights communities have legitimised these social movements. This can be seen at several different points. Subtle challenges by the legal and justice system to ensure that the inclusive visions are materialised, are often strengthened by the legal and justice system harbouring trajectories of legal activism to create more “independence” for the local judiciary. This study will depict this process of the legal and justice system and trajectory of legal activist as allies in their mutual challenge to the state. The subtle forms of activism in this alliance should not be underestimated. For instance, this alliance has been able to create many new humanitarian laws in the past twenty years (Fenster 1999). One only needs to glance at the 15,000 treaties registered with the United Nations to appreciate the different forms and shapes of legal activism working inside and outside national borders, slowly writing the legal text which may act as a mechanism to force a state to comply with other nations (Braden and Shelley 2000). In addition, the depth and breadth of this activism in this space can also be illustrated by the proliferation of human rights discourses, which are changing the “discourse of international relations” (Falk 2000:53).

In addition, when a trajectory of legal activism moves through the space of judicial independence and encounters the political structure of the legal and justice system, it encounters the three specific characteristics that distinguish the legal and justice system from the state: the connection among judges, lawyers and NGOs; the rule of law; and the space of judicial independence. The significance of these three characteristics is that the combinations of these three characteristics allow the more inclusive ideas about social justice to be made into law. A trajectory of legal activism can strengthen or weaken a ruling judge’s position on a case.

Part of this mobility and political presence has been socially constructed with the creation of legal architecture through time and space. This is the topic of the section below.

3.5.3 Transnational/Local Legal Activists and Trajectories of Legal Activism Rely on Legal Architecture

The third general impression taken from the literature is that legal architecture harbours activism within different legal communities. This assertion needs to be expressed as the territoriality of legal activism deepening and broadening in the postcold war era. This deepening and broadening will be offered as three different patterns.

The first territorial pattern is a pattern created around the activism of individuals.

Individuals actively construct laws to protect their activism in a manner that allows legal activists to be harboured in the legal architecture of domestic and international laws (Tolley 1994). Moreover, legal activists agitating in a social movement use different strategies than most individuals in other social movements (see Tarrow 1998, Miller 2000). Legal activism has four distinct characteristics. 1) Individuals who are personally engaged with the legal issue, who use “legal strategies for political ends” (Dezalay and Garth 2001: 356). 2) Judges, lawyers, members of the international legal community, specific national leaders, NGOs and the media send out a very specific message to a very specific audience. They focus on politicising legislation passed by the state and abuses of sovereign-state power. 3) These activists create a highly charged situation as they agitate to separate the legal and justice system from the state. 4) There are many intricate political relationships at different geographic scales. For instance, legal activists - judges and lawyers represent an invisible extension of the human rights movement. Each judge in a location is connected to the global community through a complex weave of local, national and global alliances. Judges and lawyers who support, and are supported by global bars redraw the lines between the state and the judiciary. For example, the Commonwealth Judicial Colloquium plays a role in changing how domestic law is imagined, constructed and administered.

The key counterpoints to sovereign-state power are judges, lawyers, members of the international legal community, specific national leaders and NGOs. Each individual has helped shape new legal landscapes within the state, the courtroom, the legal text, and the media by politicising legislation passed by the state and abuses of sovereign-state power

and by suggesting greater distance between the state and legal and justice system. Legal activism is often present in its public absence. As a result, there has been little analysis or debate regarding legal activists who subvert state legitimacy from inside and outside national borders (Russell 2001a, 2001b, Sarat and Scheingold 2001a, Scheingold 1994, Cain and Harrington 1994, Tolley 1994).

Finally, legal activism relies on the very slow process of drawing international laws into the domestic law to protect other legal activists. Moreover, the cultural politics in the legal and justice system tend to formally downplay the political nature of this institution. Yet, when the term *the rule of law* is used, the phrase signals an intensively political position at the local, national and international scales. The presence of a social movement, and its ability to deepen and broaden its presence relies on individuals to work within a silent *apolitical* culture within the legal system, slowly redraws the lines between the state and the judiciary, politicises legislation, creates new legal text and subverts state legitimacy from within.

The second territorial pattern has been created through time and space, locally and globally. This is a legacy of legal activism, which has created a complex legal architecture through time and space. For example, Tolley (1994) establishes that lawyers and judges have been very territorial. They have used a number of strategies to protect the space of judicial independence established. Tolley (1994) also argues that this space has been undergoing tremendous change since the UN accepted a revised version of the Basic Principles on the Independence of the Judiciary (1986) and the Basic Principles on the Role of the Lawyers (1990). Lawyers and judges who are territorial about this space solidified it as a political structure. Lawyers and judges lobbied to have the United Nations accept the Basic Principles on the Independence of the Judiciary (1986) and the Basic Principles on the Role of the Lawyers (1990). The UN legitimised the political space of legal and justice systems within nation-states as a unique political space in need of protection from the international community (Tolley 1994). Since then, new spatial interactions between the legal and justice system and the state have been created. In this space, legal activists gradually began to integrate international legal instruments (such as

the IDHR) within local legal and justice systems to take more legal power away from the sovereign state. Moreover, international protection of this space allows a day-to-day territorial, transcultural, transnational presence of legal activists to listen to the multitude of positions taken by different local interest groups within civil society, the media, NGOs and the judiciary – *inside national borders*. With this diversity of views and voices, legal ideas, even the legal philosophy and practices within the legal community have changed (Mathews 1986,). In turn, these changes have crystallised as new legal structures at both local and global scales (Braden and Shelley 2000). The key political institutions that actively work to take legal power away from the state are the transnational legal activists (judges, lawyer, media, NGOs) who alter the political space of the legal order and re-envision social justice, legal and human rights issues which in turn creates new places and changes places (Tolley 1994).

The key point is that human rights legal activists have been gradually developing a framework of legal architecture since the end of WWII. Because of the activism that was initiated in the 1950s, the legal mechanisms were put in place for the legal activists in the 1980s. For instance, human rights INGOs work hand-in-hand with legal activists. This coalition uses information, law, embarrassment and confrontation, and pressure to build the legal framework for human rights advocates. NGOs' documentation of justice and legal systems, politicising the Head of State's rule of law view – particularly when it encroaches on judicial independence - remains integral to the production and reproduction of the civil rights movement, and the construction of humanitarian law (Tolley 1994: 69, 162, Falk 2000). The significance of this system of activism developed over the past 50 years is that the INGOs have made the international community aware that in order for international laws to be drawn into the domestic law, *individuals* within the legal and justice system need to take the risk and take a political position (Tolley 1994, Braden and Shelley 2000). Thus, the international community has maintained its surveillance of the judges and lawyers' activism – formally through the United Nations Special Rapporteur on the Independence of Judges and Lawyers. The point being made is that how a sovereign-state treats legal activists, is very much contingent upon the

sovereign-state standing in the international community. Moreover, the international community may encourage legal activists to construct more laws to protect their activism.

Since the end of WWII, human rights activists have developed a system wherein NGOs advocate for political space of the legal and justice system. Many NGOs will provide information about legislation, voting records, politics of law making and committee testimony and many other details (Tolley 1994: 69, 162). This system is strategic. NGOs are granted the responsibility to represent justice and represent the quality of justice being administered through the legal and court system. The information contained in NGOs reports, thus becomes an important window into the international community's evaluation of the justice being administered by the legal and justice system. The international community will read international and local nongovernmental organisations reports to evaluate how state supports judicial independence and if the state supports the legal and justice system to advances justice for the whole of society.

What is interesting about this strategic system of activism is that the International Declaration of Human Rights in the United Nations' Charter appears to have made a difference in the local and international laws that protect legal activism (Tolley 1994, Donnelly 1998, Felice 1998, Okinkala 1998). The political activism and presence of transnational/local legal activists has changed in the postcold war era. Transnational/local legal activists are individual judges, lawyers, NGOs and the media who follow a vision of what the world *should* be like; advance new ideas about the role of the law and legal institutions and seek to change social power into legal power.

Both of these observations suggest the political support the international community grants to legal activists. Support is shown in forms of surveillance, the slow and incremental changes in laws, which over time and space reshape the political space of activism, as the legal architecture protects their political space.

This study attempts to map the unique legal architecture. This study suggests that legal space is layered, complex, weaving together different socio-spatial relations, which in

turn construct the legal architecture. The layers creating the legal architecture are as follows. 1) The unique political space of legal and justice systems created through a series of historical circumstances, and made by the points of intersection between the state and the legal and justice system as well as by the international legal community. 2) *The space of judicial independence/legal order*, the legal superstructure that is an extrastatal space, which continues to strengthen its political position relative to sovereign-states. 3) *The space of judicial independence* has at least six spatial patterns, which constantly renew the cultural politics within the legal system. The *space of judicial independence* connects local legal and justice systems to the global legal order: it is a space which intersects with several externally driven legal-institution-strengthening initiatives and continually changes complex arrangements between the state and the legal and justice system. 4) The critical distinction between the *space of judicial independence/legal order*, and the *space of judicial independence* is that *the space of judicial independence* is daily altered by politics in a location. Whereas the *space of judicial independence/legal order* is a political structure that allows organisations and institutions to use new ideas about justice to attack the politico-legal state structures and thereby gain more legal power over the state and change the global-local legal order. The significance of these terms is that they establish the layers, nuances, spatial relations and complex politics and processes constructing the legal architecture. In addition, these terms create a vision that the political structure of the legal and justice system is spatially separated from, yet connected to, the state. Furthermore, these three patterns of territoriality suggest that there is a presence of legal history created through time and space.

3.5.4 Trajectories of Legal Activism Follow an Idea

The ideas mobilising these activists often surfaces as differences of worldviews. At the risk of oversimplifying the worldview driving these activists, the majority of those who follow the social movement driving the international law/state transformation/human rights/democracy legal-institution-strengthening initiative adopt the Montesquieu view of Rule of Law (individual rights). Yet, each individual has a multifaceted political identity, which allows an individual to shift from supporting a Montesquieu Rule of Law view, to

a *Rechtsstaat* rule of law view in a matter of moments. The intention behind highlighting the overarching worldview of human rights activists is not to essentialise them, to use the language of the poststructuralist analysis (Monk 1996), but to suggest this is a vision, that many individuals pursue.

The point being made is that human rights activists' activism is being co-opted by the global capitalist system. Moreover, human rights activists using legal discourse in their reports, create an opening for different institutions and organisations to interpret the text with NIE/LDM reasoning. As will be suggested in Chapters Four, Five and Six the activism of the social movement advancing the Montesquieu rule of law view can easily be co-opted to support the political agenda of the international lending institutions' *Rechtsstaat* rule of law view (laws to govern the people (Tshuma 1999, Mathews 1986)).

Chapters Four, Five and Six will focus on the vulnerability of the sovereign-state to the legal and justice system because of global economic and political forces. These chapters will present empirical evidence from a wide number of commentators such as academics, judges, policy researchers, members of the press, and representatives of civil society, to evaluate the patterns of information moving from the South to the North and to evaluate how NGO use the NIE/LDM discourses can incite the legal community and the international community. This study will suggest that if we examine the relationship between the NGOs and the legal and justice system we can see how the NIE idea can restructure local communities, nation-states and international relations.

To summarise this section, this analysis of a trajectory of legal activism's points of intersection with the local legal and justice system is significant because it offers four reasons why the space of judicial independence is significant in international affairs (see Carothers 1998). First, this is the space in which different stakeholders such as the civil rights movement seeking external funds may use the NIE/LDM reasoning. Second, this is the space in which the differences among justice, rule of law, law, legal philosophy and the political practices of interpretation of the law are extremely important (Shklar 1987, Mathews 1986). Third, this is the space in which the legal and justice system, civil

society, sovereign-states, legal activists, organisations such International Bar Association, the International Commission of Jurists and institutions such as the World Bank take issues related to justice very seriously. Individuals within these institutions and organisations will mobilise if one feels very strongly that his/her ideas about justice are not given proper hearing before the courts. Fourth, the space of judicial independence is a microcosm of the reality shared between transnational legal activists and legal and justice systems. Legal and justice systems have a structure, a complex array of politics and a multiscalar political geography which may have the following characteristics: 1) Intricate political relationships at different geographic scales which combine to create a territorial, extrastatal space of judicial independence. 2) The main power relationship of the legal and justice systems is with the sovereign-state at the local level, even though legal and justice systems can draw political power from other legal and justice systems around the world. 3) Conflict is created when the sovereign-state transgresses into the space of the legal and justice system. Taken together, the literature identifies the sole purpose of many of these externally driven legal-institution-strengthening initiatives is to institutionalise the rule of law through the space of judicial independence. Moreover, the different legal-institution-strengthening initiatives work together with the legal and justice systems to deepen and strengthen the political space of the legal and justice system to dominate the sovereign state within the space of judicial independence. All of this it to suggest why the state has become very vulnerable to the activism within legal and justice systems, and even more so to NGOs re-enforcing the democratic process. Thus, the space of judicial independence has been set into the broader political structure of the legal and justice system, which in turn has been set within the broader context of global processes and social movements.

3.6 Applying the Analytical Framework to the Zimbabwean Case Study

Since 1997, tremendous changes in the Zimbabwean politico-legal, economic and social landscapes have occurred, as suggested in Chapter One. This dissertation will argue that there has been little analysis or debate regarding the activism within the legal community. With this stated, the focus in this section is on why giving the abstraction - the NIE/LDM trajectory of legal activism, a spatial presence, and sense of overlapping geographies with

the state transformation/human rights/democracy legal-institution-strengthening initiatives, will help illuminate some of the deeper processes that have been ongoing since 1997.

Four reasons have been identified why this analytical framework will offer new insights into the changes inside and outside Zimbabwe since 1997. First, the Zimbabwean case study suggests that the Mugabe Administration is having difficulty managing all these forms of attack in the politico-legal and economic spheres. Empirical evidence to support this assertion can be found in the multiple NGO reports documenting civil rights abuses (see Chapters Four through to Seven). Second, the rise of transnational legal activists, particularly human rights activists has not been explained. Although some scholars focused on Zimbabwe have offered political explanations, this will be the first study to offer a politico-legal and economic explanation, which argues that the change in the legal culture has been the main cause of the crisis (Dashwood 2000 (see Chapters Four, Five, Six and Seven)).

Third, Mugabe's popularity in the United Nations during the 1980s has been replaced by rising criticism in the 1990s and 2000s (AI 25/06/02). Fourth, the analytical framework suggests that NGOs have alliances locally and globally when they write their reports to take legal power away from the state. For instance, NGOs have collected information about the Zimbabwean constitutions. NGOs' dissemination of information explains that the constitution (the law of the land) grants the Head of State the legal power to use the Presidential Power of Pardon and Clemency (1953). Through the Presidential Power of Pardon and Clemency (1953) Mugabe holds the power to institutionalise violence. His rule of law view, which he uses to interpret this law, justifies granting political allies amnesty – even political allies that have used violence to ensure that they would be elected (see Chapter Six). The Supreme Court, in theory, cannot challenge Mugabe's use of the law, but the Supreme Court can argue that the use of this law impedes *justice* (SA-TST 08/07/2001-Gubbay, Z-MMPZ 16-22/10/00; Z-I 20/10/00; Z-I 20/10/00-LN; Z-News 18/10/00; Z-I 20/10/00-C). In practical terms, as this discussion suggests, real lives of men and women are affected by who is representing the issues.

3.7 Transnational Legal Activists Networks Changing Legal Geographies and Spatialities

The Zimbabwean case study makes it possible to illustrate the geographies of the TLAN. These concern economic, political and cultural geographies of the TLAN, which are intimately connected to the processes of globalisation.

Zimbabwe is part of the legal community in common-law Africa. Common-law Africa is a geographic region constructed through the legal imaginary of the British during the colonial period. Common-law African countries share several features because of their past and present legal cultures. One of the marked features of common law is the British legal heritage imposed upon African colonies (Blomley 2001). Another feature of common-law is the respect for precedent - past rulings of the highest courts – to create the present law. Judges are expected to know how colleagues have interpreted the law, even if the legal literature has not been published. Yet another feature of common-law African countries is the deep pluralism: state and international laws coexist alongside customary and religious laws. The legal pluralism poses difficulties because the potential clashes between different sets of rules embodied in different types of law (Widner 2001: 28-31). A final feature is the similarities in Anglophone African constitutions and the role that the judiciary play as the “real guardians of the constitution” (Hatchard 2000: 12). Differences among common-law Southern African countries (South Africa, Lesotho, Swaziland, Namibia, Botswana, Zimbabwe, Zambia and Malawi) can be found in the unique legal culture within each African country.

The case will be made that the starting conditions in common-law Africa are conducive to individuals assisting the strengthening of legal institutions, be it for hopes for a better economic future or ambitious for more inclusive political structures. Politically, ex-British African colonies are emerging from a period of authoritarianism in which single political parties held a firm monopoly over the legal, economic and political systems (CS-4/5/2001-PI, Sarat and Scheingold 2001b: 12, Z-Insider 31/07/01-O). With the disintegration of authoritarian leaders’ power and more multiparty elections, alternate

voices are appearing in the political and legal realm with new visions of justice which in turn are changing the legal culture of common-law African countries. The majority in many African countries appear to be receptive to learning about their legal right to political participation, and the role of courts to protect them from the state. However, as Taylor and Nel (2002: 172) note, this emphasis on the “marginalized and dispossessed” has become a matter of collective mobilisation of marginalized groups against the state and the global economy. Different class interests have been strengthened, new questions of the legitimacy of political leaders raised, increased discontent and deepening social conflict (see also Odinkalu 1998, 2001).

Economically, class divisions are increasing as African countries undergo liberalism and free trade. In this era of economic globalisation, the “highly privileged stratum of African elites” has more ability to benefit themselves and further marginalize the majority.

Moreover,

an emergent transnational capitalist class... of transnational executives and their affiliates; globalising state bureaucrats; capitalist-inspired politicians and professionals; and consumerist elites...is increasingly developing linkages with like-minded parties in the South to form a truly *global* elite. The elites of the New Africa may be seen as key representatives of this phenomena (Taylor and Nel 2002: 166, original emphasis)

The tensions and contradictions creating deeper class cleavages in African countries are supported by the political and economic conditions of common-law African countries. Many common-law African countries create a favourable politico-legal and economic environment for changes in the legal culture. For example, the literature on the Commonwealth legal systems, specifically common-law African countries, generally identifies that the majority in this geographic region would be receptive to the human rights movements (see Widner 2001 for review). However, a select few – the political and economic elites – would welcome the NIE/LDM legal-institution-strengthening initiative because the ethnocentric, imperialist and elitist ideas will empower them (Taylor and Nel 2002).

Behind the details of the characteristics of the geographic region, common-law Africa, lies an important theoretical critique of the simplistic treatment of the political space

occupied by transnational legal activists. Blomley (2001: 9) begins to tap into the simplistic representation of space, law and society. He argues that the legal imaginary of the geographic region of common-law countries (currently members of the Commonwealth) cloaks rather than illuminates local socio-spatial relations with the law. Common-law countries, in the legal historical literature, tend to be represented as a unified legal culture, as the following quotation suggests.

The systemisation of the English common-law crafted by the early modern jurist Edward Coke entailed the attempt at the creation of a unitary legal map in which the diverse legal knowledges of the law were immediately suspect. Increasingly, legal knowledge is imagined as disembodied, true to its own internal logic. The law speaks with a unitary voice, enabling “all the Judges and Justices in the several parts of the realm...with one mouth in many cases, [to] pronounce one and the same sentence”. This is a very conscious project, designed to eradicate the plurality and radical decentralisation of legal voices.

The critical idea is that an individual inside or outside a legal institution will respond to externally driven ideas, such as the British Imperialistic agenda, human rights movement, etc. which may make changes to the whole geographic region (also see Palley 1966). Seen in this light, externally driven ideas have the power to shape entire sovereign-states or tear them apart, as suggested by the following comment:

States collapse if public institutions do not function. There is generally a need in states for a minimal legitimate authority, law and political order (including the police and judiciary). Where these characteristics are absent.... the states in question become incapable of continuing disruptive elements on the territory of the state (Olonisakin 2000: 44)

Institutions are clearly important as a category in sustaining peace and ensuring justice in a society. Legal institutions are permeated with global politics and economics, divided between local and global interests, and more generally between civil society and the state. Legal institutions depend upon and reproduce the subtle formal and informal rules of many other institutions. The wider consequences of the United Nations' Special Rapporteur on the Independence of the Judiciary and Lawyers will survey legal institutions positioned between the local and global is, to extend Paasi (1991) in his treatise on *institutionalism*, is that the United Nations' Special Rapporteur on the Independence of the Judiciary and Lawyers is changing society, space, power, and authority and identity politics.

The section below will argue that to see the geographies and spatialities of the legal and justice system, the TLAN requires geographic analytical tools, such as the ones provided by Paasi (1991). The conflict is that a sovereign state requires legal institutions as part of a spatial distribution of its governing system. Yet, now that legal institutions are now considered to be of international concern, we need to re-examine how a sovereign-state manages the conflict between itself and the legal and justice system (which is now considered to have an international dimension because of human rights advocates focus on justice in the conflict and postconflict eras). This makes it difficult for a state to negotiate among different stakeholders, particularly as local voices are now connected to the global community.

3.7.1 Mapping Judicial Intervention

The main theory of the sovereign-state managing the global-local forces intervening in the affairs of a state reviewed thus far has been the TAN framework. Another theory is Paasi's (1986, 1991, 1996) treatise on *institutionalism*. While the TAN framework offers a visual/theoretical model with which to conceptualize local-national-international processes, in contrast, Paasi focuses more on the territorial shapes and patterns and suggests individuals inside and outside institutions shape a geographic region. The discussion below argues that Paasi's (1986, 1991, 1996) treatise on *institutionalism* captures the processes of the United Nations' Special Rapporteur on the Independence of the Judiciary and Lawyers in specific geographic locations, such as common-law Africa, granting specific legal cultures the space to change .

Four reasons are offered which justify the use of Paasi's (1986, 1991, 1996) treatise on *institutionalism*. First, geographic analytical tools allow us to make spatial connections linking the United Nations' Special Rapporteur on the Independence of the Judiciary and Lawyers, to politically strategic interpretations of international and domestic laws, to international and domestic law, to visions of justice in local societies, to overt and covert challenges to the state. The United Nations' Special Rapporteur on the Independence of the Judiciary and Lawyers is the institution changing geographic regions across the globe,

holding open the possibility for political activism within the political space for the legal and justice system (see UN- COHR 11/02/02). Transnational legal activists have become increasingly global-local presence in the 21st century, and individuals within the legal and justice system are beginning to respond to the broader political and structural changes in the legal order made in the postcold war era because of this Rapporteur.

These linkages, with a geographic interpretation, give a spatial depth and breath to the TAN framework. Geographic analysis will set the politico-legal, global-local context of the study and highlighting some of the North/South, local/global politics and processes in binding the state with the law.

Second, Paasi's (1986, 1991) treatise on *institutionalism* is particularly useful to conceptualise changing shifting identity politics inside and outside legal institutions. Paasi's (1991) allows us to visualise the symbolic presence of the United Nations' Special Rapporteur on the Independence of the Judiciary and Lawyers linking to local communities' increased expectations of the legal and justice system to establish mechanisms to disempower the state. This visualisation is important in the 21st century as postcolonial common-law African people wish for laws representing their legal pluralism rather than English common-law which tends to homogenise their desires, wants and needs in favour of the state (Widner 2001). Paasi (1991) provides the TLAN analytical framework with geographic tools to see the interactions as the sovereign state and the legal and justice system challenge, clash and collide, each with their own set of identity politics and some of the points of intersection between domestic and international law.

Third, geographic analytical tools provide a more complex way to understand social processes in a place, connected to a geographic region such as the Commonwealth. A wide range of global forces such as the World Bank, and the Rapporteur on the Independence of the Judiciary and Lawyers may focus on the legal institutions as the new strategy to be used for political reconstruction, and site of economic and political development. Yet, they need cooperation and support from the masses. To a degree, this political process could be called the *institutionalisation of the rule of law* (Russell 2001a).

Yet, the phrase *institutionalisation of the rule of law* – for geographers in particular – does not seem to capture the space, place and political processes, territorial patterns of law, power and authority that tends to surface in this discussion. Nor does this phrase seem to capture the patterns of exploitation and injustice created as multinational corporations and international lending agencies such as the World Bank seek to institutionalise this space to protect their own economic interests. However, Paasi offers analytical tools with which to understand the conflict, spatial relationships and even the political space of the legal and justice system.

Fourth, extending Paasi's multiscalar ideas to the geographies and spatialities presented in the TAN framework is a unique way to capture a sense of the local-national-international linkages that connect legal and justice systems to the legal culture, particularly in postcolonial countries. Paasi's (1986, 1991, 1996) treatise on *institutionalism* will provide a geographic analysis of how abstract global processes create local struggles, negotiations and multi-cultural interactions. This analytical framework brings to the forefront how individuals support for, or contestation with, institutions create broader socio-spatial intersections and matrixes interacting with specific geohistorical contexts.

The critical connection made between both analytical frameworks is that Sikkink and Paasi share a belief that the individual within his/her life accepts the rules, regulations and culture of an institution. Moreover, the local participant in a location legitimises an institution's presence. Paasi is more explicit about the meaning and culture of a place than Sikkink, but the argument is implicit in Sikkink's focus on the voice of the individual having an impact in international relations through human rights institutions and organisations. Combined, Paasi and Sikkink offer a way to rethink spatial relationships with the globalisation of legal discourse, local legal activism and global social moments of transnational/local legal activists shaping new political structures locally and globally.

Most importantly, this study will extend their ideas and suggest that the geopolitical structure of the legal order is an institution that interacts with locations, changing space and spatial relationships as the presence of this institution deepens. This analytical move allows this study to go beyond a simplistic spatial analysis. A simple reading of the geographies would be to argue that the human rights movement and capitalist trajectories of legal activism are dominating the legal order. Thus Euro-American interests are also driving the institutionalisation of the rule of law. However, Paasi's (1991: 246) analysis offers a deeper explanation of these processes. He suggests that when an institution is integrated into the social fabric, the place assumes the form of an institutionalised territorial unit that can be mobilised in struggles over politics, resources and power. This analysis will offer many insights into the interlinkages between different geographic scales and will help to dramatise the changing boundaries and lines in and among the state and judiciary. This analysis also suggests why judicial independence, shaped through intricate political alliances at different geographic scales in regular contact with global-local legal-institution-strengthening initiatives is a different political space, an "extrastatal" political space (Bibler Coutin 2001: 135). This analysis suggests why legal discourses (such as *civil rights*, *law and order*, *corruption*, *military state*, *women's rights*, *impunity* and *amnesty*) have become vital stimuli in the continual transmission and translation of judicial independence/legal order as a conceptual and territorial shape. Thus, this section concludes on the note that geographic analysis can reveal the apolitical, territorial and extrastatal politics and processes within this space of separateness/connectedness between the legal and justice systems and the state.

Paasi's (1986, 1991, 1996) treatise on *institutionalism* is reviewed as three points. First, that complex geographies are connected to the process of society trusting the legal and justice system rather than the state (the institutionalisation of rule of law) can be brought out through Paasi's (1986, 1991, 1996) treatise on *institutionalism*. The focus is on the vision that the international legal community and local legal activists are seeking to strengthen legal institutions in locations around the world based on society's belief that the courts will give them a fair hearing. Paasi (1991: 246) puts it succinctly in the

following quotations: “institutions do not arise in vacuum: they are spatially contingent manifestations of various social processes”.

Institutionalisation is a socio-spatial process in which a territorial unit emerges as a part of the spatial structure of the society concerned, becomes established and identified in various spheres of social action and consciousness, and may eventually vanish or de-institutionalize in regional transformation. The process is a manifestation of the goals established by local or non-local actors and organisations and the decisions made by them.

After being institutionalised, a region is perpetually reproduced in various social practices, that is, in the spheres of economic, legislation, administration, culture, etc. The origin of these practices is not invariably located in the spatial unit or in the period of time in question, but can occur on other spatial and historical scales, typically at the national and international level. We do not usually *see* the stages of the institutionalisation process, because it usually takes a much longer period of time than the “observer’s” life history, and it can be comprehended only through abstractions. The region in question can vary in size. Villages, counties, or provinces emerge and disappear. Similarly, the shape and collective identity of larger territorial units, for example, Europe, can change radically...as a consequence of politico-ideological, economic, and administrative development. Regional transformation is continually taking place on various scales and time spans (Paasi 1991: 243-44).

Second, Paasi (1991: 239) outlines a process of change connected to a place, understood to be affected by and affecting the institutionalisation process. He states, when a region undergoes a process of change through acquiring different shapes: “territorial, symbolic, and institutional shape” which is then established as an “entity in a regional system and social consciousness of society”. Although Paasi (1991) combines the state and legal system as one institution, his work is at the theoretical forefront of developing analytical tools with which to understand how territories emerge, exist and disappear. Paasi’s (1986) recognition of the importance of institutions in a location facilitates an understanding of quite marked territorial patterns. In addition, Paasi (1991) highlights that institutions alter the socio-spatial matrix of local communities, deepening symbolic shapes inside social institutions, which in turn produces and reproduces new territories. Such an approach allows an exploration of spatial patterns and territoriality of legal activism seeking to disrupt the powerful presence of sovereign-state power.

Third, Sikkink draws out the point that NGOs advocating for international humanitarian laws participate in constructing powerful discourses meant for an international audience (see UN- COHR 11/02/02). At the heart of her analysis is that individual voices are assisting in changing law and empowering legal institutions at the local and national level, and challenging the state through legal institutions. In contrast, Paasi suggests how individuals in a geographic region respond to discourse, visions and memories constructed by institutions. Paasi's work helps us better understand the spatial shapes and patterns created in the wake of different interactions in and among civil society, NGOs, the state, international organisations of nation-states and the international community. Paasi's analysis offers a spatial depth and complexity to the TAN framework. Thus, Paasi's (1991) treatise on *institutionalism* can provide a geographic interpretation of how transnational/local legal activists use legal institutions and the foundations of society to take political power away from the state. He offers a new way to envision the day-to-day struggles the state has with the legal and justice system, which takes into account the political economy of legal activism in the broader power relations of the capitalist world. Thus, combined, Paasi and the TAN framework offer a sense of how the United Nations' Special Rapporteur on the Independence of the Judiciary and Lawyers - structurally linked to trajectories of legal activism - creates changes in the spatial shapes in a local legal culture. For example, the TAN framework highlights the power of the individual, potentially changing the history of international relations, Paasi suggests that the re-iterative processes through time and space alters regions and place.

These three points suggest that the relations between the legal and justice system and the state are territorial and ever changing, and that these geographic analytical tools help us map them at different geographic scales. The spatial influence of these political structures shift and change as society supports and/or repudiates the ideas of the legal institution to legitimise/de-legitimise the state, can be seen in some common-law African countries, as the Zimbabwean case study will suggest. The sorts of new complex spatial arrangements civil society and the legal institutions have within national borders have really taken hold in the postcold war era.

3.8 Summation and Conclusions

This chapter and Chapter Two have analysed a wide array of literatures. To conclude, several points will be made. One, the legal architecture is created through combinations of practices, concepts and ideas relevant to the legal community; and legal space is multilayered, woven together by different institutions and organisations through time and space. Two, the specific characteristics that distinguish the legal and justice system from the state are: the connection among judges, lawyers and NGOs, the rule of law and the space of judicial independence. Three, Paasi's (1986, 1991, 1996) treatise on *institutionalism* can be used to analyse how abstract global processes create local struggles; to see how cultural and historical social justice is transformed as they are made a part of the legal system and local legal structures; and to reveal the territoriality of legal and justice systems. The point is to sharpen the analysis of the politics inside and outside the legal and justice system.

It has established a number of points, but only three will be mentioned. One, political structure of the legal and justice system is spatially separated from, yet connected to, the state. This political space is filled with individuals and trajectories of legal activism agitating in this space. Two, rule of law views could and should be connected to transnational legal activists. The differences between transnational legal activists' views are deeply felt political positions about how the world *should* work. Three, the Transnational Legal Activists Network (TLAN) approach connects rule of law views with transnational legal activists to suggest that more inclusive ideas about social justice are making the state more vulnerable to the international community. The TAN and TLAN framework will be drawn forward into the analysis of the Zimbabwe case study, which will examine NGO reports for their political ambitions and political implications. Figure 2.1 –the TAN framework - helps us understand dimensions of space and time as defined by national borders and boundaries. Figure 2.1 provides this study with a multifaceted, multi-institutional conceptualisation of legal space through which information, individuals, ideas and institutions interact in this space. This framework illustrates the territoriality of nation states, global legal activism and changing local values.

The next chapter will examine NGO reports for several themes: the politico-legal superstructure of the state, the political practices and patterns of lawmaking, and the economic crisis. The contents of NGO reports are also important because these specific texts are constructed during a political and economic crisis. The detail provided in the next chapter is to suggest a series of events that occur as externally driven legal-institution-strengthening initiatives, transnational legal activists and the legal and justice system try to take legal power from the state, yet as the state resists having legal power wrested from its grip, we see conflict, chaos and suffering. This series of events has been seen in many post-soviet, post-colonial, Muslim and other countries (Tolley 1994).

Chapter Four: Creating the Crisis 1997-2002

4.1 Introduction: Deepening Democracy and Development in Commonwealth Member States

The transformation of development discourse from neoclassic economic language of cost-and-benefit analysis to the legal discourse of *rule of law*, *human rights*, *good governance*, *democracy*, *private property rights*, etc has been achieved through the redefinition of development policy and practice and its integration with the fast growing agenda of human rights. The new international discourse of development no longer separates the international community from day-to-day governance in a nation-state, but attempts to join the two under the rubric of the state transformation/human rights/democracy legal-institution-strengthening initiatives. As NGOs have been increasingly integrated into the information politics of international funding agencies and the international community's concern about human rights, human rights NGOs have gained increased access to funding.

From 1997 to 2002, NGOs such as the Amani Trust , the Catholic Commission for Justice and Peace, the Legal Resources Foundation, Transparency International (Zimbabwe), Zimbabwe Human Rights Association, Zimbabwe Lawyers for Human Rights, Zimbabwe Women Lawyers Association and many others have worked in conjunction with governments from the Commonwealth Ministerial Action Group (CMAG - Canada, Malaysia, Nigeria, Botswana, Bangladesh, Barbados, Australia and the United Kingdom), the European Union, the United States and others, as well as international lending institutions such as the World Bank who use the new development discourses as a way to describe the political and economic crisis in Zimbabwe (ZHR-NGO 28/09/01-Crisis, CS-9/06/01-01/55). As argued in previous chapters, the politico-legal/economic development discourses of *good governance*, *private property rights* etc are an ambitious strategic agenda used to intervene in the governance of nation-states. Moreover, this intervention approach is seen as a legitimate way to deal with developing countries' economic and political crises. Thus, the redefinition of development, the shift away from neoclassic economic language and NIE/LDM as a day-to-day form of international intervention into the daily affairs of the state has thrown into question the

deeper agenda of the Commonwealth Committee excluding Zimbabwe from the Councils of the Commonwealth in March 2002. The following quotations and sequence of events offered below are meant to raise much deeper questions about whether or not the Commonwealth is playing an important role in de-legitimising the Zimbabwean government until the good governance/rule of law conditions of the World Bank are met.

In 1999, Commonwealth Secretary-General Emeka Anyaoku, representing the Commonwealth's 54 member countries, met with World Bank President James Wolfensohn to deepen and expand collaboration between the two institutions, with a focus on:

...the special needs of small states, management of debt and the implementation of the Heavily Indebted Poor Countries (HIPC) Initiative, public sector reform, privatisation and corporate governance, and basic education and health programmes...*They will also discuss the new development framework put forward by Mr Wolfensohn.*

The Commonwealth Secretary-General said: "I hope that a series of concrete proposals will emerge from our meetings that the Commonwealth Secretariat and the Bank can take forward to help the world's developing countries. The work that is being done for the benefit of Commonwealth member countries offers a ready example for other countries around the world."

At the talks in London last year Chief Anyaoku and Mr Wolfensohn identified in particular the specialist role the Commonwealth could play in delivering assistance to and providing support for small states. Some 30 of the Commonwealth's 54 members are small states with populations of less than 1.5 million and the Commonwealth has become an important forum for them to express their views and effect change (CS- 4/6/99-PI emphasis added).

The two institutions focused on creating a new international financial architecture and strengthening global economic governance. By June 1999, these agreements began to take form as concrete policy documents. One policy document is

[a] final report of a Commonwealth Expert Group on Good Governance and the Elimination of Corruption in Economic Management, as well as a framework...for launching a concerted Commonwealth strategy to promote good governance and combat corruption both at the national level and globally (CS- 9/6/1999-PI).

March 19 2002: The [Commonwealth] Committee expressed its determination to promote reconciliation in Zimbabwe between the main political parties. To this end the Committee strongly supported the initiatives of the President of Nigeria and the President of South Africa in encouraging a climate of reconciliation between the main political parties in Zimbabwe which they considered essential to address the issues of food shortages, economic recovery, the restoration of political stability, the rule of law and the conduct of future elections... The Committee decided to suspend Zimbabwe from the Councils of the Commonwealth for one year with immediate effect. This issue will be revisited in twelve months time, having regard to progress in Zimbabwe based on the Commonwealth Harare principles and reports from the Commonwealth Secretary-General (C- 19/03/02-PI- 02/26)

These quotations and alliances suggest that there has been an application of the NIE/LDM discourse to the Zimbabwean landscape. These quotations also suggest a dramatic departure from traditional development policy and practice.

Behind this evaluation of the presence of the NIE/LDM discourse in international organisations of nation-states and international lending institutions lies an important theoretical critique of the simplistic treatment of the political spaces affected by the global institutions using the NIE/LDM logic. The most obvious case studies are countries with their economies in transition. Many such countries are advised to strengthen institutions, to use formal economic exchanges and western legal norms to initiate long-term political-legal reform in local contexts. In theory, this solution of constructing institutional controls and trade movements will support, and be supported by, a modern legal system and a market democracy. As noted in Chapter One, this logic has its flaws. As Tshuma (1999: 75) and others have argued, the World Bank and other lending institutions advance their own interests with a narrow view of rule of law - one that focuses on procedures and institutions rather than “equity and fairness”. The *strengthening institutions* rhetoric is one dominant theme.

The other is the *good governance* rhetoric in popular literature. The *good governance* agenda has become part of many international funding agencies agenda (Weaver 2000, Abrahamsen 2000). Reading primary evidence from a wide variety of countries suggests that many economic and political problems could be solved with the sort of solution

proposed by the World Bank, that is: to strengthen weak institutions, change local legal frameworks, alter unclear policy frameworks and the lack of transparency, and reduce local problems of corruption and misspending (Keefer and Knack 1997, Webb 1999, Chhibber 1998, Harrison 1999, Cameron 2000). These techniques will create *progress/modernisation*. With very little theoretical dialogue of what precisely is being supported with such a solution, unfortunately even Richards' (1996) splendid ethnography of guerrilla fighters in Sierra Leone could be read as a cry for the sort of solution proposed by interventionist organisations and institutions wherein the post-conflict government must curb corruption. As Chapters One and Two have argued, post-development analysts must develop analytical tools to critique this logic.

At the heart of this discussion is whether or not scholars are critically analysing the impact of this development discourse, as well as the changing forms and shapes of development policies and practices being extended through time and space through democratic institutions. In light of the points made in previous chapters, two main lines of inquiry may be initiated. First, an analysis of the development discourses through a post-colonial/postdevelopment geographic perspective, which in turn seeks to make connections to other comparative case studies that examine the impact of the legal institutional development idea (the New Institutional Economics /Law and Development Movement (NIE/LDM)) in developing countries. Such analysis would focus on the power of NGOs representing a political and economic crisis with the NIE/LDM language, as they advocate for legal and economic change. Second, a critical analysis of some of the biases found in the NGOs reports should be discussed, and the study of political implications of these biases should be initiated. To summarise, the Zimbabwean-Commonwealth-World Bank case study suggests that our current understanding of how a nation-state challenges the Commonwealth/World Bank coalition is sketchy at best. This chapter will begin to fill in some of the gaps in the literature. It will consider the NIE/LDM discourses as a political language used by NGOs during the political and economic crisis.

This chapter has four sections. The first section reviews current representations of Zimbabwe's political economy and then analyses how the discourse constructed by NGOs fits into the NIE/LDM perspective. The second section acknowledges that NGOs' choice of rhetoric and strategy is most likely grounded in an awareness of Africans' resistance to the settlers' legal culture, the oppressive legal system and political processes within the politico-legal history. This section offers a critical analysis of some of the silences found in NGOs' reports. The third section acknowledges that NGOs' reports are important because they unravel some of the relationships between judicial power, democratic institutions, rule of law and legal interpretation in the post-Independence Zimbabwe era. These reports also highlight the structural barriers set in place by the Mugabe Administration that impede the flow of ideas, activism and information from the global human rights movement to the local legal activists seeking to protect citizens' rights over the sovereign-state's rights. The fourth section concludes by highlighting a few points presented in this chapter.

4.1.1 NGOs as Democratic Institutions

In this dissertation, the definition of NGO has been broadened to include a wide array of democratic institutions, which seek to change legislation and write new laws. NGOs as democratic institutions, now supported by international organisations of nation-states and international lending institutions, have become an interesting category, which mediates the political space among local and global stakeholders in and through the legal and justice system. This category of activists can help us understand the spatial presence of the NIE/LDM logic as well the production and reproduction of a number of assumptions about the sovereign-state as it attempts to respond to this process of the institutionalisation of the rule of law.

The significance of this definition of NGOs as a democratic institution is that such institutions are supported by the World Bank/Commonwealth NIE/LDM agenda. Moreover, as the relationship between the Commonwealth and the World Bank relationship deepens, NGOs using the NIE/LDM logic and rhetoric to represent the politico-legal and economic landscape will hold even greater significance to

Commonwealth countries. For instance, attentive to international lending agencies' shifting *progress/modernisation* initiatives agenda, the Commonwealth has focused on deepening democracy. It has held a series of meetings on the theme *Deepening Democracy* as part of the international lending institutions' criteria for democracy, thus supportive of NGOs (CS-4/5/2001-PI). As Sarat and Scheingold (2001b: 12) have acknowledged democracy in many post-colonial countries is a complex undertaking:

...formally colonized countries are now trying to develop new legal institutions and new forms of state-society relationships. And in a post-colonial world, human rights claims [are]...particularly controversial, bringing them face to face with increased corporate power, funding constraints, and ideological resistances.

Democracy, to most postcolonial countries, means overlaying western legal ideals such as democracy, on top of existing legal cultures. This process generally creates many difficulties and tensions. However, forty-two out of 48 sub-Saharan African countries have shifted from “military or other dictatorships to multiparty democracies” in the post cold war era. Nonetheless, a number of contradictions remain, signalling the reality that legal and economic systems cannot be “fixed” by outside institutions insisting on good governance and democracy (Z-Insider 31/07/01-O). Thus the general question is: is the case study of Zimbabwe an example of how international lending institutions produce unexpected consequences in post-colonial countries with their adoption of *strengthening institutions, good governance* and *pro-democracy* rhetoric?

The significance of this line of inquiry is that this dissertation has identified three biases in NGO reports: they tend to be ahistorical (even as they are writing the new history); they tend to politicise the Head of State's rule of law view; and they tend to use NIE/LDM discourses such as good *governance, anticorruption, and others* (WB-WD-2002). These biases will be shown in this chapter as this chapter provides an overview of Zimbabwe's politico-legal economic crisis through information produced by transnational legal activists. The significance of these biases in the texts being written to document and describe the politico-legal and economic crisis can be better understood against some of the points made in the past three chapters.

Three points will be drawn forward in order to appreciate what the biases in NGO reports might mean for this study and Zimbabwe's future in international relations. First, this study has identified that NGOs and media (democratic institutions) are the most active in disseminating information locally and globally. NGOs, especially human rights NGOs tend to focus on information about lawmaking, the interpretation of laws and the legal and justice system and law as an interactive process between the legal system, public opinion and public behaviour during a time of rapid change. This information will, and may, be used to define Zimbabwe's future in international relations (Risse and Sikkink 1999, UK-TG 29/10/01, ZHR-NGO 9/10/01 AT-SNS-Sept, ZHR-NGO-TM 10/01:2, UN-COHR 11/02/02).

Second, NGOs disseminating information through electronic advocacy networks needs to be understood at two levels. Nongovernmental organisations are in a powerful position when they report on the politics inside and outside the legal and justice system. NGOs have a unique position in this situation because they are the vociferous group, and the legal community tends to remain silent, conservative and outwardly apolitical (Sarat and Scheingold 2001b, Cain and Harrington 1994, Chandler 2001). Most importantly, NGOs reports are part of the political strategy to take legal power from the state. NGOs working in alliance with the legal and justice system can use three lines of attack – legal discourse, local agitation by legal activists and global social movements – to take legal power away from the state. In addition, some judges and lawyers will participate as an invisible extension in the human rights movement, with NGOs speaking for the activist within the legal and justice system (Backer 2001). The significance of this activism is that the activism within the legal and justice system may be perceived by the state in a negative manner, creating negative repercussion to the legal and justice system and civil society (Dodson and Jackson 2001).

This chapter will explore what the Zimbabwe case study can tell us about NGOs production of information during a crisis in order to better understand how transnational legal activists/NGO reports generating information might mediate different power relations among the Head of State, trajectories of legal activism, civil society and the

international lending agencies. This chapter is based on the empirical evidence generated by NGOs and other sources during the period of the crisis. This chapter will examine a wide variety of primary information - current NGO reports, interviews with specialists, and newspaper articles - for evidence pertaining to the social construction of Zimbabwe's politico-legal and economic crisis. It is one of the first studies to consider the political implications of NGOs collecting information about the legal and justice system during a period of crisis. This is perhaps one of the first geographic studies to consider how legal activists are fraying sovereign-state power in the African context (Odinkalu 1998, 2001).

To reveal the biases in NGOs reports to the reader, this chapter is designed to address three questions. First, *what are NGOs reporting?* The significance of this question lies in the fact that NGOs have an important power to define the *problem*. Many NGOs advocate for social/economic justice, and suggest that rule of law reform would provide a temporary solution to the current crisis. Many reveal a dominant logic - and economic rule of law logic- grounded in a modern advocacy campaign designed to connect the integrity of the legal system to the financial system of the nation-state. By economic rule of law it is meant advancing the politico-legal agenda to bind the state with the law for economic development. More importantly, the geographies of the problem and solution are significant. The economic crisis is directly connected to the flaws *within* the political legal system rather than the global politico-legal economy. The solution focuses on strengthening national institutions. This chapter will argue that NGOs aspatial construction of the problem/solution, the rhetoric of institutions, and their spatial analysis of the politico-legal change produces and reproduces the discursive structures that international lending agencies rely on to justify economic and legal reforms in post conflict countries.

In addition, *why are NGOs advocating for legal and economic reform?* Themes found in the legal historical literature hold the key to understanding *why* NGOs advocate for legal reform. These themes suggest that national laws were rewritten as policies, administered through the settlers' governmental structures, have affected cultural politics, the legal

personality and positionality of women and men and their patterns of resistance to authority and even leadership patterns in the post-Independence era, and that NGOs are providing an important service to the people of Zimbabwe.

Finally *how is NGO information being used?* The points made in this chapter will be drawn forward into Chapter Seven which will discuss how information about Zimbabwe's economic and political crisis may be used in future global politics. While NGOs are advocating for economic and legal reform, creating discursive structures upon which future international law will be constructed, NGOs are transnational and transcultural contact zones, socially constructing the crisis within their reports (Bayart 1999). NGOs produce information to advocate for legal reform. Yet this information has the potential to work in contradictory ways (Hammami 2000). The point is to caution that this discourse may be making Zimbabwe even more vulnerable to the next *modernity/progress* project. Constructions of good/bad in these texts can be traced to lending institutions' NIE/LDM logic, as well as to the social relations inherent in the NGO's multiple contact zones within which this information has been collated. In short, this chapter flags a critical point. This chapter provides the evidence with which to argue that human rights NGOs need to be aware that their dedication to alleviating suffering may be co-opted for a future *modernity/progress* scheme initiated by outside institutions.

This chapter has four sections. The first section reviews current representations of Zimbabwe's political economy and then analyses how the discourse constructed by NGOs fits into the NIE/LDM perspective. The second section acknowledges that NGOs choice of rhetoric and strategy is most likely grounded in an awareness of Africans' resistance to the settlers' legal culture, the oppressive legal system and political processes within the politico-legal history. This section offers a critical analysis of some of the silences found in NGOs reports. The third section acknowledges that NGOs' reports are important because they unravel some of the relationships between judicial power, democratic institutions, rule of law and legal interpretation in the post-Independence Zimbabwe era. These reports also highlight that the structural barriers set in place by the Mugabe Administration impede the flow of ideas, activism and information from the

global human rights movement to the local legal activists seeking to protect citizens' rights over the sovereign-state's rights. The fourth section concludes by highlighting a few points presented in this chapter.

4.1.2 Methodology and Methods of Analysis

Three levels of analysis are adopted to achieve the purpose of this chapter, namely, methodological, empirical and historical. At the methodological level, a postdevelopment/poststructuralist/postcolonial approach is adopted. The detail provided in this chapter is to capture the NGOs social construction of the crisis. In this chapter NGO is rather crudely defined: a voice not directly attached to the Zimbabwean government. Also, as mentioned in Chapter One, specific NGOs are not the specific object of analysis. Rather, the focus is upon the ideas and information that flow through them, information that is available to the general public. At an empirical level, NGO reports will be used to explain changes in the local legal culture and how this is being affected by the World Bank/Commonwealth conversations.

This chapter will review NGO reports for their historically important facts constructed in the context of intense economic, political, social and cultural transition. In addition, this study is interested in the secondary use of this information. NGOs reports are analysed for their ability to appropriately represent the legal culture during a time of rapid change. The analysis of the NGO reports more generally identifies that NGOs are advocating for legal and economic reform while advancing the international funding agencies' visions of progress/modernisation.

To operationalise the postdevelopment/poststructuralist/postcolonial approach, and to critically review NGO social construction of the crisis, NGO reports have been read alongside the 1987 edition of the *Encyclopaedia Zimbabwe*. More specifically, two entries. *A brief history of Nationalism and Liberation* and the *Biography of Robert Mugabe*.

The headings for *Nationalism and Liberation* are as follows:

- Early resistance (1890 –1893)

- First Chimerega (1896-1898)
- Protest Movements (1920s-1940s)
- Mass Nationalism (1952-1963)
- Revolutionary Nationalism (1964-1965)
- Early Stages of Armed Struggle (1966-1974)
- Détente and Its Aftermath (1974-1975)
- The Final Phase (1976-1979)

Details include who the key leaders of the resistance to the settlers were: what initiated the discontentment, anger or hostility in the African population; how the Africans organized to express their grievances to the settlers; where they mobilized; who they conferred with; what activities they took; and how successful they were at achieving their goals. Overall, this three-page entry paints a fairly detailed picture of why and how the African population mobilized. From this entry, the pattern of Africans' resistance to the settlers' regulations and laws that surfaces suggests some of the wider trends.

Viewing this narrative at broader geographic scale, a complex image unfolds. Funding for the guerrilla fighters' weapons and training came from the Socialist and Communist countries – North Korea, the Soviet Union and many others – and education, medical supplies and clothing came from Europe and America. The armed struggle affected every person: from the young men (*mujiba*) and young women (*chimwido*) who were recruited by the guerrilla fighters to bring information and supplies to the rural areas that became “liberated zones” (Sayce 1987: 279).

Reading this entry alongside the biographical sketch of President Robert Mugabe (1980 to present), born in 1924, highlights that he did grow up during the settler era. This entry brings into stark relief the guerrilla leaders' history of bringing freedom to Zimbabwe. Mugabe participated and set the agenda of ZANU which organized violence and sabotage, and armed struggle to force the settler regime to accede to the African majority. Through Mugabe's eyes, we can get a sense of the broad effects of the settlers' law during his youth and adulthood. In 1959, Sir Edgar Whitehead declared a State of Emergency. This was at a time when the African nationalist leaders gained support across the continent. Then a number of laws were introduced to suppress African political activity. In 2001 and 2002, Mugabe has used similar tactics to suppress the civil rights

movement (see Chapters Six and Seven). This is a signal of history repeating itself. It may be, as some would argue, an ironic twist. For residents of Zimbabwe, the rhetoric of the Law and Order Maintenance Act (LOMA (1960)) evokes memories of the settlers suppressing the nationalist movement that had begun as peaceful protest marches. In post-Independence Zimbabwe, LOMA has been translated into a new legislation, the Public Order and Security Act, which was passed in January 2002. As a result, starting from 1924 to the present, an analysis of Mugabe's view of the law suggests reconstructing two views of the Southern Rhodesian/Zimbabwean legal culture: the power of the state was used against him during the 1960s and 1970s, and he now uses the power of the state to quell a nationalism movement (AI 25/06/02, AI 03/01- Z, Z-CFU 20/09/01-SR, ICG 22/03/02, ICG 26/02/02, ICG 25/01/02, USA-Z-HRR 2000/2001).

The point being made is that using NGO reports as primary evidence means working with different biases. Many reports negatively represent Robert Mugabe (see EIU CP-2001: 10, ICG 14/06/02). As this chapter will suggest, the outpouring of NGO reports, newspaper articles, and documents posted on the different websites constructs an image of post-colonial Zimbabwe. Because NGOs do use NIE logic and reproduce the rhetorical strategies used by international lending institutions which seek to *fix* the government institutions with externally imposed legal reform, including reforms affecting the Head of State (regardless of post-colonial laws, legal cultures, legal consciousness, democracy or civil rights), this image supports the capitalist agenda. However, this introduction to Robert Mugabe is meant to create an important tension. This introduction allows this study to raise the important question – *is the crisis in Zimbabwe part of the global social movement supporting NIE logic, and part of the international community forcing Zimbabwe to undergo a legal and economic reform?*

4.2 Background: Representing the Economic and Political Crisis

In July 2001, a Nongovernmental organization – the International Crisis Group (ICG) – noted that:

Zimbabwe is in a state of free fall. It is embroiled in the worst political and economic crisis of its twenty-year history as an independent state. The crisis has negatively affected virtually every aspect of the country and every segment of the

population... Significant post-independence achievements in racial reconciliation, economic growth, and development of state institutions have already been severely eroded. Zimbabwe, which after independence was one of Africa's best hopes for establishing a healthy democracy and prosperous economy, is now descending into a cycle of poverty and repression...

Responsibility lies with President Robert Mugabe's government, which has mismanaged the economy, institutionalised state violence, and moved further toward autocratic rule. When the people of Zimbabwe began organising to change the government through democratic means, the ruling party, the Zimbabwe African National Union-Patriotic Front (ZANU-PF) responded with widespread and systematic violence and intimidation. ...Since the end of the 90s, a political opposition, based on the transformation of the trade union movement, has been growing in response to the mismanagement of the economy and the country. Civil society groups, a new political opposition party, and a well educated, entrepreneurial population have combined to form a significant coalition to challenge the government's authoritarian rule directly (ICG 13/07/01: ii-iii)

By June 2002, the ICG presented a very different story:

In the aftermath of the deeply flawed March 2002 presidential election, [the] crisis is deepening:

- the ruling ZANU-PF party and the government are systematically using violence to intimidate the opposition Movement for Democratic Change (MDC) and civil society in order to punish and compel them to accept the results;
- the economy is further deteriorating as foreign investment and food both become scarce commodities; with regional drought compounding the land seizure crisis, UN agencies warn of possible famine; and
- as the opposition considers mass protests, the prospect of serious internal conflict is becoming imminent, with grave implications for the stability of the wider Southern African region.

Most Western countries have done little...The European Union (EU) and the United States (U.S.) have meaningfully expanded neither the target list of affected individuals nor the scope for the sanctions (primarily travel restrictions) they imposed on senior ZANU-PF figures before the election. Key G-8 countries have signalled in advance of their 26-27 June 2002 summit that they may be prepared to relax the requirement that African states apply serious peer pressure on Zimbabwe as a precondition for advancing the New Program for Africa's Development (NEPAD) initiative on which the continent pins its hopes for integration into the world economy (ICG 14/06/02: 2-3).

The essence of the first narrative is that Zimbabwe has been economically and politically mismanaged. According to the United States report, Zimbabwe has abundant arable land, good infrastructure, an educated and disciplined work force, and strong ecotourism,

mining, manufacturing, and service sectors. The nation has tremendous potential to develop: chief sources of hard currency are exports of tobacco, gold, ferroalloys, and nickel, tourism, and remittances from citizens working in other countries (USA-Z-HRR 2000/2001). The logical answer to take from the second ICG excerpt is that very deep mismanagement has drastically changed Zimbabwe's political economy.

Yet the crisis we see in Zimbabwe between 1999-2002 must be viewed in historical context to properly evaluate what has happened in recent years. Phimister (1988, 1993) is often cited as a key Zimbabwean economic historian. His work often influences other researchers' geographic imagination of Zimbabwe's economic history (see Dashwood 2000 for example), and thus is a good starting place for this section. Since an understanding of the economic context of legal activism is imperative to appreciate the spatial dialectic between society and the legal and justice system, this section will very quickly review a few key economic historical points.

Phimister (1988) suggests that before UDI, the British South African Company (BSAC) doubled as the state and created a close relationship between the state and the economy between 1890-1923. Between 1890-1940s, economic growth was seen in the mining and commercial agriculture sectors. During World War II, Southern Rhodesia provided raw materials to Europe, benefited from the influx of foreign exchange and began to develop its infrastructure. During the 1950s, large inflows of foreign capital encouraged rapid industrialization with South Africa being their main trading partner (Phimister 1988, Sayce 1987). During the Unilateral Declaration of Independence (1965-1979), Southern Rhodesia faced international economic sanctions for its treatment of Africans (Carter and Trimble 1999: 93). The nation responded by implementing a vigorous import substitution program which strictly controlled imports and exchange control measures (Sayce 1987). The experience of UDI shaped the social-economic interactions of Zimbabwe with the rest of the world in the post-Independence era. Southern Rhodesia/Zimbabwe participated in the global community as a major exporter of agricultural products, before and after UDI (see Godwin and Hancock 1997). A re-orientation of the economy was initiated through a socialist and egalitarian system that focused on developing the country through

the production of export products. By 1990, Zimbabwe adopted a World Bank initiated economic structural adjustment program (Horn 1994a). The critical theme underlying much of this economic historical literature is that Zimbabwe's integration into the world economy has often benefited the rich black and white elite, while the majority remains poor. In 2000, this is especially true with approximately 6 million (of a population of 12 million) living by subsistence agriculture. About 75 percent rely directly or indirectly on agriculture for their livelihood. Life is difficult for many; the formal sector unemployment rate exceeds 60 percent. When this is coupled with accelerating price inflation, rapid currency depreciation, high real interest rates, and high unemployment, many analysts suggest that economic profits tend to accrue to the black and white elite while workers tend to be paid low wages, and the fruits of their efforts are exported (USA-Z-HRR 2000/2001).

The pivotal point to note from the discussion above is that Rhodesia faced international exile for almost 14 years. This experience, according to Godwin and Hancock (1997), deeply affected the psyche and economy of post-Independence Zimbabweans. Because Rhodesian settlers had borrowed funds from the World Bank to develop the transportation infrastructure, the newly independent country was legally responsible to the World Bank for service of its foreign debt. According to international law, the nation state, not the sovereign state, is accountable to the World Bank: a nation-state inherits a previous government's debt (Carter and Trimble 1999). Thus, when Zimbabwe became freed from colonial/settler rule, Zimbabwe was not offered a choice. After the long period of UDI, the IMF provided the new state with helpful international trade advice.

Zimbabwe's post-Independence aspirations to develop health and education facilities for all made it popular with the United Nations. During the 1980s and early 1990s, Zimbabwe exemplified a post-colonial nation on the road to increasing its financial and quality of life standards by exporting agricultural crops (cotton, maize, and tobacco). The government sought to increase its exports to the European community to gain access to foreign currency. Zimbabwe also borrowed from the World Bank to provide health and education facilities for the local population (Horn 1994a, 1994b).

Since the Independence of Zimbabwe (1980), the World Bank has had an influence on the political landscape of Zimbabwe. Economic Intelligence Unit (EIU) is one the best sources of information documenting the geopolitical alliances of Zimbabwe, including the relationship between the World Bank and Zimbabwe. The World Bank encouraged Zimbabwe to participate in international trade. The EIU documents that the 1980s were significant in defining the national economic identity of the newly Independent state. The country's statistics cited a tremendous growth in the Gross National Product (GNP) since Independence (see EIU 1989/90:9). It traded with the European Economic Union, Australia, South Africa, Bulgaria, Hungary, and Romania (EIU 1986: 26). By the late 1980s, the country was posed for an economic transformation. Various government policy documents created in the early years of Independence (1980-1985) promoted a more "socialist" and "equitable distribution" system (EIU 1989: 11). In contrast the private sector requested that free market forces, rather than government regulation, be in control of the economy. This request became the future government fiscal policy (EIU 1989: 11 also see Dashwood 2000). The vigorous economic growth was heavily reliant upon the export of cash crops such as cotton, maize and tobacco (EIU 1986; 12-15). However, such economic growth was counterbalanced by the depreciation of the Zimbabwean dollar and large external debt (EIU 1986: 25). By the end of the 1980s, the country had incurred immense external debts (EIU 1989/90: 31-32).

Because Zimbabwe was interested in exporting to other countries to acquire foreign currency, Zimbabwe was also willing to become more receptive to international funding agencies that promised to help it develop. Geography and economics shifted Zimbabwe's perception of the World Bank. According to Tshuma (1999: 76), in the late 1980s, the World Bank "took good governance issues on board". Around this time, Zimbabwe's economy became more enmeshed with the World Bank (WB) and International Monetary Fund (IMF) development agenda. The WB/IMF encouraged Zimbabwe to deprecate its dollar, loosen its control over its large external debt and to grow cash crops (EIU 1986, Horn 1994a, Jenkins 1997). Contradictory economic policies that sought to "develop" the nation while relying on the exportation of primary crops were implemented. During the

1980s, Zimbabwe adopted five-year development plans. Agri-economics provided the underlying development agenda. Yet, the development agenda was still connected to settlers' agri-economics: maintain control over property rights and sovereignty and citizenship rights (see Tshuma 1998). The rhetoric used by the state suggested that this development scheme would grant all Zimbabweans employment, health and better quality of life. During 1989/1990, the state changed its official economic doctrine of socialism into "pragmatic socialism".... (EIU 1991: No. 3:10) when the socialist government adopted a WB/IMF economic structural adjustment program (SAP/ESAP).

In 1989, the WB/IMF and the Zimbabwean State finalized their agreement. As the focus is on the economic paradigm that occurred in the World Bank as a result of the ESAP failure, this study will not re-iterate Horn's point (1994a: 1-3, 1994b) wherein she provides details and analysis of the policy and practice of ESAP in Zimbabwe. From the perspective of Zimbabwe, factors that explain Zimbabwe's adoption of an ESAP include the point that during 1990-1991 the government decided to redefine its economic policy with pragmatic socialism. As early as 1992, Zimbabwe began to show increasing evidence of dependency on foreign aid. For example, Zimbabwe published three economic plans (1982-1985, 1986-1990, 1991-1995) whose targets and even short-term budgets have not been met. Unforeseeable events such as world market conditions and droughts further exacerbated the negative effects of the policy instruments (which were for the most part ineffective). By 1997-1998, the IMF was able to dictate a number of economic policies to the sovereign-state (EIU 1997 No. 2; EIU 1998 No. 1, No. 2, No. 3, EIU 1999/2000).

With the increased presence of the WB in local economics, the Zimbabwean government had to comply with different qualifying criteria, including citing respect for human rights and rule of law as preconditions for loans. We can see evidence of the qualifying criteria in the text of the EIU. According to the EIU (1991 No. 3:10), government officials were enrolled in policy workshops to re-orient their thinking to the lines of the WB and IMF. Government officials were told that "... there must be less government, more respect for

human rights and rule of law and that economic adjustment must be viewed as a matter of life and death”.

The Economic Intelligence Unit's vision of Zimbabwe suggests that this is how the outside community – especially international funding agencies – view Zimbabwe's integration into the world economy. Moreover, the key idea advanced by this outside view is that Zimbabwe, not the World Bank, had neglected to deliver *progress/modernisation* under this scheme. The World Bank mirrors this view.

According to a South African newspaper, Zimbabwe's problem is *mismanagement*. For instance, from 1999 to 2001, the World Bank's analysis of the Mugabe Administration suggests that the government is acting irrationally and has not created an economic environment conducive to economic growth (SA - News 24 25/09/01). Furthermore, the IMF/WB argues that poor governance (i.e. lack of orderly, transparent and political reforms to contain inflation, reduce state spending and eliminate some of the foreign exchange shortages) created the fiscal crisis (IRIN 13/09/00). Problems in the administration have been reduced to economic rhetoric, as seen below:

...make full and prompt settlement of Zimbabwe's overdue financial obligations to the IMF... Zimbabwean authorities [should] adopt the economic and financial policies needed to enable Zimbabwe to achieve economic recovery as soon as possible... Zimbabwe's economy [is] deteriorating rapidly and its recovery depends on restoring business confidence and an orderly land reform program...only comprehensive policies [will] provide a lasting solution to the nation's problems (SA - News 24 25/09/01).

Lending agencies - connected to the views of the IMF, cited above - seem to have quietly ignored the political dimension to this act of labelling. Such labelling produces meaning beyond the abstract economic discourses. This is a meaning that emerges as a comment about the quality of leadership.

The pivotal point is that focusing on the quality of leadership as the problem has a far-reaching impact upon the way that many view the current crisis in Zimbabwe. For instance, the Canadian newspaper *The Globe and Mail* holds a similar view. Moreover, the IMF response to the controversial compulsory land acquisition program put in place by the ZANU (PF) government has been to suspend economic assistance since October

1999. Other aid donors have followed suit, often to protest the political violence connected to the land reform. The general trend has been to lock in billions of dollars worth of aid that could have been used for individuals who rely on the agricultural sector and who are most affected by drought, crop failures and floods. In 2001, inflation

hit an all time record of 76.1 percent in August, sparking fears that continued hikes in prices of basic commodities and expected food shortages in the coming few months might lead to unrest among the urban poor (Z-MDC 17/09/01- IRIN).

To charge Z\$50 per loaf of bread, compared to Z\$15 in August 2000 to an individual who may make \$Z400 to Z\$800 a month makes meeting basic food needs a near impossibility (USA-Z- HRR 2000/2001).

In contrast, scholars such as Dashwood (2000) and Jenkins (1997) provide a much more careful analysis based on an ideological explanation. Both argue that Zimbabwe's representation of itself – a socialist economy between 1980-1990 - has been particularly deceptive to scholars and local people. Jenkins (1997) offers an insightful discussion combining culture, politics and economics. She lists factors such as ethnic divisions, a shallow sense of nationhood, weak political institutions, rising popular expectations, lack of indigenous management and technical talent. Jenkins (1997: 577-578) argues that “regimes that are constitutional have performed as well (or as badly) as those who are authoritarian in managing fiscal and monetary policy.” She is sceptical of those who benefit from state-owned monopolies: most of the non-farm economy. She presents the argument that agro-economic logic was used to script fiscal policies that would in theory increase the standard of living, health care and education for all. The post-Independence administration could carry out its own agenda that connected the state and the economy through the emotive socialist call (based on the Eastern Asian experience of the state and the USSR's apparent success in rapid industrialization as a profound substitute for colonization). Thus, ZANU (PF) espoused socialist ideology as well as an ideology of state-intervention: both ideas were used as the platform to achieve material development for a select few. The post-Independence government, which also exported raw minerals and agricultural produce, mimicked the trade pattern created by the settlers. The post-Independence business elite developed a capitalist import/export business and many of

them benefited. At the same time, socialist rhetoric was used to placate the masses. After Independence, Africans who had been offered few opportunities to expand formal economic entrepreneurship (Wild 1997, Horn 1994a, 1994b) began to seek ways to change their limited access to resources. Some were not aware that the socialist propaganda was hiding a great deal of corruption (see Dashwood 2000: 97-102).

In contrast to the EIU and scholars' interpretation of the crisis, a local labour organization, Zimbabwe Coalition of Trade Unions (ZCTU 1999/2000) examines the economic crisis from the workers' perspective. They argued that the emergence of the economic crisis seen in 1997 was due to the government's failure to create an enabling macro-economic environment. Workers faced the daily economic hardship of a falling of a real purchasing power because of inflation, extensive borrowing from international funding agencies, poor performance of public enterprises, erratic Gross Domestic Product growth, part-time casual labour rather than permanent full time employment and decline of wages. The details provided in these reports include statistics on economic performance before and after ESAP, the performance of the July 1997-December 1998 budget, the performance of the economy in terms of real economic growth and the performance of the eight top public enterprises (ZCTU-PP No. 2). This report concludes "performance of the economy during the period before ESAP (1986-1990) is superior to that during ESAP (1991-1997)" (ZCTU-PP No. 2). This Zimbabwean NGO is very careful to couch its criticism of the Mugabe Administration in an economic language.

In contrast, R.W. Johnson, the Director of the Helen Suzman Foundation, a South African NGO provides a useful starting point that connects national and local spheres of the political economic crisis to the international community, the IMF, President Mugabe and local social movements (ZW-News Johnson 2000). Johnson contends that when President Mugabe promised to pay the war veterans/ex-combatants Mugabe initiated a local and international response:

First, panicked by demonstrations by Zanla ex-combatants, who had been the heart of the liberation struggle 20 years before, he agreed to pay them large gratuities and pensions...Secondly, Mugabe raised the spectre of land expropriation without compensation. Both steps brought the government into

headlong conflict with the International Monetary Fund [IMF]... how [could Zimbabwe]...ever attract investment if it confiscated the assets of investors who had put their money into creating productive farms [?]

...Further unscheduled spending, together with runaway corruption, saw inflation accelerate, producing food and fuel riots in 1998 and a growing groundswell of opposition to the regime (ZW-News Johnson 2000).

A South African NGO's comment on the Zimbabwean crisis is significant: economic decline and violence in Zimbabwe affects the region. South Africa has experienced a decline in the rand, which is partially attributable to the crisis in Zimbabwe. Botswana's tourism has fallen by about 50 per cent (ZHR-NGO 28/09/01-Crisis). South African (SADC) leaders are encouraging Mugabe to implement a land reform strategy without violence. Between September 4 and 8, 2001, the ZANU (PF) government and the Commonwealth, in Nigeria, negotiated an agreement, the Abuja Agreement. Even though the Abuja Agreement has been signed, and Mugabe promised to implement a just and peaceful land reform programme, the Abuja Agreement appears to have been simply a diplomatic move (SA-TS 07/09/01; ZHR-NGO 28/09/01- Abuja). For instance, from September 4 to 28 2001 "...violence or threats of violence have halted farming operations on more than 900 farms" (UK- TG 28/09/01). The Commercial Farmers Union (CFU) states that since February 2000, white-owned farms, farmers and their workers have been attacked on a daily basis by pro-government militants (Z-CFU 20/09/01-SR). The critical point is that the South African view has a vested interest in Zimbabwe's crisis. Rapid changes inside Zimbabwe have had dire effects on South Africa's economy. The South African NGO and media provide a forum of freedom of speech not available to local Zimbabweans.

In August 2001, Professor Sam Mayo, Director of the Southern African Regional Institute for Policy Studies offered his view. His historical narrative recounts how Zimbabwe's controversial compulsory land acquisitions programme was operationalised. Mayo also acknowledges negotiations with Britain to finance land reform initiatives. Mayo's explanation differs from most explanations of the current crisis.

Moyo offers the background of the violence on commercial farmland, connected to negotiation and compromise between the British and Zimbabwean governments when the two governments agreed on how to return the land back to the local inhabitants. The key turning point Moyo identifies is that negotiations initiated in 1991 were finalised in 1996 when the United Kingdom John Major government and President Mugabe came to an agreement. However, before attending to the international agenda, Mugabe first had to attend to a local issue "... a confrontation between the war veterans' leadership and the ruling party elite. " Moyo narrates what has happened since then:

...in 1997...the Labour government...proposed a totally new discussion...that introduced a major political confrontation with the Zimbabwean government... They proposed renegotiating the whole framework into a more explicitly poverty-oriented framework, introducing the whole debate around poverty reduction ... The Zimbabwean government's argument has been that it has to not only reform the economy but also change the political complexion ... because some people argue that even if you redistribute and leave some land to commercial farmers, you should have a racial mix of who they are. You should not leave just white commercial farmers. You should have both black and white. So the argument that (government) 'cronies' got some land - (but) there are only 400 or 500 of them out of a total of 4,500 commercial farmers ... This whole debate the British and others introduced about cronyism generated a lot of anger among the black elites. They were saying the Rhodesians who got land used to work for government, that they used to be in the ruling party and used to be former British soldiers, war veterans as well, who were rewarded with land for fighting the first and second world wars, settlers came and they were given grants, etc. So they were asking 'what is the standard'?

So this drew a whole political confrontation. I think initially the Labour Party officials ... missed the point, they had the wrong analysis of the political meltdown that was happening in Zimbabwe - because the economy was also not working, the adjustment was not delivering as many jobs, the ruling party was now going to face more competition from an opposition and the ruling party which had argued to redistribute land, which had been part of the liberation war, had not delivered because they had now compromised on the neo-liberal policies and they were being told to now go for another neo-liberal development aid concept called 'poverty reduction'...

The first invasions in the last phase began in 1998. In 1997 there was a confrontation between the war veterans' leadership and the ruling party elite, in which they (war veterans) demanded that the government pay them huge pensions. This was more or less at gunpoint. Everybody missed that point, but this was a critical point. At that same point, at which they (the Zimbabwean government) were ... abrogating their macroeconomic policy, saying 'forget about

this market business of buying land, just get land' ... the government in 1997 listed 1,471 farms and started a mass-based compulsory acquisition. So you had for the first time that political change. That was much more significant than any land occupation that ever happened or was to happen - that listing of so many farms - because it hit the economy and divided society politically. Following that there was a movement in 1998 towards the donors conference on land reform and redistribution that took place in September, which led to a government proposal on what it would do in five years and its compromise of a more gradual 10-year programme.

... Now leading to this, there was a lot of doubt in 1998 among war veterans and different communities that the government would follow through with land redistribution, so there were about 30 high-profile land invasions that took place involving war veterans and chiefs and others who were basically saying we don't believe the deal you are going for is going to work and if you try to bluff us we are still going to get our land anyway....In addition in 1997 there was a difference between the Zimbabwean government and the British and the Americans over the invasion in the DRC. In my view, another false move by the British and the international community - to say that because you (Zimbabwe) are in the DRC and it is affecting your macroeconomic policy, therefore the land problem you have had is not our problem because you should pay the money you are paying in the war ... This is when the Zimbabwe government saw in 1999 that they were not getting any money and they felt they were being isolated - which they were by the international community... (IRIN-Z 14/08/01- Moyo).

A Zimbabwean agro-political-economist's view provides a different vision than the ones offered by organisations such as the International Crisis Group (ICG 13/07/01:13-14). This view suggests that the Mugabe Administration and the international community's relationship began to fray from 1997 to 1999. By 1999, through a misanalysis of local politics, the British Labour Government alienated the Mugabe Administration. This view provides a number of insights into what has happened to the political economy since 1998 as a result of "the Labour Party officials ...had the wrong analysis of...[Zimbabwe's] political meltdown". It also suggests that we might want to re-imagine Britain's role in the Zimbabwean land issue in the larger project of de-colonisation. Upon liberation, Zimbabwe agreed to use "both the government of Zimbabwe's resources and some British funds, and [redistribute the land]... to peasants". Between 1990 and 1992, "financing from the British, was not satisfactory as far as Zimbabwean government officials were concerned" suggesting that the equation between Zimbabwe and Britain had changed alongside Zimbabwe's new "neo-liberal, market orientated or macro-

economic framework and economic policies” (IRIN-Z 14/08/01- Moyo). The critical connection Moyo makes is the international development project was *not working* and Zimbabwe was being told to follow a “neoliberal development aid” concept.

To conclude this section, this section has acknowledged that many NGOs are offering important historical evidence of a rapidly changing landscape. This economic history sets the context for the next section, which will use this economic historical information as a backdrop with which to develop a more critical evaluation of the content of NGOs reports. The next section will focus on reasons why NGOs may have adopted the NIE rhetoric, and for whom they are constructing the economic crisis. The significance of the next section is that it asks why these texts are being written, and how they might be used in the current global power relations. These questions are directly relevant to the purpose of this dissertation, which is to reconceptualise the threat of the NIE/LDM logic. As mentioned in Chapter One, this study suggests that it is appropriate to study the relationship between the NGOs and the legal and justice system as NGOs are using the NIE discourses to incite the legal community and the international community. This study will suggest that if we examine the relationship between the NGOs and the legal and justice system we can see how the NIE/LDM idea can restructure local communities, nation-states and international relations.

4.3 Whose Economic Crisis?

The details and analysis above suggests that Zimbabwe was quickly integrated into the global economy in the post-Independence era, thus vulnerable to paradigm shifts within international lending institutions, which were constructing new ways to evaluate a *successful* developing country conforming to external development initiatives. Although Dashwood (2000: 82-86, 143-53, 193-194) carefully documents the spatial patterns of finance, products, ideas and people in her argument that ESAP policies negatively changed Zimbabwe’s economy, another explanation is offered here.

This dissertation suggests that the more deeply integrated Zimbabwe became in the global economy, the more vulnerable Zimbabwe became to the paradigm shift in lending

institutions, particularly as financial institutions shifted from neoclassic economic rhetoric to NIE rhetoric. As emphasised in Chapter Two, the NIE/LDM rhetoric focuses on finding problems in *institutions*, and solving them with legal procedures and constructing economic laws. The discussion below provides three general reasons why NGOs may have adopted this rhetoric. First, NGOs often participate in the political economy of information, and the NIE/LDM rhetoric offers them common ground with funding agencies. As NGOs seek to find a common language to articulate what seems to be economic irresponsibility, the NIE/LDM logic appears to be a suitable explanation. And third, NGOs may have adopted this rhetoric in order to make the point that Zimbabwe's political economy is a contemporary example of a neoliberal democratic development initiative being imposed upon a developing country.

4.3.1 The Political Economy of Information

Given the economic downturn inside Zimbabwe, the amount of information available to the outside community highlights the fact that NGOs reporting on Zimbabwe's crisis are successfully participating in the political economy of information. As the crisis has mounted, the international donor community has reallocated funds originally designated to the Mugabe Administration. The new recipients are NGOs and other democratic institutions. This economic transfer has been noted by the EIU (CP 2001: 18 (also see p. 11)), which highlights the contradictions of this re-allocation of funds:

...the US, EU and Commonwealth [will likely] halt aid to the Mugabe government and channel assistance to Zimbabwean's civic organisations and opposition parties...[but] it sets those bodies up as targets of violent intimidation by Mr. Mugabe's government".

The complexity of who is paying for what information has yet to be discovered. While not dismissing the economic geographic patterns connected to this flow of information, the key point is that the global political economy is financially supporting democratic institutions to use the NIE/LDM logic and simplistic arguments that the Mugabe Administration has mismanaged the economy. The following comment is representative of this type of argumentation.

...prior to 2000, reckless economic policies, the hugely expensive military intervention in the DRC and rampant corruption had already seriously damaged the Zimbabwean economy (Z-AT-20/05/02-PE 2002: 6).

In sum, the NIE/LDM rhetoric and logic can be found in many of these reports. Zimbabwe's political economy is being characterised as being mismanaged, affected by poor governance, and bad leadership. As the quotation offered below suggests, the emotive rhetoric reporting Mugabe's explanations of the current economic situation pin the problem on Mugabe and his Administration with fairly linear thinking. This argument identifies the *problem* as the Mugabe Administration. The argument is supported with economic statistics. The solution implicitly rather than explicitly offered, suggests that another national leader is required, one who can offer better answers for the rapid decline in many Zimbabwean's quality of life. This equation is evident in the following quotation:

Government price controls are too low for domestic producers to make a profit. Because of artificially low prices and the weakening of Zimbabwe's dollar, much agricultural production is smuggled across borders. Zimbabweans across the country often complain of shortages of such basic goods as meal, cooking oil, sugar, soap, and dried fish. "Mugabe says that it is international sanctions causing shortages in primary consumer durables", says a Zimbabwean academic, "but Zimbabweans are increasingly seeing through this, recognising that price controls and other government policies are primarily responsible". For example, new legislation forces farmers to sell all maize to the government and then buy back what they need for feeding their animals at higher prices.

Beyond the immediate potential for a food emergency, economic trends reveal a deepening structural crisis born of damaging policies, continued political violence and a complete loss of investor confidence. Although the land invasion strategy has exacerbated this, the fundamental cause is the "inability of the government to build the economy over the last two decades" Nearly every figure highlights the emergency. Real GDP contracted 7.5 per cent in 2001, agricultural output was down 12-20 per cent, and foreign direct investment declined more than 90 per cent since 2000. Having grown more than 100 per cent in 2001, the money supply is spiralling out of control. The fiscal deficit has averaged 16 per cent of GDP over the past three years, and the brain drain is accelerating. The stock market has dropped 19 per cent over the last two months. Perhaps the most telling statistic is a comparison of Zimbabwe and its neighbour Botswana. While Zimbabwe nearly doubled Botswana's GDP in 1997, by 1999 Botswana's economy had surpassed its neighbour's (ICG 25/01/02: 8).

Many NGOs reporting on the crisis use this equation (see also Z-MDC 03/08/00). A Zimbabwean non-governmental organisation *Crisis in Zimbabwe Coalition*, as recently as June 2002, suggests that the “degree of misgovernment” and land “resettlement” program has deeply affected the political, social and economic stability of the country (Z-CIZC-19/06/02: 41, also see p. 32-37). This NGO suggests that the

...conduct of Zimbabwe’s government over the past two years is antithetical to every ideal of good governance that is expressed in the NEPAD document (Z-CIZC-19/06/02: 41).

Abstract economic statistics support this style of argumentation, providing quantitative data to suggest that the Mugabe Administration has become an icon of economic and political elements antithetical to the good governance/ideal state construct. After offering economic, political and legal evidence to support this argument, this NGO suggests that “extensive foreign aid” will be required (Z-CIZC-19/06/02:39).

Abstract economic analysis is no longer in vogue, particularly after the ESAP disaster. However, abstract quantitative evidence of physical violence has become the new medium of this communication (Kent 2001). The Mugabe Administration’s condoning of physical violence is widely available in many NGO reports. We have evidence that the global political economy is paying many NGOs for hard evidence of state condoned violence such as torture, brutality, threats, death sentences and many other forms, reproducing the general equation of *bad leadership = economic crisis*, and further sensationalising the day-to-day reality of economic hardship with evidence of physical violence (see SA-HSF 2000c; ZHR-NGO 2000-03, ZHR-NGO 2001-05, ZHR-NGO 05/08/01; Z-NCA-Reeler 2001; Z-MDC-Eppel 2000). Thus, from the quantitative evidence present, we have a sense of the spatial distribution of the violence perpetuated by the Mugabe Administration, violence in poverty as well as physical violence. The critical contradiction of this logic lies in why the data has been collected and who is interpreting the data. Each item of empirical evidence is being collected to support the next round of development initiatives. This plethora of evidence connects Mugabe’s leadership to a destroyed economy. In addition, this evidence is connected to a solution: strengthen legal institutions. The NIE logic’s management initiative suggests that strong

democratic institutions and rational, formal and logical legal systems will create stability, which is essential for Western European economic development. The underlying political economy to this information about Robert Mugabe is that this information is being increasingly refined as a way to *improve* the next national leader's performance and accountability to international lending institutions.

Some NGOs construct a very general equation of leadership, economics and violence that manages to exclude rather than include the possibility of deeper analysis (see *Section 4.2 Background: Representing the Economic and Political Crisis*). Moreover, the response of some NGOs has been to rely on sensationalising and conflating Mugabe's economic or personal agenda. For example, some NGOs demonise Mugabe as a corrupt leader who supports allies and family members with economic and political favouritism (see EIU CP 2001: 10, ICG 14/06/02). In such reports there is a tendency to ignore the fact that economics, politics and law run together in complex ways. In addition, such reports tend to exclude the importance of a widespread social movement actively resisting the Mugabe Administrations' oppression. In fact, behind the canopy of violence presented by many NGOs, is evidence of a wide-scale social movement challenging the Mugabe Administration. Reading the reports from a different angle suggests that individuals are making choices, and using a wide array of ingenious strategies to reshape their present reality and personal power. Moreover, reading these reports very carefully, one can begin to see the international connections running through this complex landscape empowering local activists. For instance, the "...UK was the first and, for a while, only champion among EU member states for tough action against Mugabe in the first half of 2001", a point which suggests that complex race, gender and class differentials run through, and complicate this political landscape (ICG 25/01/02: 16, IRIN-Z 14/08/01- Moyo).

4.3.2 Inside/Outside

NGOs have adopted the NIE/LDM rhetoric in their desire to illustrate the depth and complexity of economic disaster and what seems to be a national leader's economic irresponsibility. Many reports that focus on the minutiae of day-to-day *problems* in the local political economy contain the themes mismanagement, corruption, governance

issues and anti-ESAP rhetoric (see Chapter Two, *Section 2.2.2 The Capitalist Trajectory of Legal Activism*). Reports, particularly ones written by the EIU are typified in a series of quantitative facts about postcolonial Zimbabwe. For instance, the EIU (CP-2001: 23) provides the statistics that suggest the country has been mismanaged. They provide a historical overview of economic management/mismanagement:

Extensive price controls dating from...[UDI] were abandoned in the early 1990s, Subsidies were also gradually reduced, but the deregulation of maize, milk, beef and wheat in 1993-1994 resulted in bread riots in Harare... With excessive government expenditure driving rapid growth in borrowing...inflation has remained high, averaging over 23% per year in 1994-1998...average inflation increased markedly to 58.5% in 1999 and 55.9% in 2000 and was stuck in the 50-60% range for the first half of 2001...inflation could reach 100% in the second half of 2001.

This language suggests that a leader can control the economy. Thus, if the economy does poorly, it will be easy to pinpoint the problem – the national leader makes poor economic decisions. Moreover, as Zimbabwe is a democratic country, when poor people protest such leadership, this is part of the democratic process of hearing the local people's voices (see Walton and Seddon 1994). In short, the EIU/World Bank/IMF seems to represent the state as economically irresponsible, undemocratic, thus deserving of having "undeclared sanctions " put against it in 1999 (Z-MDC 17/09/01- IRIN). The ZCTU, a local trade union organisation, translates local union members' stories. They focus very clearly on telling how the development imaginary of neoclassical economics has had a negative impact on local men and women. ESAP, as experienced by the men and women they represent, is a violent system of development imposed from the outside that is the opposite of what the development imaginary should have created. ZCTU provide troublesome statistics that suggest deepening poverty and daily hardship (see ZCTU-PP No. 2). As will be discussed in Chapter Five, *Section 5.7.3.4 Stories from Women, Men and Children*, the anti-ESAP sentiment is a reflection of local voices articulating the real stresses created by this, and other forms of *development* initiatives.

The anti-ESAP rhetoric is another theme that surfaces. This rhetoric is mixed with regret that donors left, and that the common person is deeply affected by the undeclared sanctions against the country. This perspective acknowledges the complex situation of

anti-ESAP food riots, labour strikes and demonstrations by a wide variety of interest groups in 1997, 1998 and 1999. Despite the theoretical pro-democracy position the World Bank has taken, the World Bank chose to ignore the demonstrations and continued to fund Zimbabwe's economic reform at the cost of civil rights (ZW-H-N 1998: 8). Moreover, by 1999, the donor community had labelled Zimbabwe a mismanaged economy (IRIN-Z 14/08/01- Moyo). Although the World Bank's decision to withdraw funding seems to be connected to the land issue, many donors, including the World Bank left as a way to protest the political violence. These international interpretations of the local political economy have negatively affected the common people:" The economic malaise has been worsened by the suspension of aid in 1999 by Western donors" (SA - News 24 25/09/01). The economic crisis, which had begun with a failed ESAP program, has deepened as donors withdrew funds. With the rapid influx of donor funds in the early 1990s and then the rapid withdrawal of funds in the late 1990s, economic stability in day-to-day life is an impossibility. Most Zimbabweans face acute foreign currency shortage, fuel shortages, and skyrocketing prices of almost all commodities (Z-MDC-17/09/01- IRIN).

Table 4.1 Consumer Prices 1997-1999

	1997			1998				1999	
1990= 100	2 Qtr	3 Qtr	4 Qtr	1 Qtr	2 Qtr	3 Qtr	4 Qtr	1 Qtr	2 Qtr
All items	488	485	503	575	627	631	715	858	963
Food items	678	618	640	801	914	864	994	1289	1453
change on year on year of all items %.	22	17	18	25	29	30	42	49	54

n.b. Food prices during the first two quarters of 1999 have gone up 60%
 numbers have been rounded up or down
 Source: adapted from EIU 1999 No. 3: 25

The people most affected by ESAP and donor fund withdrawals have their realities represented as statistical data of the poor faced with increasing food prices. The poverty is "faceless and quantifiable" (Sherman 2001:5). The quality of life for the Zimbabwean poor is simply "imagined" as numbers, abstracted and homogenised (Sherman 2001: 2, also see 216-252). Nonetheless, the global economy has affected local people, cross-

cutting into the deep socio-economic divisions that were already present. Gross statistics of the current living conditions of all Zimbabweans suggest that the majority have been deeply affected by the economic downturn. In 2000, over 70% of urban residents in Zimbabwe were paid \$Z2, 500 a month while food costs were rising daily. In a context where people are spending 50% or more of their income on food, Table 4.1 suggests a great deal of day-to-day hardship. NGOs also offer quantitative and qualitative evidence of deepening economic and political crisis, which is summarised in Table 4.2 (Z-FG 27/04/00).

The government is the third theme. This theme is examined from a number of different angles. For instance, in 2001, Ngwenya (Z-MDC-24/09/01- Ngwenya) offers a typical viewpoint of the government, cited below:

starvation, malnutrition and poverty are not the products of season factors; they are the direct consequences of bad government.

As early as 1998, the local media was beginning to blame local government institutions for the economic downturn. For instance, Bill Saidi (ZW-H-LW 1998: 50) suggests that leaders who borrow funds from the World Bank and do not meet their fiscal plan and budget are obligated to the future of the nation, therefore should resign:

The man should have offered us his resignation after the failure of ESAP 1...The next mass protest against the government should have just one placard: RESIGN NOW! [this is the]...new era of peace, transparency and democracy (ZW-H-LW 1998: 50).

The NGOs also suggest alongside the deepening economic crisis that the Mugabe Administration has tried to retain its control over the country. Many NGOs cite cases where the government has encouraged violence and pro-government militants led by the war veterans. Violence has been ongoing since February 2000 (ZHR-NGO 28/09/01- Abuja, Z-I 27/07/01-E, Z-FG- 20/04/01-PE). An important point to make here is that many sources are constructing the crisis in their endeavour to illustrate the geographic breadth and depth of the problem. At the same time, many NGOs use rhetoric acceptable to lending agencies that suggests a need for their assistance and more external funding in the post-conflict era. The rhetoric that has been identified in many NGO reports is.

Table 4.2 Changes in the Political Economy (February 2000 to September 2001)

- Unemployment now stands at about 60% and is rising as the economy contracts and businesses close or downsize. Nearly 700 businesses have closed down over the last 18 months. Over the last 12 months 500 businesses have closed and 10000 people have lost their jobs since the beginning of 2001. President Mugabe claims that businesses are closing deliberately in order to embarrass the government. He has also alleged that Jewish businessmen in Zimbabwe are collaborating with South African Jews to close businesses in Zimbabwe to make the country dependent upon imports from South Africa.
- Formal sector employment has fallen by 90,000 (7%) to its lowest level since the mid-1990s.
- The farm invasions have resulted in large numbers of farm workers being put out of work and made homeless. At least 70 000 farm workers have been put out of work over the last 18 months and together with their families they have been rendered destitute.
- Inflation in September 2001 was at 70.4%. By February 2002, inflation stood officially at an all time high of 116.7%
- The cost of staple items has escalated following the increase of over 70% in the price of petrol in June 2001.
- The vast majority of Zimbabweans suffer from poverty and the situation is deteriorating rapidly. According to a recent report of the Consumer Council, over 74 per cent of the country's 12.5 million people are now living below the poverty datum line.
- Zimbabwe's total foreign debt is estimated at US\$4 billion. Some 70% of the country's GDP is required to service its foreign debt, and the Government has defaulted on foreign debt repayments (In August 2001 the repayment arrears on foreign debts was US\$695.2 and was likely to rise to US\$1 billion by the end of 2001).
- The annual budget deficit in 2001 is likely to be over 4% of the GDP. The economy is forecast to shrink by about 10% in 2002. (The Reserve Bank says that the economy is in a downward spiral and forecast an 8% decline in the economy in 2001.) The economy is expected to contract by a further 5.3% in 2002.
- By January 2002 the government's domestic debt stood at around \$210 billion - or 53 percent of the country's entire 2002 budget.
- Foreign investment has plummeted.
- According to an NMB Bank report in mid-October 2001 there has been a 5.4% decline in the manufacturing sector in the first half of 2001. The bank blamed the decline on the over 70% inflation rate and the shortage of foreign currency in the country
- What were once growth industries, such as tourism, have been devastated; tourists have stopped visiting Zimbabwe because of the violence and instability. There has been a reduction in tourism of about 70%.
- Once a large exporter of food crops, Zimbabwe has to import maize to avert famine in the country in the next few months.
- In a Harvard University and World Economic Forum report Zimbabwe is now ranked last out of 75 countries studied and is assessed as being the least economically competitive country. It has dropped from 56 to 75 since the last survey.
- Zimbabwe's health delivery system has been ranked among the worst in the world by the World Health Organisation and is expected to deteriorate further if the government fails to provide adequate funding.
- In mid-October 2001 the Government reintroduced price controls on staple items such as bread, milk, sugar and cooking oil. When there were protests from the business communities that they could not make a profit if they had to sell at the control prices, President Mugabe warned businesses that Government would take over businesses that withhold products or close down in protest against price controls. Economists immediately said that these threats would cost the country billions in foreign investment.
- There has been a huge exodus of black* middle class professionals, including doctors, nurses, teachers, accountants and other people with skills that are badly needed; the small white* population has also shrunk considerably.
- Several foreign Governments have cut, reduced or suspended aid to Zimbabwe to register their disapproval of the lawlessness that now characterizes the country.
- Violence on farms that have been invaded by pro-government militants has meant sharp decline in farm output, leading to possible food shortages later this year or early 2002, which may lead to more civil unrest

Source: adapted from ZHR-NGO 28/09/01-Crisis, AT-20/05/02-PE 2002: 6-7

*Zimbabwe's population is 82% Shona, 15% Ndebele, less than 1% white and other ethnic groups approximately 2%. Tensions are evident between the African majority and the white minority, between the Shona majority and the Ndebele minority, and among the various Shona subgroups (USA-Z-HRR 2000/2001)

blaming the government, the anti-ESAP rhetoric, mismanagement and corruption. The significance of this rhetoric is that it falls all too neatly into the NIE/LDM logic of what the problem is and what the solution should be

Several conclusions can be made about the information being generated by NGOs. These conclusions are as follows. First, this information is not coming from the Mugabe Administration which is protective of the image of “national unity” (Jenkins 1997: 578). Rather, the information is coming from NGOs that are concerned about empowering local human rights such as Physicians for Human Rights, Denmark (D-PHR 21/05/02-PPE, D-PHR 24/01/02) Amani Trust (Z-AT-20/05/02-PE 2002), Lawyers Committee For Human Rights (LCHR 19/12/01-POSB-HR) and the International Crisis Group (ICG 26/02/02) and the political opposition party – the Movement for Democratic Change.

A second conclusion is that many participate in constructing an anti ESAP discourse. This is not surprising given the plethora of literature critical of ESAP (for instance, Weaver (2000) argues, based on her extensive literature review of ESAP's failure worldwide, the critique of ESAP that been in circulation since the early 1990s). Since the late 1990s, the new economic language of *modernisation/progress* has constructed an economic discourse shaping economic structures such as institutions and organisations. This discourse seeks to reveal the very complex alliances, often hidden and submerged below the visible political landscape, involving international-national-local relationships (Bayart 1999, Salbu 1999). However, what is surprising is the lack of scholarly literature that acknowledges that the NIE logic has replaced the ESAP argument of cost and benefit analysis. Moreover, with many NGOs identifying ESAP as the original problem, they are reproducing and strengthening international lending agencies rational to use the NIE/LDM logic.

Third, these two points of intersection suggest that many NGOs' analyses of the crisis promotes a single overarching normative agenda. Zimbabwe's economy, which held so much promise, has failed because of mismanagement. This view has been in circulation since the 1980s when students posed anti-corruption demonstrations (Z-FG 18/12/97). This view is also apparent in the way that the United States Secretary of State reports represent Zimbabwe (USA-Z-HRR 1997/1998). Moreover, this view also supports a linear equation that mismanagement creates human rights abuses and violence. The irony is that the language of *rule of law*, *democracy*, *constitutions* and *human rights* does not always play a role in empowering dissidents, i.e. a unionised labour union worker striking against government fiscal policies and practices. Rather, this is the language of lending institutions in the UK or the USA seeking to advance their economic rule of law views and restructure the local economy (Tshuma 1999). The critical point is that the language and view of the *solution* has not originated from inside Zimbabwe. Thus, the tendency is to focus on procedural technicalities rather than the real issues of suffering, fear, silence and coercion (ZHR-NGO 28/09/01-CAA). For all these reasons, the language of the solution being proposed should be read with caution - the *language of rule of law*, *democracy*, *constitutions* and *human rights* as part of international lending institution's lending mandate. Rather than leave the solution in the hands of lending agencies, the conclusion of this section turns to an analysis that acknowledges that NGOs are using the NIE logic in the discussion below.

To conclude this section, this section has focused on reasons why NGOs may have adopted the NIE rhetoric, and for whom they construct the economic crisis. For instance, this review has offered a sense of *what sort of information* NGOs construct. Three points may be taken from this review. These points are as follows. First, many NGOs clearly articulate their concern that Zimbabwe's political and economic crisis and isolation is deepening. Many also suggest that social/economic justice can only be achieved through economic reform.

Second and related, NGOs are participating in constructing the new economic history of Zimbabwe. The language that they use connects the economic crisis to the integrity of the

legal system. In turn, the researchers and scholars who rely on NGO reports will likely adopt this language. The point being made is that these *facts* will in all likelihood be cited by other scholars to illustrate a growing concern that Mugabe is leading an authoritarian regime, engineered by an elite that enjoys the autonomy guaranteed by powerful political authorities who gives low priority to the welfare of the local population. The spatial implications of this transnational information flow may have far reaching effects in the future.

Many of the NGO reports will be used to define Zimbabwe's future in international relations, often without the acknowledgement of the broader context in which some of the NGO reports have been constructed (UK-TG 29/10/01, ZHR-NGO 9/10/01 AT-SNS-Sept, ZHR-NGO-TM 10/01:2). The broader context is in all likelihood the broader context connected to the Commonwealth/World Bank meetings to discuss the new development framework put forward in 1999 (CS- 4/6/99-PI). The significance of these meetings upon Zimbabwe can be seen in the World Bank/IMF deep impact upon the local economy. Since 1999, Zimbabwe has become increasingly economically isolated from the international economic community (IRIN-Z 14/08/01- Moyo). Since then, Zimbabwe has been trying to access foreign funds. Zimbabwe even signed the Abuja Agreement (negotiated between the Commonwealth and Zimbabwe in September 2001). The intent was to break Zimbabwe's deepening isolation: as a local newspaper publisher Dr. Ibbo Mandaza notes –

The agreements are part of a diplomatic and political process by Zimbabwe and designed to break the international encirclement of the country, which included undeclared sanctions against the country (Z-MDC 17/09/01- IRIN).

It is interesting that these sanctions, international relations, foreign policy issues and international lending agencies circle around the catchwords *corruption* (see EIU CP 2001: 10) and *poor leadership* by the state. This language is found locally and internationally. Other institutions have reproduced the rhetoric in various forms. The Economic Intelligence Unit (1999 No. 3) and Dashwood (2000) blame the downturn of the economy on financial mismanagement. And the local trade union organisation, the ZCTU (1999/2000), suggests that ESAP policies have destroyed the economic fabric of

the nation. Clearly the leadership of the country caused withdrawal of donor funds, which in turn has created rising inflation, rising prices of basic commodities and food shortages, and thus the ripple effect of discontentment that "might lead to unrest among the urban poor" (Z-MDC 17/09/01- IRIN).

Third, many NGOs advance a single-minded agenda. Many use legal language to politicise Mugabe's rule of law view. NGOs reports' argumentative rhetoric seems to be a reaction to the injustice perpetuated by the legal culture and legal and justice system created by the settlers' governmental structures. But the key problem with doing so is that this legal language provides the empirical basis upon which more international law is constructed.

The review of what NGOs report, and why NGOs advocate for legal reform (offered in the section below) begins to point this study in the direction needed to analyse how the discourse constructed by NGOs supports and strengthens the New Institutional Economics (NIE) perspective. The discussion then moves onto highlighting relationships between judicial power, democracy, rule of law and legal interpretation in the post-Independence Zimbabwe era.

4.4 Advocating for Legal Reform

This section will answer the question *why NGOs are advocating for legal reform*. This section will suggest that many historical and contemporary themes found in the legal historical literature hold the key to understanding *why* NGOs advocate for legal reform. A review of Southern Rhodesian legal history offers some insights into how national laws were rewritten as policies, administered through the settlers' governmental structures, have affected cultural politics, the legal personality and positionality of women and men and their patterns of resistance to authority and even leadership patterns in the post-Independence era. The review seeks to understand some of the reasons why NGOs may be making the strong argument that legal structures need to be changed and why NGOs may be so adamant about their agenda. The reasons identified below are that NGOs are questioning

- What led to the current political and economic crisis?
- What is the civic consciousness of women and men in the post-colonial era and evidence of oppression?
- How can we deal with the over simplification of state-civil society relationships?

However, rather than addressing these deeper concerns, few NGOs comment on themes such as the historical geography of law, Africans' resistance to the settlers' legal culture, the importance of time, shifting legal space, a long history of resistance to the state/legal system, the sorts of socio-spatial patterns evolved as the result of law as a political tool, the significance of legal historical literature documenting political processes within the Southern Rhodesia/Zimbabwe politico-legal history, why western legal norms imposed as a development strategy might be dangerous to local civil rights or why the Commonwealth's 54 member countries are all very vulnerable to the World Bank's development initiatives as the two institutions deepen and expand collaboration (CS-4/6/99-PI). Many NGOs' reports' representation of human rights abuses extend only as far as these images/details serve an agenda that seeks to challenge the sovereign-state's legal power.

The point being made is that this section will illustrate a significant bias in NGO reports. For example, many of these reports remain silent on the fact that Mugabe, as a national leader, moulded his leadership skills during a Liberation war (Sayce 1987). President Robert Mugabe's (1980 to present) role as a guerrilla fighter during the Liberation war brings into stark relief the settlers' culture, laws and economy that guerrilla leaders such as Mugabe challenged to bring freedom to Zimbabwe. Southern Rhodesia/Zimbabwe's legal history carries a complex shadow of laws being used to exert elected official's politico-legal power. As Mugabe's life has paralleled important politico-legal changes in Southern Rhodesia, Mugabe's personal history written alongside this literature review would sharpen the analysis lacking in many NGO reports and demonstrate that Mugabe's childhood, youth and young adult life paralleled many shifts in settlers' government authority.

4.4.1 First Reason: Whose International Norms?

One reason why NGOs may be advocating for legal reform is because they are trying to

tap into the complex power relations of law, politics, space and time creating the current crisis. Many of these power relations originate in historic state-civil society interactions. For instance, the founding moment of Zimbabwe is not April 18 1980 – the official day that Zimbabwe was formally admitted into the United Nations and Commonwealth – but a series of temporal threads that run from 1885 to the present. The importance of *time* is stressed by Palley (1966) who examines how Southern Rhodesia/ Zimbabwe was constructed through international law and how the Berlin Act 1885 granted Britain the legal right to govern territories on the African Continent. As Okafor (2000: 522) has argued, international law's "lack of concern for the internal legitimacy of African states" has left deep scars inside African nation states. In many NGO reports, rather than making these connections among international law, sovereign-state power and civil society's current situation, law is represented as if the legal culture splits into two directions: international law and domestic law (HRW-Z 8/03/02-Land, AI 03/01- Z). In creating this division in legal cultures, NGO reports tend to reproduce a critical silence about how African nations were constructed. Palley (1966) documents the complex nature of many Africans nations' constitutional relationship with the colonial powers. Her work underscores the point that it is too crude to say that international and domestic laws create two distinct legal cultures. International law is the legal framework through which many African nations were conceptualised. International law legitimised and constructed many African nation-states to become the nation-states we see today.

While many geographers might argue that international law and domestic law are separate, the reality is that the entwining of international law and domestic law changes local politics within the African continent. For instance, in the post-WW II era, the international community took note of the anti-colonialisation movement and other social movements, which grew in response to the pre-WW II international law. As noted in Chapter Two, the post-WW II international legal mechanisms, treaties and institutions were constructed to take power away from the sovereign-state, an important political opening for the African nationalist movements. In the post-WW II era, the international community became unified on the point that there was a need to protect the International Declaration of Human Rights. Yet different positions were taken on the issue of colonies,

suggesting that African people's process of decolonisation was a struggle locally and globally (Carter and Trimble 1999).

The local and global struggle is apparent in Southern Rhodesia's legal history. The BSAC-Company rule (1890-1923), Self-Governing Rule (1924-1964), Unilateral Declaration of Independence UDI (1964-1979) are different forms of government in the history of Southern Africa (Rukuni 1994b). Yet, underlying these differences is a similar connection to the legal culture being shaped by Imperialism. For instance, Palley (1966) documents how Southern Rhodesia's legal culture sought to control resources and the economy of the settler colony at the expense of many Africans' civil rights. She suggests that in many cases the government and judicial system shared one interpretation of the rule of law, a rule of law view that ran through the legal culture binding the domestic courts, governments and legal and justice systems. In 1922, the settlers opted for a responsible government, rather than joining the Union of South Africa. The Southern Rhodesian Constitutional Letters Patent 1923 was in force October 1923, when Southern Rhodesia was annexed as a colony. Hatchard (1993:7) offers details of this decision. He states that this event is marked by a decided lack of input by the majority population. It was unlikely that a large number of Africans voted (perhaps less than 60 Africans of an estimated population of 900,000 (see also Palley 1966)). The critical point to take from this literature is the acknowledgment that internationally and domestically law intersected. For example, with each shift in the Administration, the legal structure of the state remained a representative force of sovereign power that protected many forms of settler governance from outside interference. Law was used to protect state structures both inside and outside national borders.

Superficial interpretations of the complex power relations of space, time, law and politics can be found in shifts in the Southern Rhodesian governments' administration, marked by specific dates. However, a deeper reading evaluates how different administrations changed the interpretation of existing laws. Many of these dates mark increasingly conservative views being etched into the administration, which extended these views into the day-to-day administration of the culture, economy and society (Sayce 1987). This

point is made clear in the settlers' responses to Britain's demand that the settlers' allow a majority government. The settlers refused. Instead they declared the Unilateral Declaration of Independence (UDI). Although few NGOs identify that UDI is a defining moment for Rhodesia to develop its legal culture, much of the legal literature acknowledges this point (see Hatchard 1993, 2000). Moreover, various scholars point out that the legal system's interpretation of justice drew upon notions of eugenics (Dubow 1995), Christian morality (Goldin and Gelfand 1975) and ideologies of differentiation (Dubow 1989). Schmidt (1996) and Mittlebeeler (1975) argue that the settlers developed legal language as a political tool, a tool that was strengthened by cross-cultural differences. Racial, gender and cultural differences provided the settlers with justification to exclude African women and men's political participation in the governance of local affairs.

Many NGO reports remain silent on the legal history, the tensions between the international community and colonial governments and the domestic legal and justice systems' conservative and racial interpretations of rule of law, which have been woven into the standing laws of the state. This silence left in many NGO reports creates a temptation in the average reader to begin to embed international legal values into the post-Independence political landscape. However, the key point made by legal scholars, such as Okafor (2000) and Mutua (2001), is that in many cases these values/international norms do not exist. Reading the legal history of the Ian Smith government, which created laws to control the airwaves and newspapers alongside current NGO reports, which are currently documenting the fact that Mugabe has retained these laws to retain control over information, supports the argument made by Okafor (2000) and others. They argue that the colonial legal culture has been extended in space and time into postcolonial nations such as Zimbabwe (Fredriske 1980, N- 20/03/02- NEOM, Z-CIZC-19/06/02; ICG 22/03/02:12; Z-NCA-Reeler 2001, Z-NCA Sithole 2000, AI 25/06/02, AI 03/01- Z, Z-CFU 20/09/01-SR, ICG 26/02/02, ICG 25/01/02, USA-Z-HRR 2000/2001).

The critical point made by Okafor (2000) and others is that the postcolonial nation-state continues to resist the adoption of international norms. Domestic abuses of power could

occur because of the international historical arguments to respect sovereign state power (Carter and Trimble 1999). This literature raises the important question of *whose* norms are for *whom*? When the settlers declared a Unilateral Declaration of Independence (UDI (1965)) from Britain, the settlers made it clear to the international community that the identity of the settler state was constructed around the idea that Africans, such as Mugabe, could be excluded through the state's legal power. According to Godwin and Hancock (1997), the Southern Rhodesia/Zimbabwean nation state has been constructed by this white minority's vision. In theory, under the pressure of events that had come about during UDI, in 1979, Britain negotiated the terms of the agreement with the African guerrilla leaders of ZANLA and ZIPRA. Southern Rhodesia became independent as a republic under the name of Zimbabwe on April 18 1980. The terms of this agreement, known as the *Zimbabwean Constitutional Order* - or the *Lancaster House Agreement* (LHA) - came into effect on December 1979. In 1980, the newly independent government inherited the settlers' constitution, known as the Lancaster House Constitution, with the agreement that some clauses in the constitution would remain intact until 1990 (Sayce 1987, Hatchard 1993). This is the theoretical perception of Zimbabwe's independence. In practice, this nation-state's norms have not become integrated into the international community. In practice, the Rhodesian governments did not change their interpretation of the law. As will subsequently be discussed, rebel Rhodesian leaders who resisted international norms based on the unique identity politics of Rhodesia build on the imaginary of the British and South African population and the vision of the chartered company and settlers seeking self-governance. These identity politics in the legal culture constructed the legal structure, which has been extended in time and space.

This section has offered one reason why NGOs may advocate for legal reform. This section has highlighted several points such as the founding moment of Zimbabwe is a series of temporal threads that run from 1885 - when the Berlin Act 1885 granted Britain the legal right to govern territories on the African Continent - to the present (HRW-Z 8/03/02-Land, AI 03/01- Z, Palley 1966). This section is significant because it suggests the depth of the ahistorical bias in NGO reports which tend to neglect to mention

important themes such as modernity/Enlightenment era/Eurocentric vision historically embedded in international and domestic laws; and the legal structure of the state protecting the settler and postcolonial government from outside interference and internal resistance to the government.

4.4.2 Reason Two: Legal Personality

A second reason why NGOs may be advocating for legal reform is to better understand how many African women and men came to understand their legal personality. For instance, attempts to gain legitimacy in the eyes of the national legal system have always been a struggle. Jeater (1993, 1995) and Barnes (1995) have observed that the evidence of African women's and men's presence in law, politics and economics is notable by their absence. Many African men and women's lives were erased during the settlers' eras. Legal historians capture bare traces of the Africans' legal identity, and their civic consciousness. Palley (1966:xxi) argues that Africans knew how to "...point to the limits of British power" and resist forms of Imperialist control. The "two edged weapon" of law (Palley 1966: xxi) actually reflects the cultural bias and day-to-day violence wrought by these legal mechanisms. The violence of Imperial law in Southern Rhodesia/Zimbabwe has been discussed elsewhere (Palley 1966, Hatchard 1993, also see Tshuma 1998 for full literature review) and others and will not be detailed here. However, all this literature suggests that the structural politico-legal changes in Southern Rhodesia that were ongoing had a much deeper impact in the psyche of the post-colonial person, such as Mugabe.

Upon the first read, the following analysis of the implicit and explicit effects of legal grammar upon the private and public lives of African men and women might appear to be somewhat deterministic. It is presented to simplify the wealth of evidence that suggests that law and order excluded (rather than included) individuals, such as Mugabe, from the justice system. The work of Chavanduka (1979), Sayce (1987), Mittlebeeler (1976), Mathews (1971, 1986), Dubow (1989, 1995), Norval (1996) and Mamdani (1996) collectively leads this dissertation to suggest that historical legal discourses revolved around four major axes of political grammar. The first major structural impact legal

grammar had upon the social fabric of African society was when it was used throughout the public world of Southern Rhodesia/Zimbabwe's politics. Law provided a distinct legal framework that represented the legal doctrines of the colonial/settler regimes rather than African social values. As Mittlebeeler (1976) and Mamdani (1996) suggest, even rather simple political tactics, such as differentiating general law and customary law through a legal clause that when customary law was "repugnant to natural justice or morality" (Goldin and Gelfand 1975: 57), general law prevailed. This meant that there were institutional safeguards allowing the British to control even notions of customary law. This also meant that the colony of Southern Rhodesia had moral jurisdiction over both "traditional" and "modern" forms of law.

Legal grammar had another impact upon the social fabric of African society. The British governmental attitudes used universal abstract ethics, to justify their modes of morality over those of the Africans. For instance, when individuals such as Mugabe attempted to contest British settlers, and Enlightenment era notions of natural law or universal abstract ethics, they were told that they lacked the "morality" (Goldin and Gelfand 1975: 57) of civilized beings. Legal grammar also affected the social fabric of African society. As a third way of repressing the African psyche, state representatives could cite natural law - implying that Enlightenment era values were part of the natural order of progression to civilization i.e. the racial hierarchy of *black/white* - to interfere with the private affairs of African men and women. This interpretation clearly looks to the higher law of enlightenment values:

The African Law and Tribunal Courts Act 24 of 1969 defines "customary law" (section 2). It means the legal principles and judicial practices of a particular African tribe except in so far as such principles and practices are repugnant to natural justice of morality or the provisions of any enactment (Goldin and Gelfand 1975: 57)

Courts have applied two distinct tests in determining when African law is repugnant to natural justice or morality: firstly, if it inconsistent with European legal systems and in particular Roman-Dutch Law; secondly, if tribal laws impress the court with some abhorrence or are "obviously immoral in their incidence" Goldin and Gelfand 1975: 69)

In Zimbabwe, the moral framework of law was used to differentiate races. Mittlebeeler (1976) work is somewhat more transparent. He fully comprehends the contradictions of

the dual justice system. Apparently, since 1913, black Zimbabweans “...keep crimes secret and resort to older methods of obtaining compensation from the culprit, especially when the crime was against the person” (Chief Native Commissioner in Mittlebeeler 1976: 194). Through this line of inquiry, Mittlebeeler (1976: 207-208) questions the political participation of Black Rhodesian’s citizenship if it is “alienated” and “subordinate.” Contrary to urban geographer Robinson's (1997) point that political space was controlled by forces of law and order, this literature review of law in Zimbabwe suggests that the relationship between power and space in Zimbabwe was not because of a particularly close relationship of state power and the organization of space. Rather, urban landscapes were being shaped in spite of this relationship. Mittlebeeler (1976) and Scarnecchia (1994) also document the ways in which Africans were adept at resisting the state with their own unique strategies.

Legal grammar had a fourth major structural, but more subtle, impact upon the social fabric of African society. Palley (1966: 27) observed that the British believed that Africans lacked the “legal ideas of a civilized society.” Mittlebeeler (1976) alludes to the disturbing lack of equality of Africans in the legal process and a number of different standards within the justice system. This lack of legal equality is crystal clear in Goldin and Gelfand (1975: 57) who cite that customary law could be regulated by controlling “...the legal principles and judicial practices of a particular African tribe except in so far as such principles and practices are repugnant to natural justice of morality.” Alternate forms such as racial segregation also provided a multi-layered administrative tool to penetrate the public and private lives of African men and women - controlling even how African men and women managed their marriages and their land (Jeater 1993, 1995).

As many scholars cited above have argued, Africans’ private and public lives were constrained by the settlers’ laws. The presence of legal structures was a day-to-day reality in Africans and Europeans lives. Many contemporary historians represent the settler era of Southern Rhodesia through the violence wrought upon African day-to-day lives through law. However, this trend in the representation of Africans tends to portray the image of the victim. This is not the image this literature review is meant to leave with the

reader. Individuals - such as Mugabe - actively created their own reality. As Mittlebeeler (1976) has argued, an independent system of African social order continued to find support in its cultural roots. Much of this support came from ethnic groups, and within the complex and contradictory relationships between African men and women and the settlers. The critical point is that the law had a cultural bias. Mittlebeeler (1976: 206-207) acknowledges different standards within the justice system (even within the different use of languages, the different value systems of “morality” (see Goldin and Gelfand 1975: 57)).

During the settler era, the executive government assumed that their norms were neutral and notions of justice that followed these norms were for the betterment of the African society. Evidence of this logic is seen in Lugard ((1923) 1965) and Goldin and Gelfand (1975). Mittlebeeler (1976) provides one of the first studies of the cultural biases of European law in southern Rhodesia. African social control was labelled as “wizardry,” their gender-specific norms such as *lobola* were perceived as immoral, even their ideas were not “civilized.” While all of these forms of political and social violence perforated the private sphere of African men and women’s lives, these laws also affected Africans’ sense of community, pattern of friendships, shared goals, ritual and ceremonies of cultural beliefs. The collective, the community and the individual were threatened by the efficiency of laws that had not considered the moral fabric of the local community. Mamdani (1996) acknowledges that the administration of law in the public spheres of African men and women’s lives appear to have taken a sense of self from many Africans. In some cases law became the site in which all that was familiar was taken away: a form of war was waged upon the Africans with the imposition of the settlers’ laws. Legislation such as the African Status Determination Act (1948), African Affairs Act (1927), African (Registration and Identification) Act (1957); the Education Act (1972), the African Education Act (1959); The Housing and Building Act (1967), the Africans (Urban) Accommodation and Registration Act (1951); African Development Fund Act (1948), the African Cattle Marketing Act (1947); African Labor Regulation Act (1911); the Foreign Migration Labor Act (1958) and others suggest the blatant aggression contained in legislation (see Palley 1966). As Mamdani (1996), Goldberg-Hiller (1998) and Shivji

(1995) report the civil rights discourse is contested between the state and civil society. However, Mamdani (1996) brings the argument into the Southern African context and argues that through the process of colonization, African peoples were made subjects, but never citizens of their own nation.

To summarise, this section has offered a second reason as to why NGOs advocate for legal reform. This section has focused on the literature that reveals the legal personality and positionality of women and men and their patterns of resistance to authority and even leadership patterns in the post-Independence era, to suggest that this is why NGOs advocate for legal reform. At the same time, this study is somewhat critical of NGO reports which tend to neglect to highlight important historical themes such as the absence of African women's and men's presence in law, politics and economics, the erasures of many peoples' lives during the settlers' eras and the reality that the legal structure has embedded within it cultural bias and day-to-day violence wrought by these legal mechanisms. Thus, many NGO reports tend to overstate the oppression of the current Administration rather than acknowledge the historical memories and strategies of women and men seeking to avoid encounters with the law. A general conclusion at this point is that while NGOs may have many reasons to advocate for legal reform, they also have a responsibility to offer a more balanced interpretation of current events (see Chapter Three, *Section 3.3.1 Nongovernmental Organisations*).

4.4.3 Third Reason: Oppression

Many NGOs' political agenda is to protect civil society from the state. Yet, without including the information about the legal history and the legal personality of postcolonial men and women, a number of contractions are evident in many NGOs' longer-term agenda. A third reason why NGOs may advocate for legal reform is because there are oppressive legal structures suppressing social movements within the local legal culture (Z-CIZC-19/06/02: 28, ICG 13/07/01:12). The ever presence of these legal mechanisms do play an important role in shaping civil society's response to the Mugabe Administration.

A closer reading of many NGO reports reveals themes such as the political memories of the women and men, memories that originate in patterns of resistance to authority. Many NGOs will use legal language to represent these memories. Oftentimes this language is an attempt to create legal parameters to legitimise this resistance to authority within the legal system. In some ways, NGOs mirror the work of the social movement scholars who have captured the Africans' spirit of resistance to the state by documenting the *Chimurenga Wars* (*Chimurenga* means war of liberation, *murenga* means resisters). For example, a brief review of Phimister (1993) and others reveals that the civil society-state relationships have always been fractured, and many different political identities take form around a specific law. Many individuals resisted state oppression through day-to-day indirect challenges to the law (see Palley 1966, Sayce 1987, Phimister 1993, Schmidt 1996, Z-FG 24/02/00-PE-PE, Z-FG- 10/05/01- PE, Z-FG- 20/04/01-PE, Z-NCA Intro 2000). However, much of the social movement literature conceptualises civil society, state and the legal and justice systems' relationships as changing and modifying old and new relationships.

In contrast, many of the NGOs' reports tend to polarise and oversimplify state and civil society interactions. For instance, many NGOs are quite critical of Mugabe's adaptation and incorporation of the settlers' legal system, legal infrastructure and architecture. Yet a contradiction surfaces when reading the historical legal literature and the social movement literature alongside NGO reports. Many NGOs neglect to mention the legal culture that Mugabe came from. When Mugabe came into power, the legal culture, which shaped Robert Mugabe's identity, was a broad and deep subculture of resistance reacting to the legal reach of the state. Mugabe played an important role in the Second *Chimurenga*. After 1974 he led the ZANU armed struggle (Sayce 1987). In addition, Mugabe like many other Africans did not passively accept the legal and justice system. The struggle of resistance to the state's politico-legal form and legal methods of dispute resolution and interpretation has existed as a political space that lacks "legal personality" (Tshuma 1998:80). This political identity is asserting itself in 2002. Civil groups such as the *Movement For Democratic Change*, the *Zimbabwe Congress of Trade Unions*, the *National Constitutional Assembly*, the *Zimbabwe Human Rights NGO Forum* and others

challenge Mugabe very much in the same way he challenged the Ian Smith government. The real irony lies in the tensions created in the wake of the globalisation of the NIE logic, which argues that the solution is to fund NGOs to report on Heads of State's transgressions of the law (ZHR-NGO 28/09/01-CAA: 8, 41-44, SA-TST 08/07/2001-Gubbay Z-CIZC-19/06/02).

To summarise, this section suggests that many NGOs struggle with the representation of the complex landscape of civil society resisting the oppression of the state. However, in many NGO reports the state is simplistically constructed as the oppressor rather than granted a more complex legal personality that developed in reaction to the settler's oppression. While this sort of simplification allows NGOs to advocate for legal reform, the complex power relations running in and through the legal and justice system, the state and civil society seem to be misrepresented. This point leads to the fourth reason why NGOs may be advocating for legal reform.

4.4.4 Fourth Reason: Oversimplification of State-Civil Society Relationships

A fourth reason why NGOs may be advocating for legal reform is that they are struggling to understand the historical and contemporary state-civil society relationships. As Ahluwalia (2001) and others have argued, the literature tends to oversimplify these relationships. The legal historical literature offers a complex understanding of international, national and local laws reshaping civil society and the state's relationships. Nonetheless, much of the legal geography being constructed by legal scholars tends to homogenise and position the Africans against the Europeans. This literature suggests that the Africans tolerated, resisted and knew the limits of the law. Under this representation, the dual identity of African/European suggests a legal cultural impasse.

Because the literature tends to construct the stereotypical position of the Africans against the Europeans, the empirical evidence that NGOs are currently collecting contradicts much of the scholarly literature. For example, many NGOs report that Mugabe has turned the dynamics of the state against civil society inside out. By this it is meant that NGOs are documenting *how* a Black urban African leader threatens the White rural community

of farmers with legal mechanisms such as Rural Land Occupiers (Protection from Eviction) Act 2001 (Z-CIZC-19/06/02: 35, ZHR-NGO 28/09/01-CAA: 43 also see ZHR-NGO SR 09/01, USA-Z-HRR 2000/2001, Z-RO 03/98; USA-Z-HRR 2000/2001; AI 25/06/02). What is fascinating is that these reports document a reversal of the ethnically differentiated politico-legal relationships that have been documented in much of the legal history (see Section 4.4.2 *Reason Two: Legal Personality*). Moreover, many reports confirm the current commentary about rural versus urban political geographies (see Chapter Six, Section 6.3.1.2: *The Referendum: 12-13 February 2000*, ZHR-NGO-TM 01/01, ZHR-NGO-PV 10/2001, ZHR-NGO 28/09/01-Crisis).

To summarise, this section has offered four reasons why NGOs may advocate for legal reform. The general conclusion developed from this review is that many NGOs focus on the politico-legal patterns to advance their own agenda within the oppressive global capitalist system and to provide a forceful expression of what the world should look like. At the same time, many NGOs create new *truths* and *facts*. And while many NGOs' reason to advocate for legal reform can be justified through a review of the legal historical and social movement literature, many NGO reports do not offer a balanced analysis of the state, civil society and legal and justice system. While this study is interested in NGOs' documentation of changing relationships in and through the state, the judiciary and civil society, this study is also interested in the potential political implications of this information. The point being made is that NGOs collect specific information to provide a forceful expression of what the world should look like and as they do so, this information tends to construct a crisis. The information that they construct highlights patterns of suppression through law rather than women's, men's and children's resistance to these laws.

To support the argument that the text of NGO reports are dominated by three biases, the purpose of this section was to show the biases as this section provides an overview of Zimbabwe's politico-legal history. To conclude this review of the Southern Rhodesian/Zimbabwean legal history, which suggests *why NGOs are advocating for legal reform*, three points will be made about why this review is important to understand

the biases within NGO reports. One, NGO reports do offer a contemporary understanding of the politico-legal economic crisis. Yet, many NGOs hasten to politicise the Head of State's rule of law view. Moreover, many tend to be neglectful of the complex forms of resistance to the state and the multifaceted political reality and cross-cultural legal identity of Robert Mugabe. Mugabe and his wife Sally were legal activists during the Second Chimurenga when they worked to change the constitution. President Robert Mugabe's political career began in the 1960s when he was elected the Publicity Secretary for the National Democratic Party (NDP). Through correspondence, he obtained a B.Sc., an LLB, BA (Admin) and B.Ed. Robert Mugabe helped mobilize and lead the nationalist movement that fought the Southern Rhodesian settlers for passing the 1961 constitution (Sayce 1987). Mugabe's brief incursion into the European legal culture, knowledge and ideas from 1963 to 1973 –while he was in prison - is of a distinct time, Marxist legal philosophy was at the forefront of Southern African legal scholars' debate (Mathews 1971). Mugabe's personal legal history attests to a cross-cultural, complex politico-legal identity. Moreover, these historical facts suggest that rather than interpreting the legal history in dualistic terms (as does Mamdani 1996), one might consider that there are multiple legal histories, cultures and experiences with the settlers' laws.

Two, because many NGO reports simplistically construct a vision of the state as the oppressor rather than as a complex legal personality that developed in reaction to the settlers' oppression, NGOs advocate for legal reform without acknowledging the complex power relations running in and through the legal and justice system; the state and civil society seem be misrepresented. For instance, none of the NGO reports acknowledge that Mugabe's sense of legal personality, as a law student, as a legal activist seeking to re-write the constitution, and a guerrilla fighter distinguish him from many other Zimbabweans. He has retained part of his Shona heritage, but he has also combined his African heritage with an understanding of Imperial law, and the settlers' law and order regime. As a result of this cross-cultural legal strategy, Mugabe is a powerful emblem of the postcolonial legal personality, a persona flitting from one legal culture to another in the constant search for the nexus of power and authority in the postcolonial

era. Moreover, Mugabe's ability to mimic Western vision of western legal ideals, democracy, legal cultures, strengthening institutions, good governance and his decision to develop a pro-democracy position that seems to publicly support laws which could protect civil rights in a democratic society has meant that Mugabe has used his official capacity as Head of State to strengthen the legal and judicial system. For the most part, the international community has supported these activities (Z-NCA Sithole 2000, SA- SA 25/07/01, AI 25/06/02: 23-26, N- 20/03/02- NEOM).

Many NGO reports contain critical silences about the political history of the legal and justice system. But many NGOs neglect to include a discussion about the legal culture and justice system created by the settlers' governmental structures, the historical geography of law, and Africans' resistance to the settler's legal culture, and the significance of Southern Rhodesia/Zimbabwe politico-legal history. The legal history provides the key to understanding *why* NGOs advocate for legal reform. Many NGOs accuse the Head of State for local civil rights abuses. This seems to be in reaction to the historical legacy, rather than in a proactive manner. And far too few NGOs acknowledge that the legal culture's long silence made Zimbabwe a useful nation for the global capitalist system which relies on Heads of State to strengthen the legal framework in a way that excludes civil rights movements. A closer reading of the literature suggests that the World Bank has used Zimbabwe in this manner. Reading Dashwood (2000) alongside EIU reports suggests that the World Bank played a part in dismissing riots and demonstrations while lending millions to Zimbabwe (also see Tshuma 1999), and then funds NGOs to incite the international community with reports of human rights abuses, poor leadership skills, corruption and mismanagement.

Third, another bias is that NGOs are not acknowledging how they are participating in constructing the crisis. For instance, Zimbabwe's political economy during the 1980s and 1990s demonstrates the complex and contradictory situation which arises when International lending institutions, such as the World Bank, insist on *good governance* and *democracy*, tend to hold the law and order method in high regard and emphasize that nation-state leaders should govern in such a manner as to efficiently use laws to control

the economy and suppress rather than liberate civil rights (Tshuma 1999, Z-Insider 31/07/01-O). A closer reading of NGO reports provides the detail to suggest *how* Robert Mugabe assisted in integrating local notions of social justice into the post-Independence legal system. While cognisant of NGOs' agenda to politicise the Head of State's rule of law view, this study seeks to integrate a more balanced analysis of NGO reports. It focuses on the independence of the judiciary system and whether or not the local justice system could integrate the International Declaration of Human Rights into their rulings, a point we now turn to.

4.5 Legal Activists' Politico-Legal Space in the Post-Independence Era

If you analyse the face value of institutions that we have in this country, Mugabe is not a dictator. We have a parliament that is elected every five years. We have a form of dialogue albeit deformed that takes place in parliament and some form of accountability (Z-RO 03/98: 5).

This is a view of the Zimbabwean politico-legal structure in 1998. By 2002, many NGOs have questioned Mugabe's vision of democracy. When Robert Mugabe came into power in 1980 and accepted the 1980 constitutional framework, the Zimbabwean Constitutional Order – otherwise known as the Lancaster House Agreement (LHA) - invested the legislative powers in the parliamentary democracy. Many phrases contained within the 1980 constitution were inherited from the 1961 constitution and were as a result of lengthy negotiations between Britain and Southern Rhodesia at that time. Although the 1990 constitution contained the Declaration of Human Rights, it also contained a long list of extremely repressive security legislation against internal threats (Hatchard 1993:17). By accepting the LHA, Mugabe was bridging the past and the present, believing that his Marxist interpretation of rule of law would help create a state based on equality for all.

The history of the constitution holds the key to understanding the real struggle among the state, the legal and justice system and the global politico-legal economy. The history of the constitution raises the critical question of the democracy equation in all Commonwealth countries- *to what extent could the post-Independence government empower and institutionalise the use of IDHR by the justice system?* Thus, three additional questions become relevant.

- Did the executive government take legal precautions to ensure judicial independence?
- What were the power relations between the executive government and the judiciary?
- Did the executive government (specifically the President) respect judicial independence?

To answer any of these questions with a *no* suggests that the judiciary is affected and to include the IDHR in judicial rulings would bring the legal system and rudimentary legal institutions such as the police, legal aid programs, investigators, public defenders, bar associations, law schools and judges under political attack when the legal system sought to assert its power over the state.

This section provides an introductory assessment of the impact Mugabe has had on the post-Independence legal culture (see SA-HSF 2000c, ZHR-NGO-TM 06/01, ICG 25/01/02). This is not a simple task. Dodson and Jackson (2001) suggest that the visible signs of a troubled legal system can be found in legal transcripts, legislation passed by the government in power and the type of interpretation a judge chooses to make. These technical indications point to a number of technical deficiencies in the legal systems. However, the deeper structural and political problems are usually not immediately visible. These often remain invisible. Structural signs include:

- The political factors and legal cultures
- Personal preference of senior leaders who consider and reconsider legislation passed by elected officials
- Senior leaders who ignored and/or violate laws and legislation, for example, when the executive government and military is involved in judicial decisions, the judiciary will fail to challenge the government's use of security forces allowing the politics of law making to become even more troubled

This section attempts to place the interpretation of constitutional law, statutory law and statutes into a framework of politics and power shared between the judiciary, legislature executive government and democratic institutions (such as the media, non-governmental organisations and civil society). This section highlights that legal power - which legitimises an elected government to its people - lies in the struggles between the court and the state. President Mugabe's legal training suggests that he has had the privilege of comprehending the power of the law, its violence and abuses. With this knowledge, he

has exercised the power of Head of State with a clear sense of how the law could extend his reach of political power.

4.5.1 Violence/Silence: Legal Precautions to Ensure Judicial Independence?

The first question - *did the Mugabe Administration take legal precautions to ensure judicial independence?* - is really a question about the constitution. The constitution is the legal text that constructs the legal role of the justice system and elected officials. To appreciate the answer to this question, we need to examine Robert Mugabe's professional training, because the answer raises two concerns. First, trained as lawyer, Mugabe *sees* socio-spatial relationships of civil society and the state through a worldview conscious of the *power* of the law (Sayce 1987, Palley 1966). At the same time, Mugabe has the power of Head of State. Through the constitution he can orchestrate his Ministers, as well as help define the Acts that Ministers are responsible for. Second, because he has the legal power to make extra-judicial decisions, the scope of his jurisdiction weaves above and through the Supreme Court's jurisdiction (Chapter Six and Seven will provide more discussion). Both of these issues suggest Mugabe is aware of the geographies of fear, social control and power that can be extended through time and space with legal mechanisms (see ICG 25/01/02, SA-BD 09/10/01, Z-RO 03/98:7).

The constitution is the legal document that gives Mugabe the legal right to rule Zimbabwe. The head of state is a political-legal position outlined in the constitution. The President's role is constructed in constitutional law. Changes in the constitutional model - Amendment No. 7, 9 and 10 to the 1980 Constitution and the Presidential Powers Act (1986) significantly changed the balance of power among parliament, the judiciary and the executive government. Presidential Powers (Temporary Measures) Act 1986 means that Mugabe can directly control the high organs of government - such as Chief Justice and other judges of the Supreme Court, ministers, governors, permanent secretaries, deputy ministers - and have indirect control over the decisions of the elected government members. Mugabe's intimate links with the Vice-President, Cabinet Ministers, Deputy Ministers, Provincial Governors, Attorney General, the Chief Justice and other judges of the Supreme Court, The Electoral Supervisory Commission, Public Service Commission,

Director of Prisons, Police Commissioner and others (see Table 4.3, ZHR-NGO –SR-09/01: 21) were established soon after Independence and have remained an enduring feature of his power and influence. He often threatens direct intervention in the justice and legal system (ZHR-NGO-SR-09/01:18-19, Z-RO 03/98:7). Hatchard (1993) argues that this has led an overall disregard of constitutional and legal safeguards that should ensure the independence of the judiciary. In essence, Mugabe has made himself an intrinsic element in the formation of all laws.

Recent evidence provided by NGOs highlights Mugabe's multiple roles and the many arenas of struggles inside and outside official politics. Mugabe began to have the opportunity to be a key player in many spheres – often straddling the role of national leader, and power of the land; the role of the President was no longer a neutral position of Head of State. In other words, to be in the presence of President Robert Mugabe is to be in the presence of the law of the nation. Each amendment to the constitution has added power to his position, and to his consequent influence and power within the role of Head of State.

Mugabe's role as Executive President, through Amendment No. 7 to the constitution of Zimbabwe, allows Mugabe control over most government institutions. President Mugabe has the right to make a wide range of political appointments, including to the Public Services Commissions and the Judicial Services Commission. He signs international agreements and treaties. He has the power to announce marital law. Even if Parliament passes a vote of *no* confidence in the President, the Executive - selected by the President - has the power to dissolve Parliament. The President has the power to exercise the prerogative of mercy, which means that he can give pardon to any person found guilty of a crime under any law (Z-RO 03/98:7).

Table 4.3 The Zimbabwean Constitution's Definition of the President's Role

The executive State President must be a citizen of Zimbabwe by birth or descent, at least 40 years old, and 'ordinarily resident' in the country. The presidential term of office 'shall be a period of six years. Constitution is completely silent on whether a serving President may stand for office more than once, following the repeal in 1990 of s29(1)(ii) which limited tenure to two terms. The President has 'such powers as are conferred on him by this Constitution or by or under any Act of Parliament or other law or convention' (s31H(3)). His constitutional authority, which contains a marked element of personal patronage, includes:

- accrediting diplomats;
- entering into international treaties, conventions and agreements;
- proclaiming and terminating martial law;
- declaring war and peace;
- conferring honours and precedence;
- proroguing and dissolving Parliament;
- appointing and removing Cabinet Ministers, deputy ministers and provincial governors;
- assigning ministerial functions;
- selecting Vice-Presidents;
- Appointing (ceremonially, after required consultations) not only elected Parliamentarians (20 of the 150* Members of Parliament (MP): 12 nonconstituency MP and 8 provincial governors) but other state officials such as Attorney General, The Chief Justice and other judges of the Supreme Court, The Electoral Supervisory Commission, Public Service Commission, Director of Prisons in consultation with Public Service Commission, Police Commissioners, Commanders of armed forces, Controller and Auditor General, Ombudsman, ministers, governors, permanent secretaries, deputy ministers, etc
- exercising the prerogative of mercy;
- declaring a public emergency in part or all of the country (which is subject to Parliamentary resolve and within 14 days requires its approval to be maintained, although 30 days is allowed if Parliament is not sitting).
- The President is **absolutely** protected from legal scrutiny of her or his decision-making by s31K, introduced in 1987 ahead of the switch to an executive presidency

Source: ZHR-NGO-SR-09/01: 18-19, USA-Z- HRR 2000/2001, Z-RO 03/98:7

- country's chiefs (traditional rulers) select 10 of their number to sit as MPs (Mugabe appoints 20 MPs and exerts pressure on the process by which Chiefs select MPs. Thirty MPs have been consistently ZANU-PF members).

Amendments to the constitution neatly illustrate the close interplay between Mugabe's personal, professional and political desires. Each amendment has changed the balance of power shared among the executive government, parliament - which in theory is supposed to pass legislation - and the judicial system - which in theory is supposed to interpret legislation. Mugabe tends to seek the most efficient way of administering his law by placing the nation's political and economic direction in his hands. Amendments No. 7, 9 and 10 have been the three most significant amendments to the constitution. It would be easy to provide a long list of examples, from the recent NGO reports, which reveal how these amendments have been translated into legislation and have changed the material

reality (ZHR-NGO-SR-09/01, Z-MDC-Eppel 2000, AI 25/06/02). But, more generally, three points can be made.

First, we cannot understand the history of Zimbabwe without acknowledging the multiple layers of silence in public politics. This chapter provides a few details of what has happened since Independence. For example, some of the literature acknowledges that members of the ruling Party, ZANU (PF) parliament are known for acquiescence when Mugabe sought to amend the constitution. They were constantly threatened by the power differentials. Furthermore, Amendments to the Constitution are not ratified by the public but are subject only to the ZANU-PF-dominated Parliament's approval (Z-RO 03/98:7, Hatchard 1993, USA-Z-HRR 2000/2001, Dashwood 2000). While members of parliament might seek to represent their constituents, they also were witness to Mugabe's tenacious efforts to limit the sphere of each MP's efforts. For instance, Amendment 10 grants the President sole power to dissolve Parliament. Mugabe's power allows him to appoint or remove a vice president and any minister or deputy minister. While MPs were willing to debate whether or not to declare a state of emergency, and willing to risk Mugabe's anger (he has the power to unilaterally declare a state of public emergency for a period of up to 14 days (under Constitutional Amendment 9)), most feared real debate (see Chapter Five). Amendment 10 also allows the President to appoint 20 of the 150 Members of Parliament (MP). The country's chiefs (traditional rulers) select 10 of their number to sit as MPs. As the President also exerts great influence on this process, all 30 of these MPs have been consistently ZANU-PF members (USA-Z-HRR 2000/2001).

Second, individuals have had to capitalize on the opportunities that presented themselves. While given the opportunity to participate in parliament and the judiciary, many members who decided to stay with their careers knew that these important public roles came at a cost: parliament and the judiciary were structurally dependent on the Head of State in two respects. From 1987 to 1997, members of parliament were all too aware that it was politically unwise to critique, challenge or contradict Mugabe because many were aware of the power imbalances. Many ZANU (PF) MPs - as elected representatives of the people - feel threatened by so much concentrated power. Hatchard (1993) documents the

lack of debate by MPs who have passed important amendments to the constitution - such as the ones cited above. In 1997, ZANU (PF) MPs broke the silence. Their debate in Parliament (ZLP-1997a, ZLP-1997b, ZLP-1997c) is a significant change from Hatchard's (1993) assertion that ZANU (PF) MPs did not debate issues. By 1997, during the Parliamentary Debates - December 9 and 19, 1997 - members of parliament persistently discussed how Finance Bill No. 2 would affect their constituents. It is interesting to note that during these two days of the parliamentary session, a new national identity was being forged. Generally, until this point, many feared Mugabe's power to dissolve Parliament (Z-RO 03/98:7, see Z-TM 8/05/98-O). With such a threat of power over members of parliament (who are elected representatives of the people), parliament is known for passing constitutional amendments with little comment (Hatchard 1993). This consolidation of power in the Head of State has had its political repercussions in the political history of Zimbabwe.

In addition, the Presidential Powers (Temporary Measures) Act 1986 (see Table 4.3.) means that Mugabe can directly and indirectly control the government/judiciary and directly intervene when need be. Hatchard (1993) argues that this has led to an overall disregard of constitutional and legal safeguards that might have ensured the independence of the judiciary. In sum, the net result of President Mugabe having consolidated power in the Head of State is that if a Zimbabwean wishes to pursue a political career, they must consider the ZANU (PF) party as the career choice and desire to pay alliance to the ruling party.

Zimbabwean political analyst - Mapiusula Sithole - acknowledges the coercive effect Mugabe/ ZANU (PF) has held over the land. He provides empirical evidence that national elections are a ZANU (PF) "electoral hegemony", and that ZANU (PF) has dominated the public role of politics since independence:

Zimbabwe had five "majority rule" general elections. The first was the "internal settlement" election of 1979; the second was the "independence" election of 1980; the third was in 1985; the fourth in 1990, and the fifth in 1995. There have been two presidential elections: the first in 1990, and the second in 1996. Although

these elections have always been, contested by different parties, ZANU (PF) has, until the June 2000 election, held electoral hegemony.

Except for the 1979 election which ZANU (PF) and PF-ZAPU boycotted on the claim that the "internal settlement" which authored it, was "illegitimate", ZANU (PF) had, until 2000, decisively dominated both parliamentary and presidential elections since 1980. Its parliamentary seats rose from 71.3% in 1980; 80% in 1985; to 97.5% in both 1990 and 1995. In the presidential elections held in 1990 and 1996, ZANU (PF)'s Robert Mugabe won with equally decisive majorities, winning 83% of the valid votes in 1990 and 93% in 1996 (Z-NCA Sithole 2000).

While the numbers speak some sort of truth about elections, in practice, public politics connected to these statistics are very complex. *Facts* about the violence connected to maintaining this electoral hegemony between 1980-1995 can be found in various human rights reports (see USA-Z-HRR 1993/1994 through to 2001/2002; Hatchard 1993). *Facts* can also be found in the recent NGO reports of the recent violence connected to the parliamentary elections of 2000 and the presidential elections of 2002 (AI 25/06/02: 10, Z-MDC-CO-GN 2000, ZHR-NGO 2000-06, USA-Z-HRR 2000/2001). And some *facts* about the gender relations can be found in a recent NGO report, which acknowledges that

Very few women participate in Zimbabwean politics at either local or national level in any organized party...In 2001, there are even fewer elected female representatives in our democratic institutions than in the outgoing fourth Parliament, which had 21 women MPs. [In 2001] There are 13 elected and one appointed women in our fifth Parliament. The MDC's 7 elected women MPs... For Zanu-PF, the six elected ...Regrettably, all of the latter six victories were in constituencies wracked by significant violence, including against women...In April 2001, Justice Devittie annulled Olivia Muchena's election to the Mutoko South seat because of this violence. Among the State President's 12 handpicked non-constituency MPs was only one woman, Mrs. Edna Madzongwe ... re-elected Deputy Speaker. Four women were appointed as ministers or deputy ministers, but only one to a portfolio post... Oppah Muchinguri (who lost the Mutare North constituency) became Zimbabwe's first female Provincial Governor, of Manicaland (ZHR-NGO –SR 03/01: 18).

Something far more complicated and subtle is the use of legal power and state security forces to silence and quell political activism. In many cases the Mugabe Administration extended its political power through the law. The Official Secrets Act and the Law and Order Maintenance Act (LOMA) are two laws dating from the British colonial era (1890-1979). LOMA gives extensive powers to the police, the Minister of Home Affairs, and the President. People may be prosecuted for political and security crimes that are not

clearly defined. During the 2000 elections campaigns, the Mugabe Administration used violence against women and men who were perceived as supporting the opposition. Many were singled out for assault or intimidation. These included labourers in the manufacturing sector, teachers, civil servants and health workers. In many instances when cases of violence were reported, the Zimbabwe Republic Police (ZRP) did not halt acts of violence, make arrests or investigate political crimes. Zimbabweans went to the election polls on June 24-25, 2000 to elect their parliamentary representatives. Mugabe's ruling Zanu PF party won 62 seats, new opposition party - MDC- won 57 of the 120 parliamentary seats (USA-Z-HRR 2000/2001). But when the Public Order and Security Act (which criminalized the freedom of assembly and freedom of speech) was passed through Parliament in January 2002 Zimbabweans were outraged. Under the POSA

Anyone who engages in, advocates or organizes acts of civil disobedience, or threatens to do so, may be subject to prosecution... (LCHR 19/12/01-POSB) (also see ICG 22/03/02:11, LCHR 19/12/01-POSB-HR).

At the heart of this discussion is that subtle rules, procedures and overlapping interests are at stake rather than the simple maintenance of an "electoral hegemony". The critical point is that the electoral system has never operated as an efficient, neutral machine wherein women and men cast their votes. Nor have votes been apolitically compiled and presented as abstract numbers. The NGOs are beginning to reveal that Zimbabwean elections have always had violence, law, economics, fear, threats and inequalities of power, as the following quote suggests:

In 1985, during the Matabeleland disturbances, the second general election took place, and apart from the forced disappearance of possibly hundreds of ZAPU officials in Matabeleland, there was also pre and post election violence in many places including Harare. Thousands were left homeless and injured, and in post election Harare, government incited rampages that left "several dozen" dead... The government *de facto* allowed these violations to continue for three days in Harare before stopping them...(Z- MDC-Eppel 2000).

The third general point to be made about how the amendments to the constitution have changed the material reality will be about the independence of the court. The independence of the court was established in the constitution when Zimbabwe became independent. In 1986, when Presidential Powers (Temporary Measures) Act 1986 was

passed and then the constitution of Zimbabwe was amended with Amendment No. 7, the Judiciary became structurally dependent on the executive government. Ironically, because the IDHR had been suspended between 1980-1985 and had only come into force in 1985, the clear window of opportunity for the Judiciary to exercise their independence was for only one year (ZHR-NGO 30/09/01: 9-10). Furthermore, with MPs unable to create a real voice of opposition, very few elected members would challenge President Mugabe, a point that Dashwood (2000) and Hatchard (1993) have commented on extensively. And in 2001, LOMA, amnesties and other legal breaches of human rights remain present in the current legislation. However, the Supreme Court began slowly overturning sections of LOMA (ZHR-NGO-SR-09/01: 9-10).

By making changes to the 1980 Constitution, Mugabe began to infiltrate the space of elected government officials and the Chief Justice and other Supreme Court judges. The structural changes have been translated into a wide array of reactions including a political undercurrent among the MPs and the judiciary. Many feel the presence of Mugabe; many will very cautiously overtly challenge Mugabe. Covert challenges seem to be the norm. And because of this caution, a new post-colonial legal culture was made, a point now discussed.

To assert that legal activists were covertly challenging the Mugabe Administration is difficult to substantiate (see Hatchard 1993, Gubbay 1997, UN- COHR 11/02/02, Dodson and Jackson 2001 and Chapter Three, Section 3.3 *Political Practices in the Legal and Justice System*). One of the most reliable case studies to support this argument is empirical evidence of two recent conflicts: Matabeleland and ZAPU (5 Brigade, commonly referred to as *Gukurahundi*) that occurred between 1983-1987. NGOs provide details. The reports suggest that violence/silence has been a large part of the postcolonial legal culture. These reports state that in 1982, bands of "dissidents" were killing civilians, destroying property and sporadically committing acts of violence. Both ZANLA and ZIPRA ex-combatants participated in these acts of violence, sometimes against civilians and quite often against each other. The causes were complex. The point is not to focus on the causes, but on how the Mugabe Administration responded to the violence in

Matabeleland and parts of the Midlands. The government focused on two overlapping "conflicts". The first was the conflict between dissidents and Government defence units (4 Brigade, 6 Brigade, the Paratroopers, the CIO and the Police Support Unit). The second was related to opposition leader Joshua Nkomo's (ZAPU) objection to publicly stated plans to impose a one-party state. In 1983, Nkomo was expelled from Parliament and several top ZAPU deputies were arrested. When the ZAPU rank and file began to protest, the government sent in various agencies (5 Brigade, the CIO, PISI and the ZANU-PF Youth Brigades) to quell all those who were thought to support ZAPU. Included were unarmed civilians in those rural areas that traditionally supported ZAPU and ZAPU supporters in urban areas. Civilians' human rights were violated in extreme ways. The Government's attitude was that the two conflicts were one and the same. Supporting ZAPU was to support dissidents. Rural civilians, the ZAPU leadership and the dissidents themselves have remained silent on the fact that thousands of unarmed civilians died, were beaten, or suffered loss of property during the 1980s (ZHR-NGO 1999b, Z-Today-CCJP 1997).

The dominant tradition of silence was broken in 1997 when the Legal Resources Foundation (LRF) and the Catholic Commission for Justice and Peace (CCJP) published a report entitled: *Breaking the Silence, Building True Peace: A report on the disturbances in Matabeleland and the Midlands 1980 – 1989*. For the first time, Zimbabweans had material evidence of the breadth and depth of the full extent of the violence committed by the Mugabe Administration in Matabeleland: details of the widespread massacres, beatings and torture across rural Matabeleland during 1983-1987. Often the incident was referred to as *Gukurahundi* (which in Shona means "the rain which washes away the chaff before the spring rains" (SA-HSF-Focus 18, 06/00)). A South African paper (SA-HSF-Focus 18, 06/00) and a local report (ZHR-NGO 1999b, Z-Today-CCJP 1997) have provided extensive details of how civilian rights were violated in Matabeleland and parts of the Midlands and rural Matabeleland underwent mass traumatisations:

...a condition that persists to the present: the HSF survey found that rural Ndebele were still mortally terrified that a word against Zanu-PF might bring 5 Brigade knocking at the door next day. But, of course, word of the *Gukurahundi* also spread through the rest of the population and Zanu's fearsome image was

reinforced by outbreaks of violence at every election... (SA-HSF-Focus 18, 06/00).

Yet another part of the postcolonial legal culture was because of the legal outcome of the "dissident" problem. The Mugabe Administration chose to retain the settler-era legislation and to retain a state of emergency. This meant that Mugabe could make extra-judicial decisions, such as sending in Government defence units when he deemed it was appropriate.

NGOs, such as *Amani Trust*, *Amnesty International*, *Lawyers Committee For Human Rights*, and the *International Crisis Group* and many others are breaking the silence about the relationship among the judiciary and parliament and Mugabe (D-PHR 21/05/02-PPE, D-PHR 24/01/02, Z-AT-20/05/02-PE 2002, LCHR 19/12/01-POSB-HR, ICG 26/02/02). Surprisingly, the rich scholarly literature has little to say about the politics of lawmaking in Zimbabwe. The silences that are just beginning to be revealed suggest a confusing complexity about the entire politico-legal system rather than a predictable mode of governance that many scholars assumed was required of a *democratically* elected government.

This section has answered the question - *did the Mugabe Administration take legal precautions to ensure judicial independence?* – by focusing on how the constitution (which constructs the legal role of the justice system and elected officials) grants the Head of State the legal power. This section has suggested that the constitution grants Mugabe the legal power to cut through the Supreme Court's jurisdiction. By making amendments to the constitution, Mugabe has changed the balance of power shared among the executive government, parliament and the judicial system. In short, Mugabe did not take legal precautions to ensure judicial independence. Moreover, Mugabe put the nation's political and economic legal power into his own hands. This section has offered much evidence provided by NGOs that suggests that Mugabe holds a *Rechtsstaat* view of Rule of Law, which believes that highest power is the state (Mathews 1986, see also Z-LRF- LIF - 17/11/02). Thus, members of the executive government, parliament and the judicial system who hold a different rule of law view will be resigned to subtle forms of

agitation. The section below will begin to focus on how legal activists break through this political landscape of silence, power and authority and draw the attention of the Special Rapporteur on the Independence of Judges and Lawyers to Zimbabwe (UN- COHR 11/02/02)

4.5.2 Politics Within Institutions

NGOs have been quite resourceful in bringing new evidence of the legal activists' political practices to light. Many provide evidence of scandals, political crises and situations of conflicts of interest between Members of Parliament and members of the Judiciary. NGOs, such as *Amnesty International*, tend to provide glowing statements about the independence of the judiciary during the 1980s and 1990s:

Zimbabwe has had a strong historical tradition of judicial independence...the courts remained tough on government violations of human rights. In the 1960s and 1970s, and then in the 1980s, judges courageously sought to interpret the draconian Law and Order (Maintenance) Act in a manner that softened its more draconian aspects. Some judges upheld applications brought by human rights lawyers to produce in court those people detained under a State of Emergency, which was declared in 1965 by the Rhodesian government and only lifted in 1989, nine years after independence...

The government provoked a sense of lawlessness and chaos among civil society during the last two years [2000-2002] when *it began openly to defy superior court rulings that contradicted its policies*. Previously, *the government used legislation to evade reforms proposed through court rulings*, for example, the ruling that the death penalty was cruel, inhuman and degrading punishment. But starting in 2000, on the issue of land occupations, the government simply ignored repeated High Court and Supreme Court orders on the legality of the occupations...

....In addition to refusing to comply with Supreme Court judgments, the government began attempts to intimidate the judiciary to pressure some judges into resigning...A public campaign of harassment and vilification continued against sitting High Court and Supreme Court judges. Government officials called on certain Supreme Court judges to step down from a controversial case...

Government pressure stepped up, and as some judges refused to resign, Minister of Information and Publicity Jonathan Moyo reportedly threatened to use the law to remove them. Anthony Gubbay, Chief Justice of the Supreme Court, was forced into early retirement in July 2001 after receiving a series of threats. His resignation reportedly came after he received assurances from the government that if he resigned, it would not put pressure on other judges to resign (AI 25/06/02: 23-26 emphasis added).

Russell (2001a, 2001b) argues that the key question for all judicial systems is whether or not the judiciary is protected from the political influence of elected members of government. In the specific case study of Zimbabwe, the quotation above provides a partial answer. However, the analysis below focuses on judges pushing the boundaries of the working relationship. The judiciary is trying to force the Mugabe Administration to submit to their legal decisions. In other words, these are the politics of lawmaking when the court exercises its right to challenge elected individuals.

Struggles between the judiciary and the Executive President are omnipresent in the High and Supreme Courts's every day work. For example, the Supreme Court is entrusted with the responsibility to integrate the International Declaration of Human Rights into the day-to-day administration of the state. They have a cornucopia of rule of law views that they can use to make their final ruling (see Chapter Three, Section 3.2.1.4 *Doctrines of Justice: Visions of the Role the Legal and Justice System has in Society*). The legal power they create is the beginning of real change in a society – the legal scaffolding for future civil rights cases (Dodson and Jackson 2001). What is interesting is the relatively conservative position that the Supreme Court took for many years (see Chapter Six, Section 6.2.4.1 *The Legal and Justice System*). Surprisingly, ex-Supreme Court Chief Justice Gubbay (SA-TST 08/07/2001-Gubbay), who provides the key cases in which the Supreme Court sought to include international human rights law into the standing laws of the Zimbabwean legal system, retains a professional silence about how “the government used legislation to evade reforms proposed through court rulings” ... (AI 25/06/02: 23). As Williams (2001) notes, judges have a limit to their activism. The example below provides an excellent example of a judge pushing political boundaries in the politics of law making; the subtle forms of judicial activism in the High Court level; and the need to focus on some of the less publicised issues/forms of activism within the legal community. As suggested in Chapter Three, Section 3.3 *Political Practices in the Legal and Justice System*, current and future studies need to follow some of the complex threads of activism within the legal community and link activism within the lower courts to the upper courts in order to better understand how political pressure (that began at the grassroots level)

created political pressure on Zimbabwean Supreme Court judges' rulings in 2000 and 2001 (UN- COHR 11/02/02).

4.5.2.1 High Court Judge Gillespie and CEDAW

The Mugabe Administration signed the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1991. In 1999, High Court Judge Gillespie made the public statement in his ruling on the *Jengwa v Jengwa* ((HH-152-99), 1999 (2) ZLR 121 (H) case that Article 16 of CEDAW was contravened by denying women the right to immovable property in unsolemnised/unregistered customary unions (ZHR-NGO-SR-03/01, Ibhowah 2000: 852). Such courtroom comments are rare by Zimbabwean judges. Yet, this sort of activism inside the legal community holds the potential to change the distance between the Mugabe Administration and the women's movement. What Judge Gillespie stated is that eight years after signing this convention, the Mugabe Administration had not yet incorporated CEDAW into its own law: "international agreements are not binding unless they have been incorporated into our law as acts passed by our Parliament" (ZHR-NGO-SR-03/01:6). In one way, Gillespie publicizes the reality that CEDAW's provisions do not currently protect Zimbabwean women. In another, he began to circulate the idea to individuals within the courtroom who might discuss this case with their acquaintances.

By introducing this idea within the courtroom, political space was opened on a number of different levels. This courtroom announcement holds the potential to change some social relations (Widner 2001). Through the public space of the courtroom, Gillespie put out the cue that women and men should and could challenge mainstream views. In addition, such a point also empowers women's future resistance to the complex and interlocking systems of law, structural inequalities and social relations, which condone their oppression. Lastly, Gillespie extends the idea for a specific reason: to see if there was a broad agreement within the courtroom, and more generally within society that CEDAW *should* be brought into Zimbabwean law, that women *should* be given the right to own immovable property. This is his way of advancing a vision of social justice/rule of law

into the mainstream politico-legal culture to create a dialogue among the state, the courts and society.

This is a nuanced and subtle form of political activism by a member of the judiciary: Gillespie publicly challenges the Mugabe Administration for not incorporating the international treaty into domestic law. It is one of many complex threads that weave together the fabric that supports future bold moves in the local women's movement. Such subtle activism holds symbolic power for the future, as new laws are written. However, this NGO report suggests that such public statements that support the Zimbabwean women's movement are rare. As the following points suggest, the High and Supreme Court judges' willingness to remain silent on such issues signals deeper problems about incorporating the IDHR into Zimbabwean laws which would allow civil society – particularly women – greater leverage to challenge state and elected officials. Unfortunately, the silence condones a certain level of day-to-day violence against women, and exacerbates three other structural inequalities that hold the potential to disempower women.

First, as discussed above, the number of women MPs is very low (ZHR-NGO-SR-03/01). As well, the democratic process that made it more difficult for women who were vocal about women's issues to become elected, changed in 1987. In 1987, public rallies and meetings by the formal opposition party (PF –ZAPU) were banned, their public offices were closed by the state, and Matabeleland's local authorities were dissolved, under the rubric of maintaining peace in the new country. In order to sustain peace, publicly at least, ZANU (PF) and PF -ZAPU agreed that the two parties would unite under the "Unity Agreement." This political, rather than military, solution to the dissidence problem marked a substantial change in the powers of the President (Hatchard 1993, Z-RO 03/98). As previously discussed, the judiciary and MPs were structurally dependent on Mugabe. In the 1990s and up to the present, it is possible that a female MP would risk her career through engaging in a debate about women's issue. But most women in the Zanu-PF's Women's League (ZHR-NGO-SR-03/01: 19) seem to have the political agenda of the party, not of women's issues, uppermost in mind.

Second, in general, a pattern of silence about women's issues became more deeply entrenched in public politics after 1987. At one level, the whole discourse of Rights and Freedoms had been co-opted by ZANU (the precursor of Zanu-PF). For instance, the 1980 election manifesto listed 13 Fundamental Rights and Freedoms and promised that women would enjoy the right of equality with men 'in all spheres of political, economic, cultural and family life' ((ZANU 1980:16 in ZHR-NGO-SR-03/01:5). In outward appearances, the Mugabe Administration granted some gender equity through law: 1982, the Legal Age of Majority Act (LAMA), the Matrimonial Causes Act, the Maintenance Act, the Taxation Amendment Act. Yet, as the footnotes of the NGO report suggests, the focus was on passing the law and on supporting the appearance that the Mugabe Administration was supporting the women's movement. As this quote suggests, the Mugabe Administration publicly seems to support women's empowerment. Yet, in practice, powerful barriers are present that prevent women from candidly speaking, as suggested by the quotation below:

In December 2000, Zanu-PF enlarged its Central Committee to include extra 50 members of its Women's League, five from each province. However, real power remains with the Politburo, now expanded to 30 members personally chosen by the State President and Zanu-PF Secretary-General, Robert Mugabe. The current Politburo remains an almost exclusively male preserve (ZHR-NGO-SR-03/01: 19).

In short, it seems that the representation of women in ZANU (PF) party is used as a benchmark for women's empowerment, rather than as a real resource for legal activists to use when agitating for women's rights. At another level, although there are a few expectations, MPs usually did not bring women's issues to parliamentary debate. Thus, there would be little reason for parliament to pass CEDAW. At yet another level, if a woman wished to pursue a political career, she had to work within the constraints of society's beliefs of how she should behave, as suggested by the quotation below:

Some, like Margaret Dongo, resisted these pressures and played prominent roles in the more recent struggle for gender equality. Others negotiated a middle path within their political parties, assuming political prominence while enunciating culturally acceptable views on the proper role of women. There is, for example, a wide discrepancy between views attributed to Minister Mujuru as a young fighter in the Mocambican camps, and her later views which seem to advocate working

within, rather than confronting, patriarchal relationships and gender inequities. After Independence she dropped her *Chimurenga* name of *Teurai Ropa* (meaning 'spill blood') and reverted to her given name, Joyce (ZHR-NGO-SR-03/01: 5).

These details suggest that women who were in the public sphere and could draw attention to gender issues were given less room to manoeuvre after 1987.

Third, the structural problems that affect gender equity among male and female MPs are mirrored in the courtrooms. The views being advanced with the courtroom tend to be dominated by men: "In the judiciary, only six of 24 High Court judges are currently women, three of whom were appointed in 2001. No women serve on the Supreme Court bench," and the women still represent the minority on law faculty academic staff, as partners in legal firms and on the magistrate's bench. (ZHR-NGO-SR-03/01: 17).

However, the possibility of having a woman's rule of law view advancing an agenda inside Zimbabwean courtrooms is increasing. In 1997, the majority of students in the Faculty of Law, University of Zimbabwe were women (ZHR-NGO-SR-03/01: 17).

Although these inequalities currently affect the women's movement, female lawyers, judges and academics have taken the first step forward to break the patriarchal gridlock of the Mugabe Administration, which should create interesting dynamics in post-conflict Zimbabwe.

This is a narrow, but informative, window into understanding how the civil rights movement in Zimbabwe became obstructed by structural changes that began in 1987, and the possibilities for change in the late 1990s. Sarat and Scheingold (2001b) suggest that lawyers are often the courageous adventurers who expose judges to new ideas. Inside the legal system, judicial opinions and interests are rooted in and often transformed by, political struggles outside the courtroom. Often lawyers will frame the possibilities and boundaries of a case, and allow a judge to develop an alternative view on the case. Through this case study, we can see some of the gender-specific struggles in and through the politics of lawmaking.

This case study suggests several points. The Mugabe Administration places a gridlock upon the careers of many male and female MPs, which in turn affects the legal system. While the judiciary is constrained, civil society is continually being exposed to views that suggest a different set of norms: abortions, divorces, birth control, condoms, situations where women can speak freely about their rights; situations where women are free from violence in the home, marketplace, fields, factory; relationships where women can choose with whom they wish to have sexual relations. These ideas are prevalent in the society. These ideas create fears, concerns, dreams, desires and hopes of the sort of life these women want to live as modern/empowered/independent women of the 21st century. Yet, these ideas are not legitimised in the legal system, which legitimises men and women's choices - a clear indication of the deeper structural and political problems of this legal system. Thus, women's rights are constrained by three layers of oppression: a) the law; b) the lack of empowerment of the CEDAW in the standing laws of the country; c) social values, which are reproduced in a society that condones violence, and condones confusing social roles of modern/traditional women. This example suggests that a much wider audience whose political, cultural, psychological vision is woven into the texture of the court cases surrounds the vision of Gillespie. Obvious constraints affect the judiciary such as the complex combination of the 1987 "Unity Agreement", the Presidential Powers (Temporary Measures) Act 1986 and the retention of emergency legislation.

This section has suggested that NGOs have been quite resourceful in bringing new evidence of the legal activists' political practices to light. This section has presented evidence of the professional silences in the Supreme Court, particularly about when it sought to include international human rights law into the standing laws of the Zimbabwean legal system (AI 25/06/02: 23); the pattern of silence about women's issues in public politics (ZHR-NGO-SR-03/01:5) and other struggles in and through the legal and justice system as the judiciary sought to draw the International Declaration of Human Rights into the day-to-day administration of the state (Dodson and Jackson 2001). The significance of this section is that it suggests that the space of judicial independence was relatively narrow because Mugabe did not respect judicial independence. The next

section will probe more deeply into the practical politics within the space of judicial independence.

4.5.3 Respect for Judicial Independence: Shadows in the Justice System

The politics connected to the *post-Independence government allowing the judicial system to integrate indigenous interpretations of IDHR*, can only be understood if a deeper question is asked: does the executive government (specifically the President) respect judicial independence? This is a complex question. Those who have little understanding of how justice is drawn into the legal system are referred to Chapter Two, Three and Six (see also Shapiro 2001, Dodson and Jackson 2001, ZHR-NGO-SR-09/01, SA-TST 08/07/2001-Gubbay). This discussion describes how justice is drawn into the legal system with concrete examples. This will suggest why this dissertation has given the post-Independence judicial system the label “shadows of a justice system”.

As noted in Chapter Three, rule of law is upheld through the triangulated relationship of state, civil society and the legal system, through the delicate equilibrium with ruler-societal relationships, and bound together with collective arguments, reciprocal conventions, loyalties and cultural, political and economic forces. When interpreting the law, judges are given the legal responsibility to choose which rule of law view to advance to pursue a political, economic or social agenda. This in turn becomes legal power. The key to a state’s control over legal power lies in giving the legal institution - a hierarchical, bureaucratic system filled with key players who embody the role of agents of the law - the power to administer the law. Thus, the authority of the sovereign-state is legitimised and the legal right of the state is re-asserted - even if the interpretation of rule of law is coercive and forces social order against local notions of justice. However, the Mugabe Administration has used its legal power to diffuse the legal power of the justice system. In other words, there has been a redefinition of the legal order

Former Chief Justice of Zimbabwe, Gubbay (SA-TST 08/07/2001-Gubbay) acknowledges the long history of negotiation with the Mugabe Administration: "Many judiciaries are demonstrating a degree of activism... at times creating conflict with the

government in power". In all likelihood, Gubbay spoke from his own experience working as a Supreme Court Judge from 1983 to 2001. For many years he navigated within the boundary of activism granted to him by the Mugabe Administration, and the difficulties of a professional position, which can change political and professional relationships with the state (see AI 25/06/02: 23-26). Sayce (1987) provides much evidence from the Unilateral Declaration of Independence (1965-1979) period wherein the Smith government quelled nationalist movements with many laws and developed an internal ritual of using laws to suppress dissidence. However, more recent NGO reports suggest that many UDI period laws - such as LOMA - continue to be used in the post-Independence era. For example, during the Southern Rhodesian Unilateral Declaration of Independence (1965-1979), security legislation was produced and laws enforced, that sought to control civil liberties (mobility, public voice, written texts and airwaves) were all part of the strategy. Since the Law and Order (Maintenance) Act was implemented in 1965, censorship has been used in the pre- and post-Independence era of Zimbabwe (1980) for political reasons. Moreover, while the settlers created the original laws, such as the Emergency Powers (Censorship Publications) Order 1965 which established the censorship, the post-Independence government broadened the settlers' internal security laws as they adapted to technological advances in the Western world. For example, the Mugabe Administration passed the Entertainment Control Amendment Act (1983), which widened the scope of the original Emergency Powers (Censorship Publications) Order 1965 to cover video material (Sayce 1987).

Consequently, there has been an indefinite redefinition of the post-Independence era between the UDI laws that remain active in the eyes of the court, and the post-Independence government's retention of these laws to use as a symbolic force of power, threats and violence. Section 4.4 entitled *Legal Personality* suggests the parameters of men's and women's daily relationship with the state. The NGO advocacy in all likelihood is supported by a widespread underground movement. A key informant, Simbarashi (male: SLK98 01) suggests that this underground social movement is quite active:

People are not quiet. They talk about needing some changes everyday. Some, (usually men at work places) think that the Smith government was better....things are getting worse.

Simbarashi's (male: SLK98 01) comment holds several meanings. The postcolonial era was supposed to bring independence, and civil liberties. Yet, Sayce (1987) provides a sense of the overarching agenda of post-Independence government's laws. She suggests that the new laws that have been passed focus on constructing anti-racial legislation. New laws have been passed the area of sport, education, employment and accommodation. At the same time, the post-Independence government has continued to make use of the legal status of a state of emergency to control internal political dissidence and to eliminate political opposition. During the early years (1980-1987), the government continued to justify the state of emergency on the basis of continued dissident activity and continuing violence, particularly as attacks on local peasants and contacts between security forces and dissenters in Matabeleland continued. The issue of national unity was strained in the circle of government, as evident in the political scene between ZANU (PF) and PF - ZAPU. The national state of emergency had been renewed forty-nine times (up to 1990) since its original proclamation in 1965 (Hatchard 1993). Since 1990 ZANU (PF) has possessed full executive powers over legislation relating to internal defence (Z-RO 01/98, see also Palley 1966: 749-750, 730, Godwin and Hancock 1997: 49, 70-79 for similarities to settler government).

Hatchard (1993) and others (Raftopolous and Phimister 1997, Z-RO 03/98) acknowledge the invisibility of the important legal mechanisms that are independent from the powers of the judicial and legal system, but continue to reside with the Mugabe Administration. Hatchard's (1993) study of individual freedoms and state security in the African context is particularly helpful to understand this invisibility. African leaders have used states of emergency in the day-to-day ruling of many African countries. These *quasi-emergency laws* give the government the "sort of powers normally associated with a state of emergency" (Hatchard 1993: 5) and allow the executive government to retain political and economic control in the face of widespread opposition.

The invisibility of this legal power is doubly dangerous to individuals because it sits on the margins of what the courts consider just and/or legal. Many of these political tools

pose a clear threat to individual freedoms and rights. And the scope of the executive government is enormous, because through a complex series of international agreements - that *allow a government to use violence against society* - the government has the freedom to use these intensely political tools. As Hatchard (1993) argues, these pose a clear threat to individual freedoms and rights. In some cases, governments interpret legal documents in a way that will eliminate political opponents, as has been the case of Zimbabwe (Raftopolous and Phimister 1997, Z-RO 03/98, SA-TST 08/07/2001-Gubbay)

In the narrowest sense, the ideal situation would be to eliminate the quasi-emergency laws put in place by the settlers – such as the Emergency Powers (Maintenance of Law and Order) Regulations of 1965; the Preservation of Government Act; the Indemnity and Compensation Act 45 of 1975; the Emergency Powers (Security Forces Indemnity) Regulations of 1982. In essence, these laws support the actions of men and women who act on behalf of the State "in good faith". Many state that they cannot be held liable for their conduct under either criminal or civil law. This includes police, army and civil servants (Z-MDC-Eppel 2000). But in a broader sense, one would have to erase the memories of violence condoned by the state. The ability of the Mugabe Administration to use this legislation constructed the *Gukurahundi* era silence. Mugabe chose to use his autonomy to create the law as he wished. He passed Clemency Order No 1 of 1988, which granted a general amnesty for all political crimes committed during the 1980s up to that date (Z-MDC-Eppel 2000, also see Chapter Six). The key point is that many of these laws have become a resource to the Mugabe Administration: they became a cornerstone to the post-Independence identity. The Mugabe Administration could threaten individuals disputing the government's use of legal tools - such as LOMA -, which allows the Government the legal power to control the press. These legal mechanisms were used during the Unilateral Declaration of Independence (UDI) to prosecute political opponents of the Government, such as Robert Mugabe who was imprisoned under LOMA (ZHR-NGO-SR-09/01). LOMA gives extensive powers to the police, the Minister of Home Affairs, and the President to address political and security crimes. In short, although the Constitution provides for freedom of expression, the inclusion of LOMA and Official Secrets Act limit this freedom in the "interest of

defence, public safety, public order, state economic interests, public morality, and public health" (USA-Z-HRR 1996/1997). In 1997, a number of NGOs requested that LOMA be re-written. It was rewritten as the Public Order and Security Bill, which would have to be approved by the President to become law. The Mugabe Administration appears loath to let LOMA's symbolic power slip away, as suggested by the following comment by an NGO:

...President Mugabe *refused* to sign POSA into law, after he had granted war veterans the financial package which was the first policy step in wrecking the Zimbabwean economy and *after Parliament had passed it* in 1998. He preferred to retain the colonial LOMA. Already the Supreme Court has struck down as infringing our constitutional rights s50(2)(a) of LOMA, which had been omitted from POSA. Sections 30(1), 44(1)(a) 51(2) and 58 of LOMA are also being challenged as unconstitutional.

Mugabe has used two specific legal instruments to achieve his own objectives: his Constitutional prerogative of mercy; and his own Presidential Powers (Temporary Measures) Act (PP(TM)A) (cap 10:20), passed in 1986 in anticipation of an executive presidency and used only four times by the outgoing president, presumably on the advice of Robert Mugabe as Prime Minister. (ZHR-NGO-SR 09/01: 19 original emphasis)

Although these laws grant the Mugabe Administration the legal power to use violence and abuse legal power, the violence committed by the state puts the judiciary in a very complex situation, for all the reasons cited above. In light of all the constraints facing them, the judiciary ability to transform the post-Independence legal system into an authentic post-colonial legal system has had a marginal, rather than truly transformative, effect on the settlers' laws.

In summation, while male and female professionals in the legal system strove to bring justice into the legal system, the situation has been made tremendously complicated by the retention of the quasi-emergency laws, the long history of the state of emergency and the fact that Mugabe could use the Presidential Powers (Temporary Measures) Act in 1986 to override judicial decisions. This has placed many legal activists in a position where they are trying to find a foothold in the "shadows of a justice system".

This section has attempted to ask and answer whether or not the executive government (specifically the President) respects judicial independence by focusing on the subtle politics among Mugabe, civil society and the judiciary. Three important points have been made. One, the postcolonial state continued to renew the national state of emergency, has possessed full executive powers over legislation relating to internal defence and has used quasi-emergency laws to threaten to individual freedoms and rights (Hatchard 1993). Two, the ability of the Mugabe Administration to use this legislation constructed the *Gukurahundi* era silence (Z-MDC-Eppel 2000, also see Chapter Five). Three, the judiciary has only been able to make marginal changes to the oppressive settlers' laws allowing the postcolonial state to retain its colonial legal personality (Z-RO 01/98, see also Palley 1966: 749-750, 730, Godwin and Hancock 1997: 49, 70-79 for similarities to settler government).

4.6 Discussion and Conclusions

One, this overview of Zimbabwe's politico-legal economic crisis through information produced by transnational/local legal activists suggests some of the rhetorical patterns found in the information produced by transnational legal activists. Patterns discussed in this chapter suggest many NGOs' rhetorical devices also mimic the language found in World Bank-Commonwealth conversations.

Two, there is an urgent need to acknowledge the broader context in which some of the NGO reports have been constructed. This chapter began by setting the context. At the global level, Emeka Anyaoku (Commonwealth Secretary-General) met with James Wolfensohn (World Bank President) to discuss the new development framework put forward by Mr Wolfensohn in 1999 (CS- 4/6/99-PI).

The Commonwealth/World Bank policy documents use the language such as financial architecture, deepening democracy, anticorruption and good governance development initiatives criteria for democracy (CS-4/5/2001-PI, CS- 4/6/99-PI, see Bayart 1999). With this vision of the broader context affecting NGOs' production of information, the argument has been made that many reports written during the Zimbabwean politico-legal

and economic crisis seem to have a parallel agenda as the World Bank/Commonwealth New Institutional Economics /Law and Development Movement (NIE/LDM) legal-institution-strengthening initiative. Moreover, the information found in many NGO reports had had an impact upon Zimbabwe's role in international relations (UK-TG 29/10/01, ZHR-NGO 9/10/01 AT-SNS-Sept, ZHR-NGO-TM 10/01:2).

Three, NGOs are identified to be part of the capitalist system, with a reach both global and local when they speak the language of the funding agencies. This language is in turn, used to suggest new practices and policies. The political discourses identified in this chapter suggest the complexity of this logic. This chapter has positively reviewed NGO reports, acknowledging that these are important sources of information. NGO reports play a critical role in *changing* the political economy of information. NGO reports are available through the Internet in both the North and South. Many NGO reports can be fed into the political practices of international lending agencies. And, as has been argued in this chapter, NGOs use the NIE/LDM discourses of *corruption, good governance, mismanagement, poor leadership, strengthening institutions* and others.

These discourses are significant, insofar as that they tend to support the political agenda of the global political economy rather than local legal activists, struggling for local civil rights movements. This chapter has attempted to reveal how these discourses are constructed, built through a number of rhetorical layers. One layer is that abstract economic analysis is no longer in vogue, particularly after the ESAP disaster. Another layer is that abstract quantitative evidence of physical violence has become the new medium of this communication (Kent 2001). The Mugabe Administration's condoning of physical violence is widely available in many NGO reports. We have evidence that the global political economy is paying many NGOs for hard evidence of state condoned violence such as torture, brutality, threats, death sentences and many other forms, reproducing the general equation of *bad leadership = economic crisis*, and further sensationalising the day-to-day reality of economic hardship with evidence of physical violence (see SA-HSF 2000c; ZHR-NGO 2000-03, ZHR-NGO 05/2001, ZHR-NGO 05/08/01; Z-NCA-Reeler 2001; Z-MDC-Eppel 2000). A third layer is that abstract

economic statistics support this style of argumentation, providing quantitative data to suggest that the Mugabe Administration has become an icon of economic and political elements antithetical to the good governance/ideal state construct. Much evidence has been offered to suggest that NGOs have participated in producing and reproducing the *anti-ESAP, corruption, mismanagement, and bad governance* discourses that will support outside intervention in the form of new international human rights laws or economic laws.

The key point is that these discourses construct a very general equation of leadership, law, economics and violence that tends to exclude rather than include the possibility of deeper analysis. Moreover, deeper analysis is often shadowed by the NIE/LDM logic which focuses on finding problems in *institutions*, and solving them with legal procedures and constructing economic laws. The types of contemporary political discourse that many NGOs use ranges from neoclassic economic language of cost-and-benefit analysis to the legal discourse of *rule of law, human rights, good governance, democracy, private property rights*, etc to *strengthening institutions, good governance and pro-democracy* rhetoric has been achieved through the redefinition of development policy and practice and its integration with the fast growing agenda of human rights. Combined, these discourses appear to have created changes in the Zimbabwean legal culture. As argued in this chapter, NGO information is fed into the global power relations inside and outside national borders, specifically to organisations and institutions that seek to take legal power away from the state.

Four, this analysis provides some general observations about the new political structures being constructed through the use of this legal discourse. Perhaps most obvious is the political actors defining the problem and solution. As noted, NGOs assist in the social construction of the new politico-legal and economic history of Zimbabwe. The language they are using connects the economic crisis to the integrity of the legal system. This equation will be produced and reproduced by scholars and researchers who rely on NGOs form of representation. The key point is that it is important to acknowledge that many NGO reports contain critical silences about the political history of the legal and justice

system. These silences, in turn, will have far reaching effects upon the social construction of the problem and solution in the present and the future.

Five, the empirical evidence lays the groundwork for a theoretical critique of the state transformation/democracy/human rights literature. This chapter has begun to raise new questions about *how* the construction of Zimbabwe's politico-legal crisis serves the global political economy. This chapter also raises the deeper questions about why Zimbabwe was excluded from the Councils of the Commonwealth in March 2002 (ZHR-NGO 28/09/01-Crisis, CS-9/06/01-01/55). In addition, this chapter suggests that manner in which the NGOs represent the legal and justice system convey to the rest of the world is significant, particularly as this creates the potential for the NIE/LDM initiative to be applied to the post conflict Zimbabwe.

As noted in the empirical evidence presented, NGOs tend to represent dominant/subordinate relationships in the state, civil society and legal and justice system hierarchy in the following manner. The state is dominant. Civil society is clearly subordinate. Whereas, the legal and justice system is represented as not quite equal to, but nearly equal to the state. As noted in this chapter, since 1997, many NGOs have used legal language and legal cases to politicise Mugabe's rule of law view and bring to light his abuse of power. Many NGOs argue the Head of State is a political-legal position outlined in the constitution. Many NGOs connect themes such as Mugabe's disregard of constitutional and legal safeguards, the independence of the judiciary, imbalance of power, control over the high organs of government - such as Chief Justice and other judges of the Supreme Court and threats of direct intervention in the justice and legal system (ZHR-NGO-SR 09/01: 18-19, Z-RO 03/98:7). These connections establish that the power imbalance among state-civil society – the legal and justice system has maintained the silence cloaking the Mugabe Administration's violence in Matabeleland (1983-1987) for many years (SA-HSF-Focus 18, 06/00, ZHR-NGO 1999b, Z-Today-CCJP 1997). NGOs advocate for legal reform by demonstrating Mugabe's direct intervention in the justice and legal system and Mugabe's intimate links with the Vice-

President, Cabinet Ministers, Deputy Ministers, Supreme Court Judges, Provincial Governors and others (ZHR-NGO-SR 09/01: 18-19, Z-RO 03/98:7).

At the heart of this theoretical critique of the state transformation/democracy/human rights literature is that much of the state transformation/democracy/human rights literature does not highlight the significance of these patterns of representation, or explore the political implications of representing the problem/solution in this manner. As has been argued in this chapter and others, these patterns in representation must be brought to light so that there are no assumptions about how this information is being constructed, particularly as it is being constructed at a time of rapid change, and different stakeholders at different geographic scales are eager to use this information. While information being generated by NGOs has the power to rewrite global politics, political structures being through NGO reports are filled with a number of silences and assumptions. Many tend to represent the legal and justice system as almost as powerful as the state. This empirical evidence is significant because NGOs construct patterns of domination and subordination typically not visible in this landscape. The politics of lawmaking is such an example. NGOs offer several insights into the structural barriers preventing the High and Supreme Court judges from using international laws that the Mugabe Administration has ratified, and integrating these into the standing laws of the land (see HRW-Z 8/03/02-Land, AI 03/01- Z, see Braden and Shelley 2000). On the positive side, NGO reports help explain the relatively conservative position the Supreme Court took for many years, and very infrequent integration of the International Declaration of Human Rights into the day-to-day administration of the state (Dodson and Jackson 2001, SA-TST 08/07/2001-Gubbay). However, the negative side of NGOs reports is that they leave the impression that Mugabe infiltrates the space of elected government officials and the Chief Justice and other Supreme Court judges.

The critical silence that has been left unexamined in the TAN framework is that many NGOs tend to illustrate a bias in their representation of Mugabe. Moreover, many are quite critical of Mugabe's adaptation and incorporation of the settlers' legal system, legal infrastructure and architecture, and his tendency to make extra-judicial decisions.

Moreover, many NGOs are quite resourceful in publicising situations of conflicts of interest between Members of Parliament and members of the Judiciary. Evidence of scandals and political crises are used to raise questions about the independence of the judiciary.

Moreover, this pattern of representation has a second and much deeper effect. It has the power to create a distinct hierarchy of truth/untruths. These reports tend to keep intact many silences about Mugabe's personal history. However, the analysis might be sharpened if Mugabe's personal history and the broader historical context were written inside many NGO reports (Sayce 1987, Palley 1966). The significance of NGOs silencing the legal history is that they tend to overstate Mugabe's use of laws, which have been part of the state apparatus since the settler eras.

To further this theoretical critique of the state transformation/democracy/human rights literature, this pattern of representation has another effect because many relevant themes are not brought to light. For instance, themes such as the historical geography of law; Africans' resistance to the settlers' legal culture; the importance of time; shifting legal space; the long history of African women and men's resistance to the state/legal system; the sorts of socio-spatial patterns that have evolved as the result of law as a political tool; the significance of legal historical literature documenting political processes within the Southern Rhodesia/Zimbabwe politico-legal history; why western legal norms imposed as a development strategy might be dangerous to local civil rights; or why the Commonwealth's 54 member countries are all very vulnerable to the World Bank's development initiatives as the two institutions deepen and expand collaboration; and many other topics (CS- 4/6/99-PI). The significance of this practice is to sustain many critical silences about local experiences with human rights and social justice issues. By silencing the legal history, human rights advocates speak to the international community based on the dramatic changes in the legal culture. Many do present the subtler struggles outside the legal and justice system, struggles that occur even before specific issues are brought to the courtroom.

The sixth and final point is that the empirical evidence also suggests a theoretical critique of the post development literature. Post development theorists do not seem to be focusing on the shift in language, or how economics, politics and law run together in complex ways. Moreover, because post development theorists neglect to engage with the power of legal discourse, they neglect to highlight the power of legal discourse, particularly how the NIE/LDM language equates legal institutions with economic stability.

The critical point being made is that the post development theorists have tended to ignore that NGOs are speaking to an audience of international donors and lending agencies that have shifted their thinking about development and embraced the NIE/LDM logic, producing and reproducing the very general equation of leadership, law, economics and violence. These discourses flow through the Commonwealth, and other geographic spaces as researchers, scholars, the media, etc cite NGO reports -documenting Zimbabwe's political and economic crisis. Scholars who rely on NGO reports as an important source of information will be challenged by NGOs' construction of the problem/solution, their language of *institutions* and the spatial analysis of legal activism. As suggested by the details provided above, NGO reports have become a vital element of the transmission of information producing and reproducing these relationships, and altering the territorial shape of local justice and legal systems. NGOs provide evidence of the territorial relationships in and through the state, judiciary and civil society, altered by global initiatives of international lending institutions and the North seeking to impose international human rights norms upon postcolonial landscapes. However, the underlying agenda of NGOs seeking to take power away from elected officials and seeking to strengthen the legal power of the legal system over the state by using the NIE logic needs to be carefully examined by post development theorists in the present and the future.

This chapter provides the backdrop for Chapters Seven through to Nine that will provide a more critical review of the theoretical literature. Chapter Seven sweeps aside the fine-grained details presented in this Chapter and the next two chapters. Chapter Seven will examine how NGO reports strengthen and reproduce NIE/LDM logic. This analysis seeks to evaluate the political implications of this information and to better understand how

NGOs reports feed into NIE/LDM logic and also hold the power to damage Zimbabwe's future politico-legal economy. The analysis will suggest that these reports – if read together - are also designed to assure international lending agencies that NIE/LDM would serve an important function in Zimbabwe. As a temporary solution to the current crisis, rule of law *modernisation/progress* projects would alter the economic and political situation, including state-condoned violence. As a long-term solution, strengthening legal institutions to offer some stability to the economic situation might show African countries how to construct liberal democracy. More specifically, the analysis illustrates that NGOs' use of language - although representing current events with a layered vision, scope and intensity only possible by being in Zimbabwe - is structured by the rules of international lending agencies and international human rights interests.

Chapter Five: Local Voices Protesting the Post-1997 Asian Financial Crisis Global Anticorruption Initiative (*Chikafu Cheupenyu's* Analysis of the *Chidyausiku* Commission)

5.1 Introduction: *Chikafu Cheupenyu* - In the Shadow of Anticorruption Movements

Chapter Four argued that there is an urgent need to acknowledge the broader context of the Zimbabwean politico-legal and economic crisis. This chapter will establish that the Zimbabwean politico-legal and economic crisis is connected to the 1997 World Bank post-1997-Asian-Financial-Crisis-global-anti-corruption initiative. In 1997, the World Bank produced an anti-corruption initiative. In 1999, Commonwealth Secretary-General Emeka Anyaoku, met with World Bank President James Wolfensohn to increase collaboration between the two institutions (CS- 4/6/99-PI, Wang and Rosenau 2001). The two institutions began to create an international financial architecture that would be strengthened with global economic governance. Moreover, this vision created anticorruption and good governance policy documents which were circulated throughout the Commonwealth (CS-9/6/1999-PI). The literature also suggests that the 1997 Asian financial crisis has made an important impact upon international economic law. In 1999, the Organization for Economic Cooperation and Development (OECD) adopted an anti-bribery convention signed by 36 countries (Wang and Rosenau 2001, Tshuma 1999, Salbu 1999). The empirical evidence presented in this chapter will establish that individuals were responding to the 1997 global anti-corruption initiatives.

This study has identified the presence of two anti-corruption movements in Zimbabwe during December 1997 to January 1998. One was the World Bank/Transparency International/ Robert Mugabe anticorruption initiative, which is attached to the post-1997-Asian-Financial-Crisis-global-anti-corruption initiative; the other was the locally inspired anticorruption/civil rights movement. This is the first known study to identify that the post-1997-Asian-Financial-Crisis-global-anti-corruption initiative intersects with, yet is separated from, a grassroots-led anticorruption/civil rights movement. By anticorruption/civil rights movement it is meant that grassroots-led corruption organisations (often not acknowledged by the Mugabe Administration) were agitating to

have their voices heard and legitimated by global institutions and corruption watchdogs such as World Bank/Transparency International coalition.

This chapter has three sections. First, it will set the politico-legal context in which the NGO *Chikafu Cheupenyu* developed its methodology and collected empirical evidence. The intention is to provide some results from *Chikafu Cheupenyu*. The NGO - *Chikafu Cheupenyu* – hired local researchers to complete a study on the anticorruption/civil rights movement. Second, it will provide an analysis of the different rule of law views. The empirical evidence offered in this chapter will include topics such as: a) the legal culture I was introduced to through Zimbabwean researchers collecting empirical evidence in order to advocate for social and economic justice; b) the sense of power and powerlessness I noted with the people around me and c) politics connected to law and policy making inside Zimbabwe. Our research provides valuable insights into local strategies used to avoid the law, as well as the sorts of locations that nurture local anticorruption/civil rights campaigns.

Third, this chapter will represent the anticorruption/civil rights campaign, a local movement challenging the Mugabe Administration's politico-legal structure, as well as the World Bank/Transparency International/ Robert Mugabe anticorruption initiative. The intention is to offer some insights into why a micro scale anticorruption/civil rights campaign might exist in an uneasy tension with anticorruption initiative led by outside institutions such as Transparency International. And why a microscale anticorruption/civil rights initiative that began in the 1980s and early 1990s challenging the Mugabe Administration became fully operational in 1997. The critical distinction between the anticorruption/civil rights campaign and the World Bank/Transparency International/ Robert Mugabe anticorruption initiative is that the activism within the anticorruption/civil rights campaign was protesting against corruption, specifically the corruption among the elite of Zimbabwe (Z-FG 09/07/97) wherein large flows of money were being allocated to the few while the majority remained impoverished (USA-Z-HRR 1997/1998, Z-FG 09/07/97, ZHR-NGO 1999a: 4). Whereas the World Bank/Transparency International's interaction with state governments focuses on how

corruption has a negative effect on economic development. This literature reveals that there is a vast distance between local social commentary and the World Bank/Transparency International's agenda. This is because of two methodological flaws: 1) World Bank/Transparency International believes that men and women "working within multinational corporations and international institutions" can offer World Bank/Transparency International a local perception of a country's corruption; 2) The assumption is that corruption can be eliminated through the revision of economic laws: a technical solution will suffice (Wang and Rosenau 2001: 33, Carothers 1998).

The empirical evidence presented in this chapter must be understood in events occurring in 1997/1998. First, before the December 1997 to January 1998 events, civil rights groups were advancing several legal challenges against the Mugabe Administration. The 1994 – The Supreme Court Ruling in favour of Munhumeso and Others (1994 (1) ZLR 49 (SC); 1995 (2) BCLR 125 (ZS)), against Law and Order Maintenance Act (LOMA) argued that LOMA attacks the foundations of a democratic society. 1997/1998 was significant insofar that legal and human rights activists continued to criticize the Mugabe Administration for adopting constitutional amendments detrimental to human rights protections. These amendments allowed LOMA to remain active. This unprecedented debate on LOMA politicised the urban legal culture (USA-Z-HRR 1997/1998).

Second, with the focus on the success of High Court condoned National Day of Protest and the violence and suppression of the January 1998 *riots*, what is often made secondary in the analysis (or not even discussed) is that this is important evidence to the legal community. This is evidence from the grassroots level that individuals were questioning the philosophy behind the laws governing individuals' fundamental rights. These questions were often connected to the economic well being of the family. The language of *the right to demonstrate* may not have been used in general conversations. However, language of *Hunzvi*, *Finance Bill No. 2*, *the War Veterans' Pension* and *the War Veterans Association*, and *the Chidyausiku Commission* reflects individuals protesting, critiquing and challenging the Mugabe Administration for condoning the construction and payment of the War Veterans' Pension (Z-FG 09/07/97, Z-FG 27/11/97, Z-FG 4/12/97-PE, ZW-

News Law 2000). This language, as will be argued, is empirical evidence of individuals protesting the Mugabe Administrations' abuse of power.

Moreover, the tendency of much of the analysis has been to focus on the nation-wide social movements creating the December 1997 National Day of Protest and the January 1998 riots, rather than some individuals' changing awareness of how the legal system has the capacity to protect their rights. Many individuals were becoming aware that each woman, man and child had the legal right to demonstrate and *speak out* about the economic policy of the government (see ZHR-NGO 1998). This has meant that there has been very little commentary about the *individuals* who participated in a local anticorruption campaign. Likewise, there has been little discussion about the values shared by individuals who participated in the demonstration protesting the fraud of the war victim's compensation fund; the proposed tax package to create funds for the war victim and the payment of the War Veterans Pension. Nor has there been much commentary about how individuals *feel* about police, authority figures, the legal culture, and corruption linking the War Veterans' Association to the Mugabe Administration and Members of Parliament. This chapter will challenge some of the silences that tend to be produced by researchers and scholars who draw their analysis from the media, rather than the voices of the people at this time.

Third and related, with a focus on *individuals* protesting the Mugabe Administration's decision to fund the War Veterans' Pension, this chapter will challenge conventional interpretations of the December 1997 to January 1998 events (ZHR-NGO 1998). Much evidence has been collected by the NGO *Chikafu Cheupenyu* and van Zijl de Jong (1995) that suggests that individuals were protesting corruption before the World Bank/Transparency International post-1997-Asian-Financial-Crisis-global-anti-corruption initiative. Many individuals participating in a grassroots level civil rights/anticorruption movement can be found in the informal food distribution network, namely the fresh food market women who are fully aware of how corruption among members of the police force and city council negatively affects their economic well being: corruption materialises as increased bribes paid to the police (van Zijl de Jong 1995, see also

Leybourne 2003). These women's willingness to talk about how the cost of bribing the police affected their right to earn a living reveals the presence of a vocal, angry and active anti-corruption movement. Empirical evidence of the political structures being created at the grassroots level has been presented elsewhere and will not be detailed here. For example, Leybourne (2002) provides empirical evidence that only 6% of the 292 female informal food vendors interviewed after the January 1998 food riots used the language of *riots* to describe the January 1998 events. Rather, 84% used different phrases to refer to the January 1998 events: the January 1998 *food riots* were described as demonstrations (36%), labour strikes (41%) and protests (2%) that had some hooligans (5%). The following quotations illustrate two vendors' choice of words:

People were trying to stage **demonstrations** because they wanted their problems to be solved. Because they had been quiet for a very long period "Amai Tsiga" (mother, 26 years old, SLV98-101, emphasis added)

I do agree with the grievances of the people. I also don't dispute the way they carried out their **demonstrations**, that was the way they saw fit. It is wrong to blame them, things are too expensive "Amai Chirisa" (mother, 23 years old, SLV98-229, emphasis added)

As argued by Leybourne (2002) this social commentary suggests an assertive political awareness. Women, even those working in the informal sector, felt that the *individual* had the legal right to demonstrate against the Mugabe Administration funding the War Veterans' Pension. This was a demonstration against corruption *within* the Mugabe Administration. Market women, such as Amai Tsiga chose the language of *demonstrations* to suggest that women, men and children had the legal right to speak out about the unequal allocation of public funds. To better understand the significance of the words chosen, it is important to note that after the December 1997 National Day of Protest the phrase *demonstration* was very politically sensitive. After the December 1997 National Day of Protest, the language of *demonstration* was a direct challenge to the Mugabe Administration who had begun to justify its suppression of the December 1997 National Day of Protest with the rhetoric of *hooligans*, *looters* and *threats to private property* (Z-TH 9/12/97, Z-TH 10/12/97:1, Z-TC 21/1/98a, Z-TC 21/1/98b).

As will be presented in this chapter, disparate groups and coalitions inside Zimbabwe were contesting the Mugabe Administration's choice to fund the War Veterans' Pension. Yet in many newspaper articles, the focus of the December 1997 National Day of Protest shifted to struggles between security forces and *hooligans* and *looters threatening private property*. Moreover, the January 1998 grassroots activism became known as a *food riot* rather than a civil rights/anticorruption movement (Z-FG 22/01/98, Z-TC 21/1/98a, Z-TC 21/1/98b). Moreover, conventional interpretations tend to follow the Mugabe Administration's description of the January 1998 events (Z-TC 21/1/98a, Dashwood 2000). This is partially because the local media and NGOs have narrowly described corruption. The creation of the War Veterans Pension is rarely, if ever, referred to as *corruption*. Yet a close analysis of the Members of Parliament and Head of State's social construction of the War Veterans Pension suggests that this is a form of political corruption (see ZLP 1998a, 1998b, 1998c and ZLP 1997a, 1997b, 1997c, see Z-FG 13/11/97, Z-FG 4/12/97-PE). Nor has the individuals' reaction to the payment of the War Veterans Pension been labelled an anticorruption campaign. Thus, because the analysis in the media, and some scholarly work has focused on the economic corruption/fraudulent use of the War Veterans' Compensation Fund and the proposed tax package to create funds for the war victim, few analyse the changing legal culture within the nation-wide social movement: the social movement that actively challenged the political corruption connected to the War Veterans' Pension. The female informal food vendors' choice of words are telling insofar that they suggest a rapidly changing legal culture, partially initiated because of the donor community's interest in governance, corruption, etc. and the challenge legal activists had initiated against the Mugabe Administration (1994 -1997 (Leybourne 2002)).

To summarise, this chapter will argue that the critical power axis that has often been neglected in contemporary analysis of the January 1998 events is the analysis that focuses on state's ability to police the boundaries of the meaning of corruption to the outside community. This chapter will argue that given the 1997 World Bank anti-corruption initiative and the 1999 Commonwealth/World Bank anticorruption coalition, and the 1999 Organization for Economic Cooperation and Development (OECD) anti-bribery

convention - signed by 36 countries (Wang and Rosenau 2001, Salbu 1999), studies that examine how local communities challenge state condoned corruption are necessary and urgent.

This chapter will argue that this empirical evidence is significant insofar that it reveals some patterns of political discourses cited by different stakeholders at different geographic scales. This empirical evidence will suggest how the World Bank/Commonwealth New Institutional Economics /Law and Development Movement (NIE/LDM) legal-institution-strengthening initiative is being woven into the legal fabric of Zimbabwe's domestic law through different stakeholders' co-option, use and repetition of the NIE/LDM logic. While different anticorruption movements used different political discourses, many share a commonality insofar that they indicate a response to the post-1997-Asian-Financial-Crisis-global-anti-corruption initiative.

5.1.1 The Corruption Discourse

The corruption discourse is complex. It creates power for different groups. Corruption organises reality in specific way, providing legitimacy for funding agencies, the Head of State, the legal system and human rights organisations to label some economic behaviour as risky for international business and dangerous to the local economy. The critical dimension of the corruption discourse, as it is recognised in this thesis, is that it functions to maintain power relations between the global capitalist system, the state and the legal system and tends to disempower those working in the informal sector. Three points support this perspective.

One, as noted above, international funding agencies have politicised the word *corruption*. *Corruption* has become one of the powerful rules of law discourses. Kibwana et al (1996) argue that the term corruption is about elites and their mediation of the material status of others. The corruption discourse divides individuals based on local politico-legal economies. As various scholars have argued, such as Nelkin and Levi (1996), Kibwana et al (1996) and others (see Tolley 1994, Ekeh 1994, Mamdani 1995a, 1995b; Hyden and Bratton 1992, White 1996) corruption is not a simple notion. The term has the power to

change individuals' lives, depending on who is citing, interpreting and applying a strategy to combat corruption in specific context.

Two, the term *corruption* should evoke criticism from those who complete fieldwork in Commonwealth countries. As mentioned in Chapter One and Four, the Commonwealth/World Bank coalition has taken on the anticorruption agenda. The corruption discourse is often deployed to control the behaviour of different actors for different reasons such as to manage economic laws to facilitate the global political economy (see Salbu 1999).

Three, empirical evidence collected during the 1997/1998-field season suggests that the global anticorruption initiative interacts with local societies. Stated more simply, the World Bank's anti-corruption campaign – led by Transparency International (WB/TI)- has had many unexpected effects upon the local economic and politico-legal culture. Microscale anticorruption campaigns initiated from within Zimbabwe are connected to the Transparency International anti-corruption movements. With the corruption discourse radicalised by global initiatives, new political spaces were opened that the Mugabe Administration had not anticipated. Once opened, these political spaces have remained openly critical of the post-Independence government, including some spaces for ZANU (PF) MPs who genuinely are concerned about the men and women they represent.

5.1.1.2 Three Scales of Analysis

Power relations connected to the corruption discourse can be better understood through three scales of analysis. At the global level, the language *laws to combat black-market economies and bribes* and *eliminate corruption* has become common in many members of the Commonwealth development policy documents (CS- 9/6/99-PI, CS- 4/6/99-PI, CS- 28/4/99-PI, CS-04/03/02-PI 02/15). Whereas at the national level, variations of the good governance/anticorruption discourse are being used. We can find evidence in Zimbabwean Parliamentary debates. Members of Parliament use the language of “good governance” (ZLP-1998c). The state's commitment to the World Bank/Transparency International's anticorruption initiative can be partially measured in concrete actions. For

instance, judges are appointed by the state to report on allegations of corruption, such as the fraud within the War Veterans' Association. The media circulates the story that a judicial commission has been appointed, which in turn reassures the donor community that the Zimbabwean government is trying to combat corruption (ZW-News Law 2000, Z-TC 29/1/98, Z-TC 3/2/98).

Whereas at the local level, the language of *demonstrations, labour strikes, protests, and hooligans, Hunzvi, the War Veterans' Pension, Finance Bill No. 2 and the War Veterans Association, and the Chidyausiku Commission* (ZW-News Law 2000) reflects a local pattern of discourse used by individuals protesting the Mugabe Administration seeking funds for the War Victims Fund (Z-FG 09/07/97). The key point being made is that individuals protesting the Mugabe Administration's abuse of power and the global anticorruption movement are using different rhetoric. Each layer has a different agenda, operating at different geographic scales. The individual within the civil rights /anticorruption movement seeks the right to speak and the right to demonstrate against abuses of power, whereas the global anticorruption movement seeks to create more economic laws to protect capitalist interests. Although these movements differ in visibility, agenda and public legitimisation, as will be argued in this chapter, a connection must be made between these two movements. On the one hand, we need to appreciate how the rhetoric *to combat black-market economies, bribes and eliminate corruption* used by international funding agencies legitimises the activism of microscale anticorruption/civil rights coalitions. This externally driven discourse is important for the individuals who agitate for laws that protect their freedom to speak out against corruption within the state. On the other, grassroots anticorruption demonstrations are not often recognised by the global anticorruption initiatives (Tshuma 1999, Carothers 1998).

These discourses seem disparate and disconnected. Yet they share some similarities: they invoke a sustained commentary and critique of authority figures' abuse of power, and the use of public office for economic or political means. The common point shared by the local civil rights/anticorruption movement and the global anticorruption movement is that both were seeking legal and economic reform. These discourses also have a broader

significance. They suggest a wide array of political structures have been created in the wake of the 1997 World Bank post-1997-Asian-Financial-Crisis-global-anti-corruption initiative. As will be presented in this chapter, political structures evolved from a top-down World Bank/Transparency International post-1997-Asian-Financial-Crisis-global-anti-corruption initiative. These can be found in the Parliamentary debates, Mugabe's response to the War Veterans demands and the appointment of the *Chidyausiku* Commission to investigate use of the War Veterans fund. As will be discussed, political structures were also developing at the grassroots level to reach into national economic and political affairs: we have evidence of local societies positively responding to the global anticorruption initiatives. Many have used this shift in development discourse as an opportunity to articulate their right to work, to demonstrate, and to challenge the Mugabe Administration.

5.1.2 Methodology and Methods of Analysis

Three levels of analysis are adopted to achieve the purpose of this chapter, namely, methodological and empirical. At the methodological level, a feminist/postcolonial approach is adopted. The detail provided in this chapter is to recover "geographical territory" of the informal sector and the local legal culture (Said 1993: 252). This chapter will provide a way to understand how legal knowledge is constructed, including the power relations that construct legitimised knowledge. This chapter will also write a more inclusive geography by combining feminist and postcolonial approaches. This chapter offers a questioning, rethinking and offering of new meanings and new interpretations and the seeing of new possibilities. This chapter is meant to offer many layers to the study. Moreover, as silences and omissions are identified, this chapter raises many unanswered questions. This is part of the feminist/postcolonial method of inclusive writing, wherein men and women's narratives are used in the text to change the dominant modes of representation (see Monk 1996, MacEwan 2000, Mather 1996, Fabian 1999). Through this lens, post-colonial women and men can offer their words, ideas and voices to articulate their perception of the usefulness of the anticorruption /modernity/development campaigns.

At the empirical level, the informal food distribution networks' interpretation of international lending agencies' anticorruption campaigns will be used to explain the local legal culture. Informal means untaxed and unremunerated, hence illegal, economic activities. As the definition of *informal* implies, the informal economy is an economic space that challenges the state and the legal and justice system. This chapter will describe how women and men construct a space *kutyora mutemo* (jumping the law) as they create their own economic niches working in the informal sector. This description is meant to provide a nuanced representation of the friction and fragmentation in and through civil society, the state and the legal and justice system during the December 1997 to January 1998 period. As suggested in Chapter One as well as in this chapter, the collaboration between the Head of State and the international lending institutions has a troublesome outcome. For instance, intra-household discussion, anger and tension can be seen in the way that children responded. Even primary school children felt that their future was unstable. They expressed their own views with anger and violence. Children provide a powerful social commentary of World Bank/Transparency International/Robert Mugabe anticorruption initiative. While the World Bank/Transparency International believed that strengthening legal institutions and combating corruption could positively restructure a local society, children seem to have a different view, particularly as their schools are being shut down (Z-TH 14/01/98: 1; Z-RO 03/98).

The fieldwork more generally identified that externally driven legal-institution-strengthening anticorruption initiatives affect different socio-economic classes, races and genders in different ways. This chapter will develop a layered, complex picture of how the legal culture responded. This chapter reviews a number of primary documents from the field season: newspaper articles, parliamentary debates, and key informants' comments and local magazines and other sources to develop such a view. This chapter is meant to leave the reader with a sense of a local perception of the impact of these global initiatives (see Table 1.2).

5.1.2.1 Positionality - *Chikafu Cheupenyu*

This chapter will use first person and third person pronouns to demonstrate positionality on certain topics. For instance, when the first person pronoun is used, I speak from my perspective. However, the empirical evidence presented in this chapter is also from women and men who worked for *Chikafu Cheupenyu* the NGO I created for the 1997/1998 field season. The NGO relied on a team of researchers who were examining social justice issues, more specifically food insecurity in Harare. To signify the team effort of *Chikafu Cheupenyu*, pronouns such as *our* and *we* are to indicate a team effort/interpretation. We completed a number of reports based on the key question our NGO was asking: *how great is the distance between the politico-legal system and women's and men's sense of social justice?* How far does the legal system have to stretch to incorporate local people's sense of justice? Man and Wai (1998), Russell (2001a), Sarat and Scheingold (2001b) argue that such studies are necessary to understanding the legitimacy of the legal and justice system. Without the people's support, the judiciary loses its political power to the state.

Although we were also advocating for social/economic justice based on the variety of reasons cited in Chapter Four, *Chikafu Cheupenyu's* information differs from the electronic advocacy network NGOs in empirical, methodological and conceptual ways. Conceptually, we were interested in examining the silences in the city and the political identity formed in these spaces, rather than arguing for a specific cause.

Methodologically, I relied on local researchers' visions of what primary evidence we should collect, what stories and fine-grained detail articulated women's and men's hopes and fears, concerns, views and perspectives which pointed this study in the direction of understanding how corruption affected their daily lives. In contrast to many NGOs, while our NGO advocated legal reform, our study identified and discussed women and men's distrust of the politico-legal system. This study confirms some of the points made in Chapter Four; that is, male and female Members of Parliament and the judiciary were relatively powerless in this context and the majority of Zimbabweans seemed to know this. Moreover, the methodology we used allowed us to identify the tremendous divide

between the politico-legal system and women and men working in the informal sector. Issues such as distrust of researchers, fear of the word *police* in a questionnaire, concerns for the future, and the steady rise of food and petrol prices surfaced as the research was being completed. Overall, this study indicated three broad trends that separated women and men from the legal system. Fear of the authority figures that were presumed to be working for the state not the people. In addition, many seemed to think that the divide between the authority figures and the people could not be bridged. Lastly, a social justice movement/anticorruption/civil rights movement began while we were completing our fieldwork. Demonstrations connected to the social justice movement/anticorruption/civil rights movement offered us evidence that the Mugabe Administration would dismiss grassroots' demands and that most women and men felt the legal power of the justice and legal system was for the state rather than for civil society.

The methodological and conceptual differences surface in the empirical evidence we present. The empirical evidence presented in this chapter is sensitive to the legal culture, the memories, histories, divisions, and differences in society. This is not a linear explanation/exploration of legal culture. Rather, this chapter suggests that many simultaneous events occur in the city. It demonstrates that political processes within the local space of judicial independence require multiple readings of women and men's views on judicial independence and presents this information as fragments, full of inequalities. With the information organised in this manner, this chapter does not clearly define a problem or solution, thus does not directly feed into the NIE logic, although this information could be interpreted through an NIE viewpoint. However, to ensure that this study is not co-opted by international lending agencies to justify an anticorruption initiative/legal reform agenda in postconflict Zimbabwe, this study provides a practical critique of Transparency International's (TI) methodology and agenda which seeks to curb corruption worldwide. The argument, based on the empirical evidence offered in this chapter, suggests that the TI's methodology reproduces similar power dynamics to what we saw in the field.

To summarise, this section suggests that the *Chikafu Cheupenyu's* information differs from the electronic advocacy network NGOs in methodological and conceptual ways. The empirical evidence presented in this chapter will be sensitive to the differences, memories and local women and men's sense of justice. The empirical evidence offered in this Chapter is directly relevant to the study's interest in NGOs' social construction of the relationships between the state, the judiciary and civil society. This chapter suggests that complex narratives of *truth and fiction* constructed inside and outside national borders are very much connected to the global political economy.

5.2 Anticorruption Initiatives

This chapter seeks to fill some of the gaps in the literature on how externally driven legal-institution-strengthening anticorruption initiatives affect the informal economy and local legal cultures. This chapter will evaluate how economic rule of law discourses hold the power to affect the informal food distribution of Harare, and the legal culture of Zimbabwe. Economic rule of law discourses are rule of law discourses that have the politico-legal agenda to bind the state with the law for economic development. This chapter will consider both how the NIE/LDM anticorruption discourse holds the power to change practices, concepts and ideas in local legal societies as well as change the legitimacy of the legal and justice system in the eyes of local people.

How locations respond to global anticorruption initiatives is little understood (Kibwana and Okech-Owiti 1996). The literature and empirical evidence has been examined through different scales of analysis to better understand how this study will address this gap in the literature.

The first scale is global. Evidence presented in Chapter Four established that the World Bank/Commonwealth conversations constructed a top down anticorruption initiative. The World Bank/Commonwealth initiative made the suggestion that Zimbabwean government officials/authorities and private industry make changes to the legal structures to improve the economy (see Table 1.2 in Appendix 1.1). Yet, very little of the literature on global anti-corruption movements asks how the global anti-corruption initiatives

intersect with the local, and how this might create changes for grassroots anti-corruption initiatives. Salbu (1999) offers a starting place. He asks the difficult question – is the global community’s management of corruption threatening local economies, or is the post-1997-Asian-Financial-Crisis-global-anti-corruption initiative disintegrating political bonds? This is an important position in the international economic law literature for two reasons. First, much of the literature tends to couch the issue in society-structure terms. After the 1997 Asian Crisis, which cost the World Bank millions of US dollars, the World Bank has attempted to protect investments and create more economic transparency in member states. The World Bank has been financially supporting "corruption watchdogs" such as Transparency International (Z-Insider 31/07/01, WB-ACK 2001, Feldstein 1998). International lending institutions have made corruption “...a new global issue area, characterized by increased public awareness and emerging worldwide norms” (Wang and Rosenau 2001: 31). The economic structure began to alter economic communities. For example, because Transparency International is “solely dedicated to fight corruption”, it follows an agenda to encourage “governments to establish and implement effective laws, policies and anticorruption programs”. A transnational anti-corruption movement, according to Wang and Rosenau (2001: 28), is growing throughout the elites of corporations, nation-states and NGOs. Wang and Rosenau (2001), Tshuma (1999) and Salbu (1999) acknowledge that the international economic community has adopted an anti-corruption campaign. The significance of this literature is that it suggests that this idea is being spread throughout the world alongside economic globalisation through institutions, such as the World Bank citing rule of law visions that seek to eliminate corruption, bribery and black-market economies. These ideas have the power to change the workday and political economy of those employed in the informal sector.

A second reason why Salbu (1999) offers an important position is that he focuses on the point that a global anticorruption legal-institution-strengthening initiative has the political agenda to bind the state with the law for the purpose of economic development. This agenda, as he argues, affects real people’s social bonds, feelings of trust and community. His perspective offers new insights into the political and economic changes inside and outside Zimbabwe (1997-1999). For these reasons, this chapter will use Salbu’s (1999)

position as a point of departure to argue that international lending institutions, such as the World Bank, circulate the idea that there is a need to control corruption. This idea, once adopted by the Head of State (particularly in an authoritarian government) has the power to restructure real people's lives. The key point is that this is not a direct development policy per se. It is the circulation of an idea that has a powerful impact upon communities at the global and local level.

The second scale of analysis is at the national level. Patterns of eliminate corruption discourses and the shifting power relations between global anticorruption campaigns and nation-states have crudely noted in the literature. As Carothers (1998) argues, states tend to reform legal structures in the economic domain or in law related institutions, rather than increase the government's compliance with the law. Moreover, as Keefer and Knack (1997) report, the World Bank evaluates a state's legal reform based on quantitative evidence of changes to the legal system rather than qualitative changes in social norms and values. Taking these points and applying them to the Zimbabwean case study, I argue that we need to re-examine conventional interpretations of the December 1997 to January 1998 events. Dashwood (2000), who connects the *Chidyausiku* Commission reports to earlier anticorruption initiatives and suggests a pattern of local anticorruption initiatives led by individuals within Zimbabwe, offers a point of departure.

The third scale of analysis is at the local level: local responses to the global anticorruption initiative. Salbu (1999) and Tshuma (1999) acknowledge that local social movements must mobilise against the processes of globalisation, the World Bank/Transparency International post-1997-Asian-Financial-Crisis-global-anti-corruption initiative and the invisible politico-legal and economic structures being constructed by the global economic laws that tend serve the North rather than the South. There are three important elements in the Zimbabwean protest against the World Bank/Transparency International post-1997-Asian-Financial-Crisis-global-anti-corruption initiative. First, the World Bank focuses on the economic elements of corruption, not the political. International lending institutions that are creating the driving force of the global anticorruption initiatives claim that anticorruption initiatives are *apolitical*. Yet, this

initiative offers advice to individual countries to fix corruption problem. Legal advice is offered, with the hope that governments *apolitically* will carry forward proposed economic and legal reforms (Wang and Rosenau 2001).

As a witness to how the Mugabe Administration *apolitically* introduces these ideas to the local legal culture, I partially understand why steps taken in the formal economy to combat corruption are somewhat flawed. During September 1997, I participated in a workshop with members of the police force and private businessmen. A University of Zimbabwe professor led the discussion of the short course entitled, entitled: *Crime Management in Organizations* (Management Training Bureau, Harare). What I found interesting was that the discussion tended to focus on technical solutions rather than changing norms and values. Given my previous research of the informal urban economy, I felt that technical solutions would be quite ineffective in the informal economy: decades of socialisation had shaped this economic space, the social norms and day-to-day activities to avoid encounters with law (see Horn 1994b, van Zjill de Jong 1995). More importantly, the differences between the grassroots anticorruption campaign (which began in the 1980s and focused local political alliances, local economic transactions and the cultural politics within the economic community) and the World Bank driven anticorruption initiative means that small, yet significant, actions taken by grassroots organisations are barely recognised by the global institutions (Kibwana and Okech-Owiti 1996, Wang and Rosenau 2001).

Second, the local social movement has very complex geographic patterns. Although Robert Mugabe dominated the judiciary and elected Members of Parliament (see Chapter Four), this social movement was also connected to, yet separate from, the Members of Parliament and the legal and justice system. The women and men I worked with articulated that there were intricate relationships of political memory, economics, and household politics shaping a multi-tiered social movement trying to take power away from the Mugabe Administration, a social movement that was connected to, yet somewhat separate from, the informal food distribution.

Third, this interpretation of the 1997/1998 events is grounded in the media's frequent reference to the language of *the Finance Bill No. 2* and *the War Veterans' Pension* and the IMF/World Bank. These articles are read as empirical evidence that suggests that the Mugabe Administration was constructing new economic structures that create the illusion that the Mugabe Administration implements transparency, accountability and good governance in day-to-day governance of the state (Z-FG 11/12/97, Z-FG 27/11/97, Z-FG 11/09/97).

This interpretation is based on my 1994 and 1997/1998 field season observations. In 1997/1998, while I was in the field working with a research team who were interviewing women and men working in the informal food distribution network, I heard the phrase *Chidyausiku* Commission to express humour, anger and frustration with the rapidly changing politico-legal economy. Speaking to the women and men I was working with and reading the local newspapers, I developed a loose interpretation of several disparate themes. Robert Mugabe was cognisant of the World Bank/Transparency International demands for transparency, accountability and good governance (ZW-News Law 2000, Z-TC 29/1/98, Z-TC 3/2/98). Independent newspapers published the story about funds embezzled from the War Veterans Pension (USA-Z-HRR 1997/1998). Newspapers also ran the story about the *Chidyausiku* Commission. Through the newspaper articles I learnt that Judge President Justice Godfrey Chidyausiku led an 11-member judicial commission, which investigated the War Veterans Pension's fund and reported to President Robert Mugabe. Yet the judicial commission was not allowed to release the findings to the public (Z-FG 09/07/97-NR). These different sources of information allowed me to make the connection that was that High Court judge Justice Godfrey Chidyausiku was hired by the Mugabe Administration to lead the *Chidyausiku* Inquiry as a partial public overture to the World Bank's interest in legal processes and procedures to remedy economic problems. By constructing this Commission, the Mugabe Administration could participate in the World Bank anticorruption initiative, as well as silence the World Bank's demand for accountability, transparency and good governance.

I became interested in the views of the people (who are in theory supposed to support – thus legitimise) the political broadcloth of the legal and justice system, and the views connected to Judge President Justice Godfrey Chidyausiku, (Z-FG 09/07/97-NR also see Dashwood 2000: 102-103), and why Justice Godfrey Chidyausiku's name was used to connote these two entwined events, and more generally, the Mugabe Administration's' condoned corruption. Yet the window through which I look at these issues is a very different window from most other studies: the views of a loose coalition of frustrated women and men who daily participated in constructing a space of *kutyora mutemo* (jumping the law) and participated in covert critiques of the Mugabe Administration matter in this study. These women and men aligned themselves with civic organisations that became an anticorruption/civil rights movement. These women and men told us of the impact that the post-1997-Asian-Financial-Crisis-global-anti-corruption initiative had upon their lives.

Based on these bits of information, I could better understand the meaning behind the phrase *Chidyausiku* Commission. I could also make sense of the shifting balance of power at the grassroots level: the more individuals used this Judge's name in conjunction with the report on the War Veterans' embezzled funds, the more they de-legitimated the Mugabe Administration's power: I will argue that this was the voice of the local anticorruption movement (Z-FG 09/07/97-NR also see Dashwood 2000: 102-103).

Based on this explanation, I will suggest that the locally inspired anticorruption/civil rights sentiment was developing alongside the rapidly changing political economy. These changes in the politico-legal and economic landscape were connected to many events. To make my point, an oversimplified explanation of global-local connections will be offered.

One change occurred as a result of the WB/IMF discovering that President Mugabe did not reprimand those who embezzled the funds. In turn, the grassroots civil rights movement rose up in response to two concurrent events. Initially, men, women and children were responding to Mugabe's and the Mugabe Administrations' support for the War Veterans' Association. At a local level, Dr. C. Hunzvi, and the ex-combatants who

were granted large gratuities and pensions through the War Veterans Bill were rewarded, rather than being reprimanded, for abusing this fund. However, at a global level, when the IMF discovered that Mugabe was borrowing more funds to support the War Veterans, the IMF withdrew its financial commitment; immediately, the Zimbabwean dollar was perceived as inflated, and was devaluated (Z-FG 11/12/97, Z-FG 27/11/97, Z-FG 11/09/97). The ripple effect of the embezzled funds shifted from the local to the global and back to the national economy. The inflation and devaluation of the local dollar affected living standards. The cost of bread, milk and cooking oil rose at an incredible rate, as noted in Chapter One and Four. Women and men protests for a wide variety of reasons. One reason has been offered by ZHR-NGO (1998, 1999a), who notes that on January 19 1998, demonstrations began in Harare, rapidly developing into full-scale riots that spread to other centres

...During the week beginning 19 January [1998] there were isolated instances of small-scale protest against increases in prices occurred in Mabvuku and Glen Norah. A small group of housewives picketed stores and turned away delivery vans carrying basic foodstuffs like bread, milk and mealie-meal. In Mabvuku on the morning of Monday 19 January 1998 a group of seven mothers picketed the local supermarket or shopping centre and noisily protested against the increase in the price of bread (see also IRIN 6/02/01, ZW-News Johnson 2000, Z-TH 30/12/97).

To summarise, this section has suggested that working with the NGO *Chikafu Cheupenyu* collected me many insights into law as an interactive process between the legal system, public opinion and public behaviour during a time of rapid change. This section also suggests that the broader politico-legal and economic context must be brought into the analysis of local level corruption. Three reasons are offered. First, scholars such as Dashwood (2000) who are interested in corruption in Zimbabwe must be connected to the broader context of the development industry's interest in corruption as a *problem*, in order to understand how her scholarship may be co-opted to support the global capitalist economy rather than local anticorruption campaigns. Second, the development industry, particularly those who follow the NIE/LDM logic, argue that corruption needs to be addressed with technical solutions within the legal system. This global agenda sets the stage for partially understanding the production of the Chidyausika report. The fact the Chidyausika report even materialised is significant. It speaks to the World Bank

audience questioning why the economic development plan is not *successful*. Moreover, the Chidyausika report documenting the vast sums of funds siphoned off by the war veterans, was a bold move. Given the political culture and alliances of Mugabe and the war veterans, which shall subsequently be established, the media's publication of the case, and the anger within most of civil society at the time, Judge Chidyausika was likely aware that the contents of report would be controversial when he presented it Mugabe (see Z-FG 09/07/98-NR, ZW-News Law 2000, Z-TC 29/1/98, Z-TC 3/2/98). Third, the 1997/1998 field season experiences and observations cannot be understood without understanding the local political and economic structures were being affected by the World Bank/Transparency International post-1997-Asian-Financial-Crisis-global-anti-corruption initiative in both the formal and informal economies.

To conclude, these three points suggest that by acknowledging the broader context of the Zimbabwean politico-legal and economic crisis we can better understand how specific locations challenge global development initiatives initiated by the World Bank.

5.3 Chikafu Cheupenyu

When I arrived in Zimbabwe, September 1997, a large-scale anticorruption/civil rights movement had already begun. The existence of the anticorruption/civil rights campaign was not anticipated, nor was it part of the original research question. The original research project sought to collect empirical evidence of the civil rights culture in a *lawless* location: the informal sector, and to provide evidence of citywide poverty. The informal food distribution network is an important location where lawlessness can be found. The extent to which self-employed men and women, working as food vendors or transporters, can rely on knowing how a policeman/woman might respond to him/her profoundly affects how these men and women interact with the law on a day-to-day basis. In turn their assumptions of how law will be enforced influences how they interact with the legal system. Consequently, men and women in the informal food distribution network of consumers, vendors, transporters and producers provide an appropriate location for a study of the emergence of a new legal consciousness.

I created a small NGO, *Chikafu Cheupenyu* (food for life) for the purpose of hiring local researchers to complete the fieldwork. The methodological approach was based on three sets of literature. Theoretical/methodological discussions that focused on epistemological issues including themes such as the representation of the subject (Mather 1996, Fabian 1999); Afrocentric feminist cultural studies (Amadiume 1995, Collins 1998a 1998b; Nyah-Abbenyi 1997 and Witt 1999) which provide many insights into African and Afro American women's public and private politics; and the food and feminist literature specific to Zimbabwe (Schmidt 1996, Rutherford 1996, Barnes 1995, Barnes and Win 1992, Staunton 1990).

I was fortunate to be working with a research team that was able to help me document political nuances in different locations. We were investigating local *raw* rule of law views, trying to make the connections between these views and the justice being administered by the legal and justice system. The field site we worked in is significant, and directly affected by global initiatives. As Horn (1994a, 1994b) suggests, the importance of Harare as a field site is not so much its location, but how this location has interacted with municipal, national and international laws. It is a space that has been outlawed in many ways (also see Scarnecchia 1994). As we were studying perceptions of the law in this location, we were working with a critical tension. The myriad of laws relevant to the informal food distribution network range from statutes governing the use of periurban space (see ENDA-Zimbabwe 1994, 1996, "Manyame" SLC98-UG-03), to whether or not a fresh-food vendor can sell in commercial or residential locations (ZLR-Chijira 1997, Horn 1994b), to the recent debate in Parliament on whether or not the informal sector should pay bribes to a local policeman (ZLP-1998a). *Chikafu Cheupenyu* was interested in how women and men were asserting their "right to food".

All of this had been pre-planned in Canada. What had not been anticipated was the high emotion connected to the Zimbabwean anticorruption/civil rights movement in 1997 and increasing mobilization of legal activists and NGOs. Two examples suggest that the field site was affected by legal activists calling upon different source of legal power from an

array of different geographic scales, different legal systems and entwining international and domestic law.

First, 1994 – The Supreme Court Ruling in favour of Munhumeso and Others (1994 (1) ZLR 49 (SC); 1995 (2) BCLR 125 (ZS)), against LOMA) argued that the right to freedom of assembly and of association is the foundation of a democratic society. In other words, for the first time in the history of Southern Rhodesia/Zimbabwe, Zimbabwean men and women were legally allowed to demonstrate without having to apply to the police force for a permit to demonstrate. I began this research in 1994, for my Master of Arts thesis. What is strikingly different about the periods when I began the original research and when I had come back to Zimbabwe in 1997 was that when I returned to Zimbabwe, the number of demonstrations taking place was astounding (see Chapter One).

Second, 1997 is the year that NGOs and the legal community began to increase their activism, often encouraged and funded by the international community (Jamali, per comm. 1997/1998). 1997 stands out because the human rights organisations called for LOMA to be re-written. LOMA was revised and put before Parliament as the Public Order and Security Bill (POSB) and passed (USA-Z- HRR 1999/2000 2000/2001). 1997 paved the way for the events we see in 2002. As we shall see in this chapter, the landscape was dominated by pro-ZANU (PF) rhetoric.

Given the legal activism and the social mobilisation of the majority during the field season period, our NGO, *Chikafu Cheupenyu*, shifted its research agenda to collect primary evidence of an anticorruption/civil rights movement. The fine-grained detail includes a variety of concerns, views and perspectives and women's and men's desires, hopes and fears. These details reconstruct civil society's social justice power, which was trying to become legitimised in legal power. The grainy language of men and women tells us how corruption was affecting their lives, and why they might soon mobilise. Our findings are supported by the critical legal development literature. This literature argues

that the microfoundations of rule of law can often point one to the answer of why macroeconomic changes occur in a location (see Appendix 1.1).

The key point is that the original research project had not planned to study corruption, or the political implications of the corruption initiative being driven by international lending agencies. However, because Zimbabwe was interested in attracting foreign investors, the Mugabe Administration allowed the private media to publicly criticise a highly public case of corruption among the upper echelons of the Zimbabwean society (USA-Z-HRR 1997/1998). The reaction of nongovernmental organisations, the media, and some members of the judiciary made the scandal even more prominent on the political landscape. Many used the *Chidyausiku* Commission case as a vehicle to publicly criticise the Mugabe Administration. This was the context of my arrival in 1997, and the context in which I completed the field season.

5.3.1 Formal Fieldwork

I offer some notes on empirical evidence that was collected during the 1997/1998-field season. Very little has been written on the politico-legal consciousness of the men and women we interviewed. My field-notes suggest that much of the primary and secondary evidence is greatly affected by the quasi-emergency laws - Law and Order Maintenance Act (1960)/Public Order and Security Act (2002). What has been noted is that local political realities, as voiced by the people, are quite distant from the reality orchestrated by the Mugabe Administration. This gap creates silences and assumptions replicated in contemporary literature. Many studies offer an important historical view and important empirical evidence of some of the contemporary issues; but few address the question of how men and women think about the law, or how the law reproduces material and symbolic inequalities in their day-to-day lives. Lending institutions suggest that democratic institutions such as "independent media, civil society organizations and the judiciary" (Z-FG-09/08/01-C) challenge the legitimacy of the sovereign state on behalf of the individual and try to create more political space for individual rights. But this study is very sceptical that these institutions can speak on behalf of the people. For instance, as noted in Chapter Four, because much of the mass media is controlled by the state (USA-

Z-HRR 1996/1997), the independence of the judicial system has often had to compromise its position in the interest of achieving long term changes (SA-TST 08/07/2001-Gubbay; Z-MDC-Eppel 2000, Hatchard 1993, Sayce 1987: 136); and NGOs are often aware that the ZANU (PF) government has a political agenda when it speaks the language of civil rights (see ZOP-IE- 1997 (Msipa); ZOP-IE- 1997; ZOP-IE – 1997 (draft)); and - arguably- a certain silence cloaks the political landscape.

Luckily for this project, researchers were committed to the future of their country. Many were willing to share their insights and their worldviews. For this reason, this study remains first and foremost grounded in the empirical evidence collected during the 1997/1998-field season (see Tables 5.1 and 5.2 and Leybourne 1998b). Primary evidence from key informants, focus groups, and local researchers' reports, supplemented with the views of local newspapers and parliamentary debates provide the backbone of this analysis. The point of providing the field season methods is to highlight that the primary evidence provides the driving force for my understanding of the Zimbabwean legal culture. Reports by local researchers are formally acknowledged in the text of the dissertation (UZR-Mapedzahama 1998, UZR Sigauke 1998a, 1998b, 1998c, UZR-Mungoshi 1998, UZR-Shambare 1998, ZLR-Nyamuda 1997a, ZLR-Nyamuda 1997b, ZLR-Chijarira 1997, ZLR-Dhlakama (a) 1997, ZLR-Dhlakama (b) 1997, ZLR-Kwete 1997a, 1997b). Unfortunately, the analyses of many of the local researchers reports are outside of the scope of this thesis. Only select quotations have been used to illustrate the quality of their work as an important intellectual contribution to this thesis. Much of the empirical evidence collected during the 1997/1998 field seasons extends the argument that Zimbabweans were learning how to point to the limits of the executive governments' power in 1997 and 1998 and to use legal discourse with some confidence by 2001.

The discussion below focuses on the methods used during the field season. Leybourne (1998b) offers a full report of this study. As a participant who observed that the discourse of corruption and riots held the key to understanding how international funding agencies viewed the success of Zimbabwe's political development, I sensed- rather than knew – that these events were significant and were permanently changing the political landscape.

To summarise, this section has discussed how the pre-planned research agenda changed because of the major changes in the legal culture from 1994 to 1997. 1997 was significant because the international lending agency community was advocating for anticorruption initiatives and NGOs and the legal community were advocating for legal and economic reform. Civil society, the state and the legal and justice were responding to these advocacy networks. The next section will provide a brief description of 1997/1998 field season methods. This section will highlight that although we carefully collected primary evidence from a wide array of sources, one point that became the most apparent as the writing progressed is that the local political reality as voiced by the people needed to be carefully represented so that this information would not reproduce precisely the same assumptions about the *failure* of development in Zimbabwe. As argued in Chapter Four, Zimbabwe has become a classic case of what Bayart et al (1999) acknowledge is a “failed” African state. However, what is often left unacknowledged in these simplistic arguments is that the international lending institutions’ funds tended to strengthen coercive state institutions rather than the emancipatory ones.

Table 5.1: The 1997/1998-Field Season’s Correlation with Nation Wide Political and Economic Changes

Fieldwork schedule in Harare*	Sept 1997 arrived in Zimbabwe	Oct 1997 -December 1997 city wide survey of food security in high density residential areas in Harare: interviewing consumers, vendors, transporters and urban gardeners		January 1998 In-depth studies of consumers, vendors and urban gardeners (Surveys include question of perception of demonstrations)	February 1998 Interviewed vendors and consumers about perception of food riots.
Nation wide Political Events	After August 1997 promise to war veterans, seeking sources of money for war veterans, question in parliament - who will receive pension	Nov. 1997 Land redistribution IMF responds Local dollar devalued	December 1997 Tax Bill for War veterans to be passed through Parliament Civil society protesting imposition of taxes	January 1998 War veterans monthly pension begins Civil society protesting	Feb. 1998 Rumour mill breaking the silence

- Detailed field reports see Leybourne 1998b

5.3.2 Empirical Evidence and Data Collection Methods

First and foremost, it should be noted that the full length version of the field report documenting the methodology created during the 1997/1998 field season has been

written as a field report for interested readers to refer to. This section will highlight a few key points that are fully documented in the field report (see Leybourne 1998b).

One, the process of information collection was a re-iterative process. A research team helped collect different perspectives of local knowledge. Local researchers helped frame the issues, which were set into the questions in the survey, they administered the survey and ensured that the inclusive process of interview selection was consistent with the instructions set out in the contracts. Local researchers also assisted with the analysis of the empirical evidence and developed working definitions of the working class, informal sector and the urban poor (see UZR-Mapedzahama 1998, UZR Sigauke 1998a, 1998b, 1998c, UZR-Mungoshi 1998, UZR-Shambare 1998, ZLR-Nyamuda 1997a, ZLR-Nyamuda 1997b, ZLR-Chijarira 1997, ZLR-Dhlakama (a) 1997, ZLR-Dhlakama (b) 1997, ZLR-Kwete 1997a, 1997b). Discussion provided in the field report is important (see Leybourne 1998b). I note that empirical evidence was analysed by other researchers along the themes of gender, generation and location; and the variety of methods to gather alternate perspectives on a primary text. The process was to ensure local analysis of the empirical evidence as the information was being collected. This re-iterative, interactive process allowed me to adapt the direction of the research to changes in the local economy.

Two, the local researchers were encouraged to self-direct their research interests, to take control of individual research projects and to analyse the information from their individual perspectives. Three, I did not administer surveys. My level of participation consisted of interviewing key informants, meeting with the focus group everyday, and holding lengthy and frequent conversations with key informants. I directed and supervised the research team of five interviewers, four field supervisors, two typists, three key informants, nine independent researchers, and one translator-public relations officer. Some local researchers filled more than one position. For instance, one individual wrote a local report, gave input into the survey questions around the themes food security, administered the survey and was a key informant. Four, during the administration of the surveys, the research team of five interviewers, four field

supervisors and I met as a focus group to discuss the incidents of the day. Each interviewer met 6-8 people a day and they shared their stories with the group at the end of the day. This time was used as a checkpoint to identify the difficulties researchers and supervisors experienced in the field. Researchers were asked to write a report on each location and how different people responded to different questions in the survey. Five, field supervisors were hired to evaluate the dynamics between interviewer and interviewees in the field. They could hear the background dialogue at the field site, evaluate the physical and verbal communication between the interviewer and interviewee, and they became familiar with each difficulty each interviewer experienced while working in Mbare Musika. Six, this study encountered a number of anticipated problems during the field seasons such as language barriers, socio-economic differences, gender differences between interviewers and interviewees, physical danger at Mbare Musika and asking for names and addresses of interviewers. These *problems* are discussed in the report as well. As well, a number of unforeseen problems were encountered during the field season. These problems related to being inclusive, the response of interviewers and interviewees to the economic pressures affecting the whole country, nation-wide strikes, riot police and army suppression. These are also discussed in the report.

5.3.3 The Composition of the Research Project

The 1997 research project was planned to be a citywide survey of the high-density residential areas. The intent was to investigate the urban food distribution network that was created, maintained and sustained by the African urban population, which had little formal support from the state (ZLP-1998c), and to determine the spatial patterns of food transportation, consumption, people and strategies to sustain the network. Leybourne and Grant (1999) and van Zijl de Jong (1995) offer a literature review of the historical and contemporary problems this network faces, which will not be re-iterated here. The 1997/1998 field season events changed the focus of the Ph.D. dissertation.

The study needed to be conceptualised in a manner that offered in-depth information concerning all the layers of the informal food distribution network of vendors,

transporters and consumers. At the same time, the study had to offer a broad overview of the city as a spatial unit. To achieve these objectives, I worked with a team of researchers who interviewed transporters, vendors, consumers and gardeners in the city of Harare. My initial problem of developing potential informant relationships had been solved through my correspondence with a network of Canadian, American and Zimbabwean researchers. Through this network, I arranged to meet a number of local researchers. I hired many of them. Zunki (SLI98-03), Nyaradzo (SLI98-02), Tariro (SLI98-01), Rudo (SLI98-05), Bekai (SLI98-04 -01) Simbarashi (SLK97-01), Ngoni (SLI97-01) came to work on this project with me in exchange for financial payment (see Appendix 1.2). The questionnaires developed for the consumers, vendors, transporters and gardeners sought to empirically define the spatial breadth of the informal food distribution network and examine the differences among different low income residential areas. A large database of the 1200 surveys was collected. Most of the analysis of the empirical evidence is outside of the scope of this thesis (see Tables 1.2 and 5.2); the focus here is upon establishing the representation of the politico-legal structure and micro foundations of rule of law, that is, the views of how a movement should interpret the rule of law to achieve justice for the people in order to better understand the unintended outcome of the World Bank ESAP.

Table 5.2: Fieldwork Surveys 1997/1998

Survey		Location of interview	Number of interviews	Representative of Location
	Consumers (1997)	At place of residence	430+	15 HDRA++
	Consumers (1998)	At place of residence	90+	Warren Park, Budiro, Highfield
**	*Vendors (1997)	Mbare Musika	340+	15 HDRA++
	*Vendors (1998)	Mbare Musika	340+	15 HDRA++
**	@Transporters	Mbare Musika	50+	Informal
	Urban Gardeners	At place of residence	25	15 HDRA

++ Kuwadzana, Hatcliffe, Sunningdale, Budiro, Old Tafara, Mbare, Dzivarsekwa, Epworth, Glenview, Glen Norah, Mufakose, Old Mabvuku, Hatfield, Kambuzuma, Highfield

** did not use survey data in this thesis

* see van Zijl de Jong 1995 for categorization of vendors

@ see van Zijl de Jong 1995 for categorization of transporters

see Leybourne 1998b for methodology

Because of the size, complexity, socio-spatial history and perceived social complexity of the urban environment, the research team was developed to represent a wide and geographically dispersed range of available perspectives. This dispersed research team conducted surveys in different parts of the city. This meant that the stories I heard during the daily focus group meetings represented events observed throughout the breadth of the HDRAs. This meant that I had a citywide perspective of current events while still cognisant of neighbourhood differences. Local researchers' views helped me understand the local context and the broader context of the city.

In this work, written statements and comments presented by team members allowed me to concentrate on the internal composition of the research project to differentiate subgroups of gender, generation and location. We were trying to understand how the legal and justice system had managed to exclude rather than include individuals in this location. We began by examining how men and women of different age groups defined modernity/ tradition through the retailing, consumption and familial exchanges of foodstuffs. The 1994 fieldwork suggested that there were over-lapping spheres of reality - shared by transporters and vendors, vendors and consumers, and urban gardeners and vendors (vendors are retailers who are an important link in the chain of food production, food transportation and consumption). The 1997/1998 field work sought to acknowledge all the layers in the informal food distribution networks; and capture a sense of cultural identity in these neighbourhoods. Local researchers completed reports (see ZLR-Nyamuda 1997a, 1997b, ZLR-Dhlakama (a) 1997, ZLR-Dhlakama (b) 1997, ZLR-Chijira 1997, ZLR Sikutwa 1998, UZR-Sigauke 1998a, 1998b, 1998c). Their report helped me understand some of the changes from 1994 and 1997. Many of the changes were startlingly. Many of the changes documented increasing tensions over money. In fact, during the 1997/1998 field season the social backdrop had to be re-learned. The field report suggests the processes of this relearning (Leybourne 1998b).

This section has only provided a brief outline of the methodology and the conceptualisation of the fieldwork. More information that is included in my field report may be useful to those seeking to complete research that asks probing questions that

allow one to assess whether or not the micro foundations of rule of law are being represented by the local justice system. Before turning to the next section, two further points about the process of the fieldwork needs to be mentioned. One, the 1997/1998 fieldwork contracts were developed to emphasize the economic worth of this information - I was paying for information. Tariro (SLI98-01), Nyaradzo (SLI98-02), Zunki (SLI98-03), Simbarashi (SLI97-01), Ngoni (SLI97-01) worked with me before, during and after the food riots. They made important contributions in interpreting the wealth of collated information during and after the food riots. Local researchers were willing to share their knowledge and their deep commitment to improving the future of their country. Their knowledge and interpretation of the survey information greatly enriched the quality of information collated during the field season. Their knowledge has helped create three-dimensional vision of the issues affecting the daily lives of local women and men. Mamdani (1995b), an Africanist scholar concerned with methodology, argues that local people's lives are often neglected, or worse, represented with "unilinear evolutionist perspective" (p. 607, 608). Often researchers will represent the state as an institutional category (thereby extending the colonial mythology) and civil society is represented by "characterized" visions of African characters rather than real living people (Mamdani 1995b: 607). In short, Mamdani (1995b) points to the need for methodological sensitivity and appropriate representation of civil society. Two, during the 1997/1998 field work, the local researchers worked with very little direct interference from me. Fortmann (1996) inspired this approach. She outlines a strategy that allows researchers to administer the surveys and write their reports with little interference (see ZLR Nyamuda 1997a, 1997b, ZLR-Dhlakama (a) 1997, ZLR-Dhlakama (b) 1997, ZLR- Chijira 1997, ZLR-Sikutwa 1998, UZR-Sigauke 1998a, 1998b, 1998c).

This section has offered a brief description of 1997/1998 field season methods, the methodology and the conceptualisation of the fieldwork. This section also acknowledged that the full-length version of the field report documenting the methodology created during the 1997/1998 field season offers an in-depth evaluation of the field season and methodology. The significance of this report is that it acknowledges the important contribution local researchers made to this study. Researchers developed a three-

dimensional vision of the issues affecting the daily lives of local women and men, and interpreted the wealth of collated information during and after the food riots. Because local researchers were willing to share their knowledge and interpret the survey information, their care in representing the issues should surface in the empirical evidence offered in this chapter.

The next section will describe the legal culture I was introduced to. Zimbabwean researchers introduced me to the subculture of women and men construct a space *kutyora mutemo* (jumping the law) as some work or patronise the informal sector. Crudely put, researchers working with me helped me collect empirical evidence which would allow us to advocate for social and economic justice for urban Zimbabweans. Yet our argument was being constructed out of fragments, momentary political vignettes encountered during the field season. The next section will provide a nuanced representation of the friction and fragmentation in and through civil society, the state and the legal and justice system during the December 1997 to January 1998 period. The next section will also describe three contemporary views encountered during the field season.

5.4 Raw Rule of Law Phrases

Female Researcher *Question*: Please define *kutyora mutemo* in your own words
 Female (SLV98-029) Answer: *zvinoreva kujamba kana kuita zvisingadiwe nemutemo...* (moving beyond or skipping the law)

While we were completing the fieldwork, the Zimbabwe Congress of Trade Unions (ZCTU) began to encourage members to demonstrate against the ESAP. The purpose of this activism was to make clear to the Mugabe Administration that ESAP was negatively affecting workers. By the end of the field season, the ZCTU was called the unofficial opposition party (Z-TS 22/03/98: 1). The women and men we spoke to used anti-ESAP sentiments. Demonstrations had become a high profile topic. This topic became more popular as rising food and petrol prices re-enforced the anti-ESAP language. ZLR-Sikutwa 1998 noted vendors were quick to complain about the prices:

Basically, vendors from all HDRAs complained about the high transport fares... Usually older women (35++) would complain - who have seen the prices soaring over the years. They complained a bit - in some cases, the older men did so too.

The younger vendors (both male and female) complained less because when they entered the “trade”, fares were already high.

However, vendors’ willingness to complain about the economy was not mirrored as a desire to talk about the law. This represented a challenge. Our research project sought to understand the difficulties and opportunities of women and men navigating and interacting with the politico-legal structure, authority figures and navigating around the law. Also, using English words to describe what we were seeing seemed inappropriate. We wanted to find a way to capture the language of men and women who daily justified to themselves and those in their community why the legal texts needed to be transgressed, why authority figures should be challenged and why the legal system did not serve justice to the masses.

5.4.1 Jumping the Law (*Kutyora Mutemo*)

This section highlights the distance between the politico-legal system and women and men’s sense of justice in several ways. First, a key informant told me she needed to navigate around the law simply because the laws were outdated and oppressive. She used the English phrase “jumping the law” and then told me that *Kutyora Mutemo* is a Shona phrase and concept particular to urban Zimbabwe legal culture. Its equivalent in the English language is to do what is not allowed, to do something that is beyond the law, to disobey what you are told to do, navigate around the rules, and so on (Z-LR- Chijira 1997). When we asked fresh food vendors to define *kutyora mutemo* in their own words, they offered a number of different answers. For example *kutyora mutemo* is explained as a transgression of the law: *kurega kuteerera zvinodiwa* (unable to follow what is allowed (female SLV98-153)).

Second, the lack of consistency in the answers we received is significant. The lack of consistency suggests the sorts of complex values we were encountering. How different men and women answered was often related to an individual’s decision to respond to the interviewer. Some offered answers. Others did not. Some answers offered as definitions of *kutyora mutemo* are as follows. *Kuita zvinhu zvausina kunzi uite* (to do something which you were not told to do (female SLV98-154); and *zvinoreva kudarika mutemo* (it

means to go beyond the law) (male SLV98-111). A more complex explanation of what *kutyora mutemo* involves is the acknowledgement of limits: *kupfurikidza hwaro hwaunofanira kutevedza muupenyu* (exceeding certain limits set for you in life (male SLB97-016); *kusatevedzera mpimo inodiwa nevamwe* (not following the expectations which are required of you by others (male SLT97-016)); and *kusagamuchira nzira inoshandiswa navamwe* (not conforming to the standard that society holds (SLT97-014)). The impression given is that the street language *kutyora mutemo* broadens the interpretation and application of the law for the individual who is analysing the law. Many will analyse a law and ask if it provides them with justice in their day-to-day life.

Third, there was a purpose to our focus on local explanations of *kutyora mutemo*. The intention of this exercise was to better understand men's and women's views on the legal system, the law and law enforcers, as separate forms of social control applied to individuals, as well as a system of social control. We were documenting a subculture of men and women who told us their views on authority figures. We also wanted to have a sense of the variables involved in the *kutyora mutemo* discourse, which would give us a better understanding of the spatial distribution of this subculture.

Fourth, this exercise did give us a sense of the political identity being formed in the space of this subculture. For example, the women and men we interviewed defined *authority* with some creativity: *Authority figure* suggests that there are a multitude of positions an authoritative individual takes on in society. For instance, authority figures were perceived as *munhu anoidziirira nyika kubva mune vanotyora mutemo* (a person who protects the country against people who break the law (female SLV98-221)) and *munhu anoita basa rekuchengetedza zvinhu zvese nekubatsira vanhu sekunge varohwa* (a person who takes control of everything in the country and also people (female SLV-249)); *munhu anoongorora magariro edu* (a person who controls how people are living in an area (female SLV98-130)). The point that seems to come clear with both of these local understandings of authority – is that authority is there to protect the interests of the state rather than civil society.

Fifth, the important variable in the *kutyora mutemo* discourse, which reconstructs the space of this unique subculture, appears to be the silences, evasive answers and partial answers/partial untruths, as suggested by the quotation below:

People are generally suspicious of researchers, especially if they suspect you are with the police. Therefore, when they give you answers they will not say exactly what they want to say for fear that you are a sell-out. Sometimes they can even refuse to be interviewed for no reason. Also, some -male commuter omnibuses operators, men vendors etc. - people at Mbare just harass people. Especially, if they notice that you are not familiar with their activities they will deliberately harass you. Like: “how can you be carrying out a research from the University of Zimbabwe - you don’t even look like you have “O” levels. Sometimes omnibus operators prevented vendors being interviewed - saying if they said that transport was a problem, they will go to their selling points on food from Mbare so the women got scared and would not say exactly what they wanted regarding transport.

Women. Because of the reasons above, women tended to guard what they wanted to say especially when asked how authority figures’ laws affected them as well as their community. As their community, one could tell that the women *could* have said more, but for one reason or another, can’t. No matter how much an interviewer convinced the women that this was a research, which had nothing to do with the authority, they could never disclose more.

Men. Men feared less and so spoke their minds on all issues discussed. One man from Mbare laughed when asked what an “authority figure” was and asked jokingly whether we were from the police and said: “I don’t care anyway even if you are - I will tell you what I think - even if you arrest me it will be for telling you what I think and I will stand by it”.

Men are usually less suspicious of interviewers’ identity...

Women, despite asking you over and over again who you are, why you are doing the research, whether or not the information they disclose will not be used against them - still remain suspicious.

Older women (35++) were more guarded of what they said. Some even showed fear by laughing when asked that question [on authority figures] and said: “are you with the police?” Younger women were more frank, fearing less, and having less suspicions.

Men were less suspicious. Of all ages and locations...even those like Kudwadzana where there was lots of violence (UZR-Mapedzahama 1998)

As the quotation above suggests, *how* interviewees responded to the sorts of questions we were asking suggests that asking these questions was a personal confrontation. Stated in another way, their thoughts on the legal system had been formally excluded and our attempt to include them was causing disequilibrium. By asking them to help us construct a *kutyora mutemo* discourse we had tapped into a particular space that challenged

mainstream ideas. This space is unique because of its subversive presence in society. The wide array of answers suggests that *kutyora mutemo* is a fluid conception of how women and men interact, challenge and avoid the law.

Two general points help summarise these views. One, individuals who are faced with a situation in which they have to *jump/skip/move* beyond the law tend to interpret the law with some flexibility. Two, and in contrast, most men and women seem to be aware that authority figures with the power of the law tend to interpret the law in a harsh and literal manner. Law is a means of punishment by authority figures such as the police and the legal system. The key point is that men's and women's definitions of authority figures tells us a lot about local perceptions of law enforcement: *munhu anoita basa rekuchengetedza zvinhu zvese nekubatsira vanhu sekunge varohwa* (a person who takes control of everything in the country and also people (female SLV-249)). The word *control* is the key to understanding how men and women within the *kutyora mutemo* space felt about this power relationship.

To conclude this section, this line of investigation allows the themes, political positions, strategies and tactics used in local society, which, in turn, are used to contest the authority of the law to surface. However, we also wanted to understand how a local person – the individual producing and reproducing socio-spatial relationships in the general *kutyora mutemo* space - perceived global anticorruption initiatives weaving a legal-institution-strengthening initiative into the legal fabric of Zimbabwe's domestic laws. This is the focus of the section below.

5.4. 2 A Critical Tool: Seeing the Political Space constructing the *Kutyora Mutemo* Discourse

One point stands out about individuals who produce new socio-spatial relationships through the *kutyora mutemo* discourse. This discourse allowed us to tap into local impressions of the quality of *justice* from the legal and justice system. Many believed that the legal and justice system served the state rather than the people. This belief illustrates their *perception* that there was a great distance between their day-to-day reality and the

politico-legal and economic structures. Civil society understood this distance as the distance that the state and/or legal and justice system would have to bridge before civil society would legitimate these state structures.

This is how I learnt that the power of the state and the legal and justice system was being de-legitimised in the day-to-day lives of men and women. This point can be better understood in the socio-economic and politico-legal context. Women and men would use the phrase *kutyora mutemo* threaded into a discussion about their daily needs such as ensuring that their children's school fees will be paid, medical needs attended to, housing, food, transportation, water fees, remittances for the extended family would be sent in time to buy seed for the next ploughing season, and a multitude of other reasons. Within the overall rubric of *kutyora mutemo*, many of them participate in *kutyora mutemo* simply to make it easier for them to continue their jobs, for example, a woman selling fruit and vegetables on the corner is willing to create this political space. This economic dimension of breaking the law meant that most women and men we spoke to felt that they had to break the law to protect their economic survival. They had to take direct action, even if it meant de-legitimising the authority of the state and the legal and justice system.

By understanding this, I understood that most women and men were forced into a making a political statement about the state and the legal and justice system in their daily lives. They were being forced to commit a "crime" in this context. The point being made is that one who participates in *kutyora mutemo* is never disinterested. He/she is always a politically situated person contributing to the ongoing process of constructing the politico-legal culture of Zimbabwe. Thus, the political space that *kutyora mutemo* champions presents itself as a reluctant critique, although it is a critique, of the Mugabe Administration. This critique is rooted in the individuals' daily challenging the authority of state control, the political hierarchies and inequities and authority figures.

Some individuals were also very clear that they were de-legitimising the legal and justice system, as suggested by this man's comment:

... One man from Mbare laughed when asked what an “authority figure” was and asked jokingly whether we were from the police and said: “ I don’t care anyway even if you are - I will tell you what I think - even if you arrest me it will be for telling you what I think and I will stand by it” (UZR-Mapedzahama 1998)

Most individuals seem to negate deeper questions about the legitimacy of the law, but many expected a wider interpretation of the law. This odd tension suggests that individuals embrace the law because they understand its boundary – as the *jumping* is attached to knowing what the legal text states. The conclusion of this exercise is this: the *interpretation* of the law, not necessarily the law, needs to be broadened. Thus, this grassroots rule of law view suggests that the law has failed the people because the justice system does not interpret laws widely enough to represent their reality. At the same time, by acknowledging the socio-spatial reality producing a *kutyora mutemo* discourse, we acknowledge the men and women who - through daily economic transactions in a workday - provide a daily critique of the legal system and create and recreate *kutyora mutemo* as a political space for individuals to engage in the political struggle against the state.

The significance of understanding local impressions of the quality of *justice* from the legal and justice system is that we began to understand the hopes and dreams and aspirations of individuals working in the informal sector, the *kutyora mutemo* discourse indicates that men and women are aware of the law, particularly those who work within and outside the bounds of the law. Yet, despite the steady increase of corruption stories in the local newspapers (as a way to appease World Bank officials (USA-Z-1997/1998)), it was clear that many women and men did not connect *kutyora mutemo* to corruption. Most focused on carrying out their normal economic activities. This lack of connection between *kutyora mutemo* and the externally imposed anticorruption agenda is significant. This lack of connection is probably due to most people thinking that corruption is the language of the formal market economy whereas *kutyora mutemo* is the language of an economy that has always marginalized in the eyes of the state.

This section has identified that the core of the *kutyora mutemo* culture is a society deeply divided, characterised by the view that access to law and justice is not equal. Yet, this

culture is shaped by a long history of different experiences with oppression and conflict. In the section below, I narrow the focus and describe three contemporary views encountered during the field season.

5.5 Three General Views Woven within the Legal Culture

... [the] two main lines of thought [about the legal and justice system are], more or less opposed to each other, one sees the police as a body created from below, or by civil society, the other as body created from above, by the rulers (della Porta 1998: 245-249).

5.5.1 First View: Broadening Narrow Views of the Law (?)

In 1997, a new non-governmental organization was formed, the National Constitutional Assembly (NCA), organized by legal and NGO community activists. The NCA had an explicit agenda: focus on human rights, directly challenge the state on matters of the constitution, the criminal code, etc. and recreate the politico-legal structure (Z-NCA-Kagoro 1999, Z-NCA - Kagoro 2001, Z-I 27/07/01). The NCA seeks to challenge the national politico-legal structure and re-write the constitution to create more equitable solutions for all (Chapters Four, Six and Seven). They have a mission to educate and reawaken the political activism of the people (a point subsequently discussed in Chapter Six). Since 1997, the NCA has altered how people view the law and legal structure. They acknowledge the difficulty of cultivating public support for the law and the court system and argue that most people resolve their disputes outside the court. They offer a variety of reasons and suggest that many women and men raise the following questions: does the legal system represent their social norms? Will the legislation and the rulings made in court follow political logic of those in political power, rather than higher ideals of justice? Has the legal system developed shared principles with the broader society, or if the people do not trust the court, how can the courts be connected to the people they are supposed to represent? At the heart of all these questions is the critical point: the majority are wary of the alliances woven between Mugabe Administration and the judicial system (Z-NCA Intro 2000). The central argument made by the NCA is that law is understood as a text that expresses the permission, prohibition, duties and obligations of the state. The state drafts legislation to control the behaviour of the people.

Both ZLR- Chijira (1997) and the NCA focus on structural inequalities within existing political hierarchies connected to the legal system. Many of the people we interviewed indicated that they were concerned with the ruling party's influence upon the police. Many identified two forms of abuses by the state. First, encounters with the police are thought of in unfavourable terms. Local researchers' reports help to explain why. Certainly part of the reason is based on the notion of authority; part is based on distrust. For instance ZLR-Dhlakama ((b) 1997) documents that many police collected bribes, and harassed and threatened men and women with their presence. Just the threat of police is frightening to many (Zunki SLI98-03). To be detained by the police and held in the prison, renowned for its unpleasant conditions (USA-Z-HRR 1999/2000) is a frightening prospect. Other explanations are offered as well. Part of the reason is based on the notion of whom the laws serve. For instance, a librarian working with me, ZLR - Chijira (1997), argues that the state condones the seizing and searching of property of vendors and many other economic subgroups that struggle against unequal distribution of resources. Legislation passed by the government is perceived to control people (ZLP-1998a). In many cases the presence of law was perceived to be a formal way of resolving grudges between the state and civil society, usually in the favour of the state.

Second, police are expected to be affiliated with the ruling party - ZANU (PF) (ZLR- Chijira 1997, Z-FG 11/12/97-NR, Z-FG 11/12/97-PE). Some researchers, such as ZLR - Nyamuda (1997a, 1997b) and ZLR-Dhlakama ((b) 1997), stated that men and women resolve their conflicts away from the police, and away from ZANU (PF). Other researchers amplify this point (UZR-Shambare 1998, CUR-Tsatsa 1999). If calling upon the police, men and women usually expected more trouble. The solution created by the people, as UZR-Shambare (1998) suggests, is that small communities know who the troublemakers are. Troublemakers are commonly known as the people who were *kusagamuchira nzira inoshandiswa navamwe* (not accepting the way that is used by others (male SLT97-014)). Local people set up their own structures of surveillance to control those who don't follow local norms. At the heart of many women's and men's fear of the law was the exercise of sovereign state power guided by norms and values that they did not agree with. This fear is well founded, as suggested by the events that

occurred during the *Gukurahundi* period. During the anti-dissident campaign (1982-1985), civilians were killed and maimed when the 5 Brigade, commonly referred to as *Gukurahundi*, was sent into the region to crush mainly ex-ZIPRA dissidents, the military wing of ZAPU during the liberation war. Recent reports and newspaper articles suggest that the fear of the *Gukurahundi* period is still prevalent (Z-TDN 13/12/00, ZHR-NGO 1999b, *Z-Today-CCJP* 1997). In the wake of this event, is an extreme fear of victimization (see ZHR-NGO 2001-05).

In sum, most women and men living in the high-density residential areas had a fairly narrow interpretation of the law: avoid contact and interaction. One reason why we may have heard a different set of explanations than those offered by NCA is because of the distinct position we took inside the research project, and what sort of changes we would like to see as an outcome of the research. Shamir and Ziv (2001) loosely categorise the two main views on how legal structures could be changed – a market cause view and human rights view. *Human rights views* lie with the individuals who focus on human rights and are willing to directly challenge the state on matters of the constitution, the criminal code, etc. *Market /Community views* lie with business entrepreneurs, vendors, buyers, contractors, employees, employers, communities or neighbourhoods on issues and ensure that they advocate for change in the market rather than within the state. The NCA approach was a human rights approach, whereas we took care to embed our advocacy issues within a market view so that we were not threatening people when interviewing them. Moreover, most of the researchers working with me were not overt political activists; all seem to be deeply concerned about the future of their country. Many have other jobs as furniture transporters, hardware vendors, computer business school owners, writers and university students. Working on this project, I was introduced to the breadth and depth of inequalities around this diverse group. Moreover, I sense, rather than am told, that these men and women felt constrained, with little individual power to change the economic direction of Zimbabwe. In all likelihood, they too avoided the police at all costs.

The problem with this solution is that it is a narrow understanding of the law - i.e. avoiding law enforcers. Many men and women we interviewed had made little attempt to approach the police with their problems, thus local issues were not solved by the legal and/or justice system, but by local communities. Compounding communication problems between state and civil society is the reality that the Mugabe Administration controls mass communication: the television stations, radio and newspapers were dominantly controlled by the ZANU (PF) government (USA-Z-HRR 1996/1997). Most men and women we interviewed were aware that many of their neighbours and relatives were engaging in extra-legal activities: ranging from vending vegetables to illegally transporting people. In general, many men and women are even more vulnerable because they continue to *kusatevedza mutemo* (not abide by the law (male SLT97-008)), and very few made the effort to bridge the legal system and their concerns. This is precisely why the NCA sought to educate the masses with the message that the law was supposed to represent the people's wishes, not the state.

These findings, supported by the literature that documents the delivery of "justice" to the African population during the settler era, suggest that this view is deeply rooted in a historical distrust of the judges, magistrates, police and court system. During the settler era, very few Africans were allowed to challenge the public record. The system of apartheid legislation implemented during the settlers' era (even more rigidly enforced during UDI) meant that most Africans perceived racist rulings among judges, magistrates and clerks. Many Africans felt that quality of justice was biased. If there were errors, these errors according to the NCA (Z-NCA Intro 2000) came from the flaws within a racially biased court (see Palley 1966, Mittlebeeler 1976 and others).

5.5.2 Second View: Stop Asking Threatening Questions

Many of the men and women we interviewed expressed reservations about even answering questions about law and authority, as suggested by interviewers' notes related to the question *what changes have you noticed transporting produce in 1990-1994 and 1994-1998? Why do these authority figures (i.e. police) create problems?*

Some of them replied this question not freely as they don't want to talk about police. Someone asked me if I worked for CID [Criminal Investigation Department] when I was about to finish interviewing her. I explained to her that this survey has nothing to do with CID. She go on to answer the question and it's the last on page five. Some told me one comment as they did not want questions involving the police ("Tariro" female (SLI98-01-Jan 14/1998))

Most of the people feared the mention of police. Some of them thought we were under the ZANU (PF (ruling party)) and were trying to arrest those people who talk too much ("Nyaradzo" female (SLI98-02-Jan 13/1998))

The word police actually made them uncomfortable and they would prefer to pretend not to get the question perfectly. They would also need to know why mentioning the police. They also feared that I might be trying to betray them. And another lady volunteered to know my name and she took it down including the ID number ("Zunki" male (SLI98-03-Jan 12/1998))

In an ideal world, this should not be a threatening question. However, in the reality of many Zimbabwean men and women, who live in high-density residential areas, the term *police* in a questionnaire related to an informal food distribution network is quite threatening. While these difficulties were not anticipated, the intent was not to mischievously create a stir in the community. Rather, we sought to seriously understand their concerns. What the interviewees' reservation to this question suggested to us is that many thought that the law and law enforcers were outrageous, in the sense that these laws did not respond or correspond "to the changing needs of a changing society" (Henkin 1999: 37-38). ZLR - Chijira's (1997) report provides a great deal of evidence that the legislation did not reflect the changing economic and social needs of the majority in the wake of a failed ESAP. In one way, the view of the law offered by vendors, consumers and transporters in the informal food distribution network supports the NCA viewpoint of the law – law is intensely political. But the men and women we interviewed offer a different version of the same reply. Many discussed the power of the law in the context of their work place.

In this second view, the power of the law seems to be regarded as an elusive, abstract entity, which materializes when an authority figure appears on the horizon. This individual can be negotiated with. For instance, many men and women understand that their extra-legal activities test the jurisdiction of the state/law, that their activities

challenged the law, as suggested by the following comment made by a vendor: *zvinoreva kujamba kana kuita zvisingadiwe nemutemo...* (moving beyond or skipping the law (female SLV98-029)). Many understood that boundaries were being crossed. As one bus driver stated: " *kupfurikidza hwaro hwaunofanira kutevedza muupenyu* (exceeding certain limits set for you in life (male SLB97-016)). Many are willing to explore the possibility of crossing this boundary. In many cases they are surrounded by other inequalities. For instance, some see the wealthy drive through the city in their Mercedes. In this context, a Mercedes symbolizes a powerful legal-political statement to those who cannot afford such luxury items. Many – who live within extreme wealth-poverty disparities - dream of such wealth. But more importantly many dream of having the political alliances and social networks that are the entry point to such wealth (Z-FG 28/08/97, Z-FG 11/12/97-PE).

With this view of the law, the dialectic of criminal/citizen behaviour is invoked. Some individuals made distinct decisions to condone a range of activities that others would not accept as acceptable, perhaps at the cost of creating tension and challenging social norms within the community. Many had to question whether or not they would take their power into their own hands and create a future for themselves. As a local transporter put it: to follow the essence that he/she had the power to do what they wanted in life (*kuwa nesimba rokuita zvaunoda muupenyu* (SLT97-038)). The balance of justice was being weighed: on one side - the attraction of having money, material wealth; on the other - the likelihood of being caught by the police who one could bribe, or simply give the goods to. Weighing these options would likely affect the level of jumping the law that a person would engage with. Physical or mental conditions, a prior record of engaging with petty theft, vending, dodging authority figures and whether a person had a steady job and family ties were part of the decision-making process involved in jumping the law (Zunki SLI98-03; Tariro SLI98-01; Simbarashi SLK97-01).

Local researchers such as ZLR-Chijarira (1997), ZLR-Dhlakama (1997) ZLR-Dhlakama (1997) and ZLR-Nyamuda (1997a, 1997b) report that the specific post-Independence legislation re-written to empower many Africans was often impractical. Many self-

employed men and women continued to participate in "extra-legal" activities such as urban gardening (ENDA 1994, 1996), and used "extra-legal" activities such as prostitution, etc. Their workspaces needed to be protected from other entrepreneurs. Thus, many would consciously create a political space for themselves on a daily basis. The literature that focuses on African economic empowerment argues that Africans assimilate economic norms on their own terms. This literature supports our findings. For instance, Horn (1994a, 1994b) documents how women respond to economic opportunities and Mougeot (1999a, 1999b) provide a study of urban gardens. Wild (1997) makes a similar argument in his study of African businessmen and women. Schmidt's (1996) analysis of gendered social relations between 1890-1939 suggests the settlers used the law for political reasons. Jeater (1993) contends that in many cases, state control over the family affected "traditional" cultural norms (see Bourdillon 1991a).

5.5.3 Third View: *Amai Tsitsi*

A different view from those working and purchasing from the informal food distribution network is a housemaid, formally employed by an Ex-patriot British family. *Amai Tsitsi's* view provides a sense of a shifting and changing post-colonial identity. In one way, she actively hoped that the post-Independence era would bring her and her family a new life (Palley 1966, Barnes and Win 1992, Hatchard 1993, Zinyama et al 1993, Godwin and Hancock 1997). In another, she is sharply reminded of the inconsistencies of her hopes and aspirations for the post-Independence era and the reality she lives in. The third view is much deeper than the other two, and it has not been explored in recent scholarly work. This view needs to be understood as a socio-spatial and political abstraction that was originally grounded in the mythology that Independence would equate freedom. This abstraction is now a contemporary geography that flows from the fear of the legal text of the Law and Order Maintenance Act (1960). Shortly after the 1997/1998 field season, I wrote the following piece. This narrative is significant for several reasons. It details a Zimbabwean woman's life, hopes and dreams which suggest a worldview of many men and women represented in this thesis and some of the local views of law, justice and inequalities.

The passing of the Public Order and Security Act, January 10 2002 makes this narrative a particularly appropriate subject for an in-depth examination (LCHR 19/12/01-POSB-HR). The success of NGOs during the year of Zimbabwe's exclusion from the Commonwealth will depend largely on individual's willingness to challenge the POSA in their own homes, communities and in the public sphere. As noted in Chapter Four, the Mugabe Administration hopes to quell the rising social movements by charging journalists and the opposition under POSA (Z-CIZC-19/06/02). This piece suggests the psyche of individuals and some of the subtle power relations that challenged LOMA for many years. This narrative also tells us that Mugabe's rule of law view was not as dominant as one might assume.

Amai Tsitsi

The public persona of *Amai Tsitsi* is a hardworking housemaid, known for her practical jokes and willingness to exchange cheerful greetings with the lodgers. Indicative of the socio-cultural environment of the house, the cats and dogs are given more house privileges than *Amai Tsitsi*: they are welcome to eat, sleep, watch television and socialize with the inhabitants of the main house. Whereas she is not, once she is off duty. She enjoys a higher social standing than the gardener, Chabata. Chabata is not allowed in the house, even to receive long-distance phone calls from his pregnant wife who lives in the rural area. The more private persona of *Amai Tsitsi* slips out on occasion. I have seen her take advantage of the absence of her employers to chase the dogs and cats with a broom.

Amai Tsitsi and I often meet in the kitchen, a common space for a housemaid and a lodger to chat. A housemaid for over twenty years, *Amai Tsitsi* has had a lot of time everyday to scrutinize Mugabe's style of governing. She knows I am a student. She is always willing to clarify and further hone my understanding of the issues. I am happy to chat. It was quite common that I would read *Amai Tsitsi* snippets of the daily news as she irons residents' clothes that she washes by hand. We are both relaxed. I use this space to rejuvenate my sense of peace and security. After experiencing the friction and activity of Mbare Musika, I am thankful that I (a graduate student) can "lodge" (rent a room) in one of the most affluent residential areas of Harare, Mount Pleasant. We chatter, agreeing that the restructuring of the economy had led to high levels of taxation (which had led to large national budget deficits) and increased inflation and there had been little improvement to the living standard of many African Zimbabweans since Independence (1980) (Jenkins 1997). I am aware that these interactions become increasingly less causal as the field season progresses.

The chatter has a serious sub-text. Our seemingly causal conversations are laden with several political layers. The most apparent one is the social and spatial

context of our interactions: my privileged identity as *madame* and her occupational identity as a woman who hand-washes my clothes and dishes, changes my bed sheets, polishes the floor, etc, etc. The second layer is that I am not comfortable with being firmly categorized as *madame*. I find that only a few meters exist between myself and a representative of the body politic that Zunki (SLI98-03), Nyaradzo (SLI98-02), Tariro (SLI98-01), Rudo (SLI98-05), Bekai (SLI98-04 -01) Simbarashi (SLK97-01) have interviewed in the past six months. The third layer builds upon these circumstances. In these instances my concern that various adjectives will accompany the title *madame*: elitist *madame*, racist *madame*, Eurocentric *madame*, that I am doing my best to break down the signifier *madame* and ensure that I do not provoke her to think that I am the sort who constructs such notions to distinguish two human beings. When we met in the kitchen, at stake is the symbolic territoriality of our speech. I seek to legitimate *Amai Tsitsi* as a human being rather than as a woman oppressed by axes of difference - gender, class, race, and age (Collins 1998a, 1998b). In doing so, during these times, I also offer her sanction to use a thrust and parry of emotive images for my "access points" of sympathy (see Amadiume 1995, ZLR-Chijira 1997), decreasing my own latitude to shift my identity as something else than the identity of the western/foreign/Other.

Anecdotes of her life history provide a good example. These anecdotes highlight how the increasing competition for material and symbolic resources have diminished her self-worth, pride, dignity and even her compassion for others. Her behaviour changes as she continues to wonder if the post Independence economy will protect her in her old age. I admire *Amai Tsitsi*'s ability to assert notions of difference between us. She creates political space that allows her to manoeuvre; to shift her identity between the often-essentialized "customary" behaviour and "modernized" urban African woman, through her stories of her life. For instance, her stories of traditional *muti* (magic) wherein *n'yangas* (witch doctors) dismembered human bodies for strong magic re-assert these notions of difference. I have a hard time internalising her story: how would I feel if my missing relative was found in the river, his genitals and fingers missing, his death attributable to the high prices paid for body parts used for strong *muti*? I simply do not know. The distance between my reality and her story allows me to simplistically essentialize and categorize her "culture" as different - her belief systems (Bourdillon 1991a) separate her from me. However, her story signifies that her worldview differs greatly from my own.

This leads to the fourth political layer of our discussion, which is related to how I chose to accept or repudiate her stories of difference. It seems to me that in these micro-interactions, as routine as my need for a late afternoon cup of tea, I am fostering a situation that accepts a reversed power role: *housemaid-dominant/madame-subordinate*. By requesting that she make her concerns of her personal security visible to me, I have no control over the images such as *muti* (magic) and *n'yangas* (witch doctors) she narrates as real stories of her life. Indeed, many narratives she offers are counter-discourses to my prevailing

understanding of what is *reality*. These counter discourses have the tendency to fill the physical space of kitchen with the serious sub-text of disbelief/belief. What becomes quite profound about her stories is that they tend to verify rather than repudiate the researchers' notes on the daily hardships facing urban men and women.

These interactions tend to follow three themes. First, my political background differs from hers. I readily accept that the stories *Amai Tsitsi* and I exchange are really an argument, a contained attack on the inequality surrounding her. She comments on the deficiencies within the machinery of the state to clarify, process, and amend the public's access to public authority which appear to be as limitless as the topics we have covered in our late afternoon conversations. It is rarely an abstract discussion about the goals of the nation. Questions posed by *Amai Tsitsi* - such as how the state's recent implementation of the taxation policy (which is to pay for the expenditure of large sums of money on development projects in the rural areas and more generally throughout the country) is for the economic well-being of the nation - also force me to question how this national identity is being constructed by the State-owned media (USA-Z-HRR 1999/2000). More frequently this discussion is grounded in her comments about her children who have limited opportunities in the formal employment sector; these job opportunities are characterized by exploitive principles, scandalously low wages, negligible opportunities for advancement, and the number of other ways in which these jobs were discriminatory. *Amai Tsitsi* is all too aware she is not allowed to speak from the floor of Parliament and her Member of Parliament will not voice her concerns (ZLP 1997c: 2725).

Second, my privileged reality sometimes disturbs me. For instance, at times I find myself wishing that I could separate the location of this purposeful, and value-oriented social commentary and my place of residence. Perhaps then I could analytically listen and comment. But critical self-reflectivity often prevents me from placing boundaries on our social interaction. It forces me to put her face on these stories. I try several different strategies because psychologically I am more receptive in this symbolic place I presently call *home*. The politicisation within this "private" space personally touches me. One of the first strategies I use is to soften the boundaries of black/white, Zimbabwean/Canadian, housemaid/graduate student, her work-place/my home between us. For instance, when we were in the kitchen, it is a semi-hierarchical exchange of knowledge. Location and gender become commonalities that temporarily overcome racial and economic differences. The spatial corollary to our actions and words make this information exchange partially stable: we are both women who perceive the kitchen as a core part of our identity.

The space of the kitchen also helps define the power/resistance dialect that exists between her and I. It is stable as long as I accept the category: *madame*. The instability of shifting political roles detailed in the description below illustrates what happens when I make the effort to include her in discussions about the

national security issues. In one, I am recognizing her as an equal: a political voice. In another, I become accountable to her political voice when I've disrupted these stable political roles. Another strategy I try is to put on a mask of a public persona. This allows me to exclude her as simply another marginalized person. I also try to use neutral phrases, narrating media rhetoric that major governmental structures provide the framework for this exploitation, thereby hiding behind a polite void of un-accountability. But a principled debate about political issues echoes with triteness, particularly while I am standing beside a woman whose hands are chapped and dry from hand washing my clothes everyday. The third strategy is to seek for shared points of interest and truths. As I came to know the intimate details of our experiential differences, the hierarchy of *subordinate-housemaid/dominant-madame* became lost in the interstices of our smaller struggles for truth.

Third, I become more aware of the local social norms and legal culture of Zimbabwe through our conversations. For instance, in late March 1998, I read aloud the article "Bill to Silence ZCTU" (Z-S 22/03/98: 1) to *Amai Tsitsi*. *Amai Tsitsi* non-committally listened to the details of the Public Order and Security Bill:

Bill to Silence ZCTU

Faced with growing rebellion by the masses and the successes of the ZCTU [Zimbabwe Congress of Trade Unions]-organized demonstrations and work boycotts, the government has come up with a bill that will effectively curtail all activities that the state deems undesirable.

The new bill, published on Friday [March 20 1998] and which is to be called the Public Order and Security Bill, is intended to replace the dreaded Law and Order Maintenance Act, which was imposed during the colonial period to check black political activism. The old act has been highly criticized in the post Independence era, and government had undertaken to revise it.

But the proposed bill is even more draconian than the pre-Independence Act.

The new piece of legislation will make it a crime for anyone to organize a public gathering without three days' written notice to a regulating authority - being a senior officer in a particular place. It will be a criminal offence for anyone to utter a "subversive statement," which is a statement that is likely to incite persons to public disorder or to oppose the state by unlawful means. The maximum penalty for contravening the clause will be a fine of [Z] \$25,000, or five years in prison, or both.

However, it is not clear what constitutes a subversive statement.

The new bill will also give magistrates the power to prohibit all public gatherings within any area for up to three months.

Anyone who thereafter organises or attends a public gathering in a contravention of a magistrate's order will be liable to a fine of [Z]\$5,000, or one year's imprisonment or both.

Responsibility for the payment of any damaged property during the riots will be shifted from insurance companies to the organisers of the demonstration.

"If an organiser of a public gathering fails to give the police notice of his gathering, or fails to comply with a direction or order regulating or prohibiting the gathering, he will be liable under this clause to compensate injured parties for any injury, loss or damage they may suffer as the consequence of this failure," part of the bill reads.

Police protection against angry demonstrators has also been heightened by the new bill.

Z-S 22/03/98:1

She politely waited for me to finish reading. Then, she simply said: "That man [President Mugabe] is a killer."

Amai Tsitsi's flat, emphatic, and subversive statement surprises me. She has never before commented so forcefully about this "open secret" which was only discussed in loud whispers. Nor in all six months of my fieldwork, have I heard such a clear sentence challenge Mugabe's leadership style (see Staunton 1990, Barnes and Win 1992, Sampundi 1992, Godwin and Hancock 1997, Hatchard 1993). In this pithy five-word sentence, she blandly acknowledges that the state has used violence in the past, and present and will in the future. Through the words of this sentence, I hear confirmation of other stories I have heard and read: people detained without trial, the harsh interrogation techniques of detainees and civilians in Matabeleland, the criminal offences and investigative powers of the Central Intelligence Officers (CIO) (Hatchard 1993). This is the first time that a local person has done so, and I am somewhat shocked, even though I have seen this woman in my daily life, five days a week, for the past 26 weeks.

At this particular instance, *Amai Tsitsi* communicates with her body, her voice and her expression the many decades men and women Zimbabweans have sceptically viewed the so-called supremacy of national constitutions or international law. The decades Africans have been dominated by legislative mechanisms that validate emergency laws. Using Scott's (1990: 45 50, 80-87, 136-137) ideas as a guide, it seems that her brittle words reflect the political transition of the past months. The dissidence welling below the surface of official politics is beginning to be openly expressed. People are becoming less frightened about talking about the brutal practices of the post-Independence government. Like *Amai Tsitsi*, they are openly making their thoughts and opinions publicly known.

In the past, *Amai Tsitsi* and I often cloaked our communication with protective silence, obscurities and humour to lighten the hard edge of a politically sensitive social or economic issue (Shuy 1993, 1998, Kuzon 1998). Momentarily, I believe *Amai Tsitsi* and I are equal. Then I am aware of my self-deception: I suddenly understand three points that had remained elusive. First, internal security force jurisdiction threatens personal security; the private is public in *ordinary* situations and conversations. *Anything* could be considered a *security* threat. My silence -

that follows her flat statement - reflects the power/powerlessness dialectic within my possible interpretation of her statement. If I agree with her that there is an abuse of power in government, am I the one making the subversive statement, or is she? Additionally, I understand the “discourse of silence” left in the wake of war noted by numerous Southern African scholars, such as Abel (1995). Amai Tsitsi knew the value of “keeping quiet”. As Allan (2001: 89-119), argues, individuals who seek to protect themselves from the state’s legal power, often use silence. Lastly, our political differences lessened. In understanding these points, I am aware that I had entirely misunderstood the power relationship between us.

Understanding the Power/Powerlessness Dialectic

The lesson I learnt from this conversation profoundly changed how I understand that the state threatens activism simply with the power of maintaining LOMA, and letting women and men feel a sense of risk when speaking.

As a Canadian, I had made several assumptions. I assumed that I had the power and the responsibility to appropriately represent Zimbabwean issues. For instance, in the field report I acknowledge some of the difficulties involved in carrying out research. I thought perhaps my struggle was with my ability to appropriately represent these men and women’s lives (Leybourne 1998b). For instance, I have only crudely outlined details of *Amai Tsitsi*’s life. Her political reality is vibrant and ever changing.

I have tried to untangle, define and publicize some sort of understanding of her reality. Yet, the categorization I claim here might be contested. Nonetheless, the ideas gleaned from these conversations is that these concrete details of *Amai Tsitsi*’s experiences, beliefs, hopes and dreams offer a sense of how her own identity politics were created in a location, under a set of specific age, gender and economic conditions. The stories offer me a very personal insight into how someone I share a “home” with lives on a day-to-day basis in Zimbabwe, as well as how her sense of national identity shifts as the politico-legal landscape shifts and changes. However, as I look over the hundreds of surveys completed (see Table 1.2) I realise that this is a rule of law view that directly challenges Mugabe’s Administration.

Another series of assumptions I had made were based on how I assumed that our legal cultures were somehow similar. I assumed that I enjoyed a large sphere of freedom of movement, economic freedom and societal freedoms that *Amai Tsitsi* did not seem to have, and I attributed this to geo-historical differences of origin. As a Canadian, my interactions in Mbare Musika had indicated that I enjoyed many liberties, perhaps more than most Zimbabweans. Yet, I thought the state and the police force work are accountable to people (see Herbert 1997a: 4). And somehow I still felt protected by the Canadian Charter of Rights and Freedoms (1982) (see Hirschl 2000a: 1064-1065). Whereas, Zimbabweans do not have this legal privilege. As I realize how LOMA/POSB worked, I realize that our legal histories and assumptions about the way the law worked were intensely different.

What was not different is that we were both vulnerable to LOMA; our private thoughts and opinions could be used against us.

In fact, in our casual afternoon discussions, I had encroached on political space I should have left alone. We had freely discussed the nation's politics, economics and the corruption of the security system. Moreover, Amai Tsitsi has the political positionality and political networks to shift all these intimate discussions of ours and frame them in a way that I could be seen the internal security threat. I would be seen as an outsider - the enemy.

Moreover, competition for political favours and economic rewards had reached the level that Amai Tsitsi might be working with her estranged husband, a member of the Zimbabwe Republic Police (ZRP (Hatchard 1993: 31-32)), and reporting the statements of the lodgers (Canadians and Britons) to the Central Intelligence Officers (CIO) who cover all aspects of state security, internal and external (Hatchard 1993: 31, Godwin and Hancock 1997). For the first time, I was interpreting LOMA/ POSB as if I were an enemy of the state, as have many African Zimbabweans in the settler and post-Independence eras. As a Canadian completing fieldwork in Zimbabwe, I learnt what it was like to be the recipient of a group boundary of us/them: a boundary that actively excluded me rather than included me: I was the one perceived as the threat. I learnt that LOMA/POSB meant that most men and women lived with a blanket of fear - the fear that cultivates silence and secrets.

Politics of Information

The purpose of my research is to collect empirical evidence in order to legitimise a citywide reality of poverty: injustice in society. I realize how intensely political this research is. I began to understand how the community I socialised with - foreign researchers and volunteers working at non-government organizations - might be perceived as a "meddling" group of outsiders. For example, this information that Zunki - (SLI98-03), Nyaradzo (SLI98-02), Tariro (SLI98-01), Rudo (SLI98-05), Bekai (SLI98-04 -01) Simbarashi (SLK97-01) and I had collated of a food insecure situation could be more broadly interpreted as a threat to national security. We had mapped a citywide movement of men and women, many of whom were frustrated with their quality of life. Conversations with *Amai Tsitsi* verified that these 1200+ stories were probably fairly representative of the political consciousness in the high-density areas. Men and women were frustrated with the post-Independence politics, a relatively bleak future and the lack of positive change for the majority. All of the fragments we had collected indicated a desire for change: dissatisfaction with institutions, and a sense of identification with an imaginary or real community of activists. The people could interpret our maps of food insecurity as the increasing spatiality of militancy. After this interaction, I realized the maps we had compiled on the January 1998 food riots/labour strikes should be taken down from my office wall and locked away in my suitcase. *Amai Tsitsi* could use the maps of the food riots/labour strikes if she

had decided to use the POSB. Clearly, her and my interests in personal security transcend the local level of a kitchen in Mount Pleasant, Harare.

Control of Political Space

This lesson taught me that *Amai* Tsitsi, not I, had the power. For instance, I began to hope that *Amai* Tsitsi's power over me is limited to her social sphere of interaction: her workplace and her urban and rural networks. I did not dare to ask any more security related questions, elicit information, criticize government actions, or make suggestions about future policies. These comments/questions had all been stifled by POSB (Public Order and Security Bill). I used silence for fear of being labelled *the enemy*. The POSB may have originally been written for Africans, not for foreigners (Mathews 1986, Hatchard 1993, Godwin and Hancock 1997). Yet, the post-Independence era had taught many Africans to invert these categories. Thus, to regard *Amai* Tsitsi as a passive victim disguises the intricate processes of how she uses space to protect her own day-to-day life, as well as to use it to penetrate my private space. As the focus shifted from my sense of personal liberty to my sense of personal insecurity, I became increasingly aware of the changing forms of economic grouping. *Amai* Tsitsi may be separated from her husband, but years of networking with his family as her children grew up have built up some form of community that creates one alternative. She has the choice of how she will interact.

As I mentioned before, on a number of occasions, *Amai* Tsitsi clearly understood these differences enough to use her narrative power with which to construct and reconstruct these differences (Amadiume 1995) defining the boundaries of the knowledge exchange between us. This boundary of *us/them* made me realize how unprepared I was to cope with this situation.

The details above suggest that *Amai* Tsitsi's and my conversations are ordinary conversations, much like those of many Canadians who read *The Globe and Mail*, and provide a running commentary based on the recent scandals of corruption exposed in the Liberal Government and the Chrétien administration in June 2002. Such conversations, we think, are hardly subversive.

What is interesting about the details about *Amai* Tsitsi's life is that nothing in particular stands out. In one way, her story is perfectly *normal* in the Zimbabwean context, as most likely is her contempt for the legal and political system. Also quite normal is my reaction to her frustration with the concept of "Independence." With independence, she thought she would have a better life (see Staunton 1990, Barnes and Win 1992). Since Independence, it has been a question of adequate compensation. Her position as a

housemaid, as a stepping-stone to a better-paid job wherein she could learn the language and ways of the settlers or other elites, has become static. She is a 40+-year-old woman who has no other formal job prospects (the national employment is at 50% unemployed). She lives in the servant's quarters, relying on explosive paraffin stoves to cook her daily meals. Another point of how *normal* our association is that we both share a hope that the future will bring her and other Zimbabweans a better quality of life.

However, her life experiences created within the legal culture unique to Southern Rhodesia/Zimbabwe meant that *Amai* Tsitsi had grown up with laws that officially excluded her and labelled her as an African woman, part of the "non-civil-society" (Mamdani 1995a: 3). She is a woman who has never known a reality where there was "equal citizenship for all under the law" (Mamdani 1996: 129) and who is acutely aware that the country had undergone a changed in leadership, which meant "deracialization without democratisation" (Mamdani 1996: 32). Her childhood was the sort of childhood many had experienced. She grew up in Tribal Trust Lands, surrounded with laws that did not recognize Africans as citizens (Palley 1966: 564-628, Hatchard 1993: 9-12).

5.5.4 Power/Powerlessness in the Dissident Culture

This section will offer a summary of all three views. At first glance, these three views seem different. However, a shared history provides the connective tissue. In 1981, the abolition of the dual legal system meant that, for the first time, a single hierarchy of courts administered law in Zimbabwe. This has meant radical shifts in the Post-Independence legal system (Sayce 1987: 215-16). These structural changes have worked their way into the fabric of Zimbabwean's domestic law, by individuals working in the legal system. Some, like politically committed lawyers in NCA, do their best to position themselves to speak for others' views on the law (Z-NCA Intro 2000). The effects of the changes in the legal culture since 1981 are yet to be fully appreciated. Yet, we know that domestic laws are responding to external ideas, such as the researchers working with me on the food security project suggesting to local consumers and food vendors that local food rights are an important issue both nationally and internationally.

Some of the effects of the single hierarchy of courts administering the law are quite dramatic. For instance, a process of cross-fertilization of ideas and norms has been initiated. While customary law has been used to further divide Africans and Europeans, whereas Roman-Dutch law has been applied to both Africans and Europeans. Some effects are more elusive. Most of the legal aid offered to Zimbabweans is through NGOs such as the University of Zimbabwe Legal Clinic, and the Harare based Legal Projects centre, which disseminates basic legal education throughout the country. And an informal legal Bar – the Law Society of Zimbabwe – disciplines practitioners whose behaviour is deemed “unprofessional, dishonourable or unworthy” (Sayce 1987: 216). What is striking about these three views is that they *all* are situated in different locations, and connected very differently to the legal system. For instance, members within the NCA are closely connected to the legal system, and they use the language of the law to legitimise their attempts to change the legal system (Z-NCA-Kagoro 1999, Z-NCA - Kagoro 2001). In contrast, individuals such as *Amai Tsitsi* who grew up during the settler period have had the settlers’ laws shape a portion of her public identity (see Chapter Four, *Section 4.4.2 Second Reason: Legal Personality*). She has experienced: i) LOMA - minority suppression of majority nationalism era in the settler era and its accompanying suppression of democracy, constitutionalism, notions of citizenship and human rights (ii) given her age of 40+ years, *Amai Tsitsi* had grown up with gender-specific repressive “laws” that denied her the right to own property, iii) even dignifying social customs such as lobola had been made illegal (Mittlebeeler 1976). With this background, she may work as a housemaid to avoid having to challenge the law and law enforcers on a daily basis (Mittlebeeler 1976, Hatchard 1993: 9-12, see Schmidt 1996, ZHR-NGO-SR-03/01)

The details above suggest that *Amai Tsitsi* has had to re-work her identity alongside the realization that the post-Independence era has not provided all the promises she expected. In contrast to NCA’s agenda to connect different social moments and re-awaken the masses, *Amai Tsitsi* seems to acknowledge her limited scope of power. From my observations, she has become somewhat complacent. The scope of her responsibility to make changes for the next generation seems to extend only to her children and her family. She has already lived through one liberation war and is aware that the change in

leadership meant “deracialization without democratisation” (Mamdani 1996: 32). At the same time, our conversation suggests that she is becoming more militant. She believes that she deserves a better life. Wamba-dia-Wamba (1994) contends that the work of militants is to make public statements and force debate, thus creating new political spaces. When *Amai* Tsitsi spoke, I suddenly heard how Zimbabweans are politically gagged, bound by decades of silence – but that their voices are waiting to be heard.

In contrast, the connection of the informal sector to the legal system is complex. For example, men and women who must daily participate in the space of *kutyora mutemo* and work in the informal sectors are something of a paradox. A key feature of their daily work routine is to participate in *kutyora mutemo* and recreate that political space. In normal circumstances, a key feature of the law is that an individual feels morally obligated to obey the law, to protect the community from harmful effects of abnormal behaviour (: 45-146). But these are hardly normal circumstances. As noted in Chapter Four, the complex politico-legal structure holds the danger of undermining the participation of people like *Amai* Tsitsi in the political process. Those earning a living in the informal sector have to agitate every day to ensure that they can earn a living. They, unlike *Amai* Tsitsi, use their power to reshape the power of the law within their day-to-day actions based on an individual choice to reconstruct the *kutyora mutemo* space.

Each view represented above is significant. Each view suggests that individuals choose to engage or disengage, or ignore the legal structure in very different ways. One would think that there is little interaction among these three views. Yet, these three views intersect on several points. First, all want changes in the legal system, but very few are willing to risk the threat of physical violence (Z-NCA - Kagoro 2001). Additionally, they share an understanding that *all* are vulnerable to the values currently being exercised within the post-Independence politico-legal structure. For example, *Amai* Tsitsi provides us with an insight into how contemporary group boundaries are presently being constructed in Zimbabwe. Yes, my reaction to *Amai* Tsitsi’s comment: “That man [President Mugabe] is a killer” is telling. The critical point is that even up to March 1998 the silence about Mugabe’s style of governing was relatively intact. *Amai* Tsitsi, the researchers working

with me (Zunki - (SLI98-03), Nyaradzo (SLI98-02), Tariro (SLI98-01), Rudo (SLI98-05), Bekai (SLI98-04 -01) Simbarashi (SLK97-01)) and I had all been socially conditioned to remain silent. What is even more significant is that this process of socialisation is very rarely publicly discussed, nor acknowledged in the scholarly or popular literature (see Z-TM 8/05/98-O). And what is the most profound about silence and fear becoming a social norm in this landscape is that it suggests the Mugabe Administration's values and views seem to have a powerful hold in society. These values are present even in the crevasses of society, for example, these views hold the power to permeate a kitchen conversation in an affluent residential area.

Reactions such as mine - hide my research and protect the information I had collated - suggests how individuals respond to the power of the law. Anecdotes are important. They suggest that the legal tool, LOMA, has deeply touched and moulded many Zimbabweans' reality. For instance, a person might be suddenly held accountable for speaking too freely. For instance, while I was in the field in 1997/1998 I was too frightened of the phrases "subversive statement" and "undesirable activities" (Z-S 22/03/98:1) to further probe into how members of parliament rushed this Bill through, or to solicit the civil society's response to the POSB. Zimbabwean journalists were too nervous to initiate deeper investigation for a similar reason (Simbarashi SLK97-01). Because Southern Rhodesia/Zimbabwe has been in a state of permanent emergency, a *normal* part of political life of the public is to use suppressed modes of dissidence and silence as forms of defence (see Allan 2001). Or as Abel (1995: 206) has argued, in these contexts, information is shared through a "... smokescreen of lies, silence and mutual incomprehension."

The third point of intersection is that the International Declaration of Human Rights language is not a focal point of women's and men's communication. Sometimes the language is used to define what is *normal* – such as the right to earn a living without being harassed, but the language is used in covert conversations rather than as a public statement. As Marx and McAdam (1994: 86-90) put it, the gossip and rumours are all part of a dissident culture when individuals privately or publicly identify with an

imaginary community of activists at the beginning of a social movement. Fourth, stirrings of a group willing to publicly demonstrate against the Mugabe Administration have been in motion since the 1994 – The Supreme Court Ruling of *Munhumeso and Others against LOMA* argued that the right to freedom of assembly and of association is the foundation of a democratic society (SA-TST 08/07/2001-Gubbay). Fifth, ESAP has touched all these groups. All are concerned that the present government's vision of development has failed. In holding different views than the government, and lacking legal power and processes to offer their views, a geography of resistance to the state has been growing as their hopes and aspirations for the future have become increasingly constrained. Their discussion, debate on the street corners and in public forums suggests a constant critiquing and reworking of ideas of how the nation can be better directed toward preparing an economic future for the next generation (Z-NCA-Kagoro 1999).

To summarise this section, the critical point being made is that individuals in Zimbabwe are only as powerful or powerless as represented by the text. This study acknowledges that these points of intersection hold the potential to make civil society powerful. Individuals and NGOs *could* find linkages with other NGOs to connect to international institutions. These horizontal and vertical linkages connecting domestic and international laws hold the power to make change. What seems to be apparent in many of these views is that all create some room to manoeuvre and agitate. From *Amai Tsitsi's* shift in identity politics, to market women inventing gender norms through economic and sexual behaviour, to the NCA challenging the executive government by holding a Stakeholders Conference (Z-NCA - Kagoro 2001), *all* are prepared to contribute to re-defining a new vision of politico-legal development.

A second point being made is that this study acknowledges that the Zimbabwean civil society is somewhat powerless. Clarification is needed. Their powerlessness crystallises in the reality that these individuals and groups remain fragmented, diffuse and disenfranchised. As I observed during the field season, there is little interaction between these groups. Perhaps because they do not see themselves engaged with related issues. Market women did not see any reason to collaborate with the NCA, because the NCA

uses a different language. Yet the market women I spoke to in 1994 were carrying out their own form of anticorruption campaigns ("Tambudzai" female, 35+ years old, SVZ-V94-01 (Unpublished field notes for van Zijl de Jong 1995)). The NCA uses the language of law, as does the Transparency International. Both organisations speak to a political elite about the need for an anticorruption campaign (Wang and Rosenau 2001:39).

The intention is to stress that the two anticorruption initiatives remain separate because the World Bank/Transparency International/ anticorruption initiative does not speak the language of the common people. For instance, the World Bank/Transparency International/ Robert Mugabe anticorruption initiative might confer with NCA, but they do not confer with the market women who are very much in touch with the economy and the politico-legal structure, or with individuals who participate in the raw politics agitating for new space in the *kutyora mutemo* subculture. The difference of language, community, and identity politics means that the social masses that might create an important change in the legal culture at the grassroots level are excluded from the very discussions that are meant to include them.

The third point is that this section has offered a nuanced representation of three contemporary views. This study acknowledges that the Zimbabwean legal culture is one deeply divided by history. This study acknowledges the deep divisions in the legal culture because individuals have unequal access to law and justice. This study also acknowledges that these different views tend to intersect on several points: most avoided the police, many desired changes in the legal and justice system and the local economy, and many feared the symbolic laws such as Law and Order Maintenance Act (LOMA (1960)). This discussion is directly relevant the points made in Chapter One that *individuals*, rather than entire legal and justice systems, choose how he/she produces and reproduces a vision of social justice; and individual voices can force a sovereign-state to "cede some sovereignty to international organizations charged with enforcement [and compliance of international law]" (Braden and Shelley 2000: 126). Against this backdrop, the next

section will describe the conditions that created the nation-wide anticorruption/civil rights movement.

To conclude, all these nuances and disparate voices suggest that there are a wide array of political spaces in which individuals, small coalitions, and allies (inside and outside national borders) create opportunities for potential allies to join the anticorruption/civil rights movement against the formal politico-legal and economic structures of the Mugabe Administration. The two important points to consider are these. First the *kutyora mutemo* space - marginalized as a politico-legal space, has a unique economic reality. Women and men construct the space *kutyora mutemo* (jumping the law) as they create their own economic niches working in the informal sector. This is an economic space that challenges the state and the legal and justice system on a daily basis. Moreover, this space has a unique political identity. Many individuals do share views on some issues. They participate in an oppositional space to the Mugabe Administration, and they are part of a political endeavour that seeks to challenge the Mugabe Administration. Second, the nation-wide anticorruption/civil rights movement was not being legitimated by the state, or by the international lending institutions. Yet, this movement does interfere with the mainstream reality constructed by Judge President Justice Godfrey Chidyausiku, the Mugabe Administration and beneficiaries of the War Veterans' fund, as the section below suggests.

The next section will offer the methodology used to reveal the presence of an anticorruption/civil rights campaign, a local movement challenging the Mugabe Administration's politico-legal structure, as it sought to be legitimised by the World Bank/Transparency International anticorruption initiative.

5.6 Representing an Anti-Corruption/Civil Rights Movement in Zimbabwe

Because the anticorruption/civil rights campaign was not being legitimised by either the Mugabe Administration's politico-legal structure or the World Bank/Transparency, this study developed a method to reveal an anticorruption/civil rights campaign, based on two general questions. One, why was there a nation wide anticorruption/civil rights

movement forming as a response to the Judge President Justice Godfrey Chidyausiku, the Mugabe Administration and beneficiaries of the War Veterans' fund? Two, why did the micro scale anticorruption/civil rights campaigns exist in an uneasy tension with anticorruption initiative led by outside institutions such as Transparency International?

This method will be included here. Two reasons justify outlining the method used to collate the material that suggested that an anticorruption/civil rights movement was rising within Zimbabwe in 1997. One, this technique is distinct from the Transparency International's strategy, which focuses on conferring with the business and political elites of countries around the world (Wang and Rosenau 2001). Two, this technique used several steps to collate the relevant material.

The first step was to review the primary documents. This review identified evidence of the corruption discourse in newspaper articles, parliamentary debates, and key informants comments and local magazines. Many of the primary documents hold the suggestion that there has been some resistance to Mugabe's Administration inside and outside formal state institutions. For example, the labour union organisation – the Zimbabwe Congress of Trade Union (ZCTU) – offers statistical evidence proving that ESAP has affected members' quality of life. Many NGOs, such as ZCTU, have become statistically competent. Without appearing overtly political, ZCTU can argue - with the ESAP language - that the worker's quality of life has been affected by the Mugabe Administration's economic mismanagement. More importantly, this primary evidence suggests that these NGOs borrow the tradition of economic discourse from Transparency International to suggest that the Mugabe Administration was inappropriately managing the economy. This review is significant, insofar that this study made the connection between a political discourse that was acceptable to the local politico-legal culture, which also had the power to gain attention in the outside community. The unfortunate outcome of NGOs using this language was that it was interpreted through a cost/benefit analysis rather than as the political language it was meant to be.

The second step was to identify the multilayered politics within different organisations and institutions, including the ZANU (PF) party that were changing alongside the economic landscape. This study examines the micro-instances of friction inside the ZANU (PF) institution. These shifts of power in formal politics reshaped the power dynamics in civil society. The third step was to consider why an individual might join an anticorruption/civil rights movement in the context of current events. Abstract anti-Mugabe-Administration sentiments, during this period, might be from any number of events that were happening in 1997/1998. As numerous NGOs have commented, 1997 was the beginning of the period marking the beginning of a new politico-legal landscape. Table 5.3 provides the list of several important events that have significant meaning for the situation in May 2002. Stated most simply, 1997 created the foundation of the large-scale civil rights movement that we see today. Especially notable were the nation-wide civil rights/anti-corruption movements of December 1997, January 1998 and October 2000. These civil rights/anti-corruption movements have been discussed elsewhere and will not be repeated here (ZHR-NGO1999a: 9-10, Z-MMPZ 16-22/10/00, ZHR-NGO-SR-09/01: 22, ZHR-NGO-TM 10/01). The significant point to take from the nation-wide civil rights/anti-corruption movements of December 1997, January 1998 and October 2000 is that they have been labelled as *riots* by the Mugabe Administration (Z-MMPZ 16-22/10/00).

It is evident from this section that the empirical evidence is available for the state and post-1997-Asian-Financial-Crisis-global-anti-corruption initiative and "corruption watchdogs" such as Transparency International to analyse and evaluate whether or not they have the grassroots support (Z-Insider 31/07/01, WB-ACK 2001, Feldstein 1999). However, because the World Bank/Transparency International/ Robert Mugabe anticorruption initiative allowed the dialogue to remain at the level of the elites, rather than ask the local people, the micro scale anticorruption/civil rights campaigns were forced to exist in an uneasy tension with anticorruption initiatives led by outside institutions such as Transparency International. Nonetheless, the state transformation/human rights/democracy legal-institution-strengthening initiatives supported the microscale anticorruption/civil rights initiative that began in the 1980s (see

Table 5.3). This study will suggest that because of this external support, microscale anticorruption/civil rights initiative became fully operational in 1997.

5.7 Evidence of an Anticorruption/Civil Rights Movement 1994-1998

Several examples of primary evidence available to the World Bank/Transparency International/ Robert Mugabe anticorruption initiative are offered below. This material could be easily interpreted as economic and political corruption through the World Bank/Transparency International anticorruption initiative viewpoint. The argument could be easily made that this is more evidence that Zimbabwean legal and economic culture is resisting the World Bank's vision to eradicate corruption and bribery, including the World Bank's vision which simplistically seeks to strengthen legal and economic institutions to improve Zimbabwe's economy. Outside institutional practices that connect the Mugabe Administration and the economy affect real people. The individuals I spoke to never directly stated that they were challenging the Mugabe Administration's political economy, rarely – if ever - used the language of *corruption*, and very few of the women or men we interviewed worked for the state. Yet many provided evidence that each individual, within her/his limited sphere of power is trying to monitor, alter and challenge politico-legal structures that govern her/him. Many were challenging the states' politico-legal structures using legal methods of dispute resolution and interpretation and allowing the broad and deep subculture of resistance to the legal reach of the state to surface. Thus, close and multiple readings of women's and men's comments about the post-Independence era legal infrastructure and architecture suggest micro scale challenges within and outside the Mugabe Administration. While not monumental, each small action is significant because it is directly connected to redrawing the lines dividing the state, the judiciary and civil society, as the variety of readings offered below suggest.

Table 5.3: Events in 1997 – The Foundation of the Nation-wide Anti-Corruption/Civil Rights Movement

Activism by Democratic Institutions – The Media, NGOs

Demonstrations

- 1997, the ZCTU organised a legal nation wide stay away by obtaining a court order prohibiting the government from interfering with its plans for a peaceful demonstration (a lesson that had been learned from the August 1996 nationwide strike of civil servants. The 1996 strike had been declared as illegal by the government, but many civil servants had been re-hired by the government (USA-Z-HRR 1996/1997). This set the stage for the "winter of discontent" - a series of private sector, wage negotiations and strikes in 1997 (USA-Z-HRR 1997/1998); nation-wide protests against the fraud of the war victims compensation fund and the proposed tax package to create funds for the war victims. In 1997, ZCTU took it upon themselves to organize a one-day national demonstration to protest the government taxes to fund the war veteran's pension. The demonstration was immensely successful. A reported 3.5 million people attended the demonstrations around the country. This nation-wide display of activism attracted extensive suppression by the government. The fact that ZCTU approached the High Court to hold the National Day of Protest, even though it was legally unnecessary, meant that the ZCTU had the legal document supporting their public activism whereas the state had no legal grounding for its harsh suppression of the demonstrators.
- 1997, Demonstrations by the war veterans who demanded compensation for wartime injuries. The government chose to address the demonstrations as a security threat, thus needed a security bill. In July 1997, to ban the demonstrations by the ex-combatants, the government made use of LOMA (Law and Order Maintenance Act).

Publications

- Private media criticism of official corruption increased during the Chidyausiku Commission investigation into the fraud of the war victims' compensation fund. The political space opened through this wide spread acknowledgement of corruption meant that the private media could begin to criticise the actions of the military. After 1999, this political space had been silenced (USA-Z-HRR 1997/1998, USA-Z-HRR 1999/2000)
- In 1997, the publication of *Breaking the Silence, Building True Peace: A report on the disturbances in Matabeleland and the Midlands 1980 - 1989* by the Legal Resources Foundation (LRF) and the Catholic Commission for Justice and Peace (CCJP) gave Zimbabweans a text to reflect upon and to discuss the full extent of the violence committed by the Mugabe Administration's violence in Matabeleland. Details of the widespread massacres, beatings and torture across the rural part of Matabeleland invoked anger, memories of the *Gukurahundi* era violence.

New NGOs

- 1997 - the formation of the National Constitutional Assembly (NCA) which focuses on strengthening the independence of the Supreme and High Courts from the political pressures of the ruling party. Agenda: re-write the constitution.

Debate

- Unprecedented public debate on the repeal of LOMA - prevented the bill from being passed by parliament. Legal and human rights activists continued to criticize the Government's efforts to adopt constitutional amendments detrimental to human rights protections. With the support of the public, a number of non-governmental organisations consulted with the government to re-write the LOMA bill as new legislation known as the POSB (USA-Z-HRR 1997/1998).

Private Property

- November 1997: owners of 1,471 farms, some of which are black-owned, were notified their land would be acquired by compulsory means. In some cases, land was apparently targeted for acquisition to achieve political goals. In December, 1,420 administrative appeals were filed with the Ministry of Lands and Agriculture by owners of the targeted farms, challenging the notices to acquire their lands. By year's end, the Government had not acquired any of the newly identified land. Opposition party leader M.P. Ndabadingi Sithole continued his legal battle with the Government over its 1993 acquisition of his farm (USA-Z-HRR 1997/1998).

Elected Officials

- In 1997, inspired by the vocal response of the civil society protesting the re-imposition of LOMA and the War Veterans pension, the interference of the human and legal rights NGOs and the increasing public criticism of official corruption by the independent press, Parliament had greater influence on the content of proposed legislation in ruling party caucus debates and during the committee phase than in previous years. Until 1997, there is no effective Parliamentary opposition, and the legislature remained subordinate to the executive branch (USA-Z-HRR 1997/1998).
- In 1997, the Supreme Court upheld the validity of the 1996 election results. The High Court nullified the results of the Oct. 1995 mayoral elections in Harare, Bulawayo and Gweru. Ruling party candidates won the 1996 mayoral elections.
- In 1997, I was surprised to learn that the Mugabe government formally endorsed human rights, even inviting ZimRights to meetings (ZOP-IE- 1997 (Msipa); ZOP-IE- 1997; ZOP-IE – 1997 (draft)).

5.7.1 Oral Stories from Mbare Musika in 1994

This experience of a market woman in Mbare Musika, the central open market in Harare, is from unpublished field notes, collected for my Master of Arts thesis. The oral story of a market woman “Tambudzai” suggests the interweaving of law, economics and differential power relations, which have shifted and changed as ESAP policies began to change local economic and political structures:

... Ten years ago [1984], there were no thieves. Five years ago, there were a few thieves, but not many...Last year [1993] there were not too many thieves because there was special security in Mbare...the Market is owned by City Council. When the good security was transferred, the new security is working with the thieves, who bribe the security with the tomatoes they steal from the vendors...only 15% of the security is honest...Last year, the security was more honest, but the pressure of his work mates made him transfer away from Mbare. Now, thieves are picking up our tomatoes. There are five thieves for four vendors. There are 7 thieves around one woman. They want to steal her tomatoes. If we provoke them, they will use their knives (“Tambudzai” female, 35+ years old, SVZ-V94-01, interviewed in Oct. 1994 at Mbare Musika, Harare, Zimbabwe).

These interactions among vendors, thieves and the security hired by the Harare City Council suggest an ironic twist. “Tambudzai” becomes doubly vulnerable – security guards work with thieves. Municipal law in this location is inverted in such a way that the security guard receives more personal incentives to work with the thieves than to protect market women. Yet, this interview is significant for several reasons. This interview was completed in 1994, before the World Bank anti-corruption initiative took shape.

“Tambudzai’s” willingness to detail the changing legal/illegal behaviour from 1984 to 1994, the number of thieves and the method of payment to security guards suggests she is willing to participate in an anticorruption/civil rights movement. Her voice may have made a difference in 1998, when Harare’s executive mayor, Solomon Tawengwa, was formally accused of misuse of public funds. By 1999 Tawengwa had been “investigated” by the Mugabe Administration (Z-TDN 7/3/02, Z-TM 26/01/01-C).

5.7.2 Parliamentary Debates: The Politics Passing New Legislation

The World Bank/Transparency International (WB/TI) suggests that making new laws will curb corruption (Tshuma 1999, Wang and Rosenau 2001). However the citation below, a

Parliamentary debate, provides a forceful example of the politics of law making. Apparently, the externally driven initiative to create legislation and re-write current legislation to proactively manipulate the economy has some unexpected consequences. This primary evidence disqualifies the NIE logic that law creates economic progress for the masses. Moreover, it provides an important counterpoint to the WB/TI argument that law making is apolitical. The parliamentary motion set in front of Members of Parliament is legislation regarding the Zimbabwean Republic Police. During the Parliamentary Debate, Mr. Chigwedere (Member of Parliament) stated to other members of Parliament that:

I move that, taking note of the critical role the Police Force plays in the sustenance of peace through the enforcement of law and order, and cognizant of the new government policy of the retention of fees in health and education institutions, this House calls upon government to urgently allow the Zimbabwe Republic Police, as an institution to retain the funds they collect from traffic fines and use them to enhance their operational efficiency and to improve their working and living conditions, their education and health, as an incentive (Mr. Chigwedere (" Zimbabwe Republic Police" ZLP-1998a)

Mrs. Tungamirai (Member of Parliament) responded:

... My main worry is the way the motion has been passed. I would want the mover to rephrase the motion because there is going to be a need for millions of dollars to address these problems of the police which is a very essential social service for the good governance of the country...I am afraid that it will introduce a lot of corruption, especially with traffic fines...

You will also have problems where the Police are well known for harassing these vendors...My father was once a policeman and I know what happens. The junior officers would go and raid people who are trying to sell their goods and at the end of the day they would share the goods...We used to see our father bringing home these oranges, bananas and we used to feast...

So, you see that is why I am saying police would be over zealous because they would want to confiscate as much as possible and collect more money because if you tell them that their accommodation is going to come from there, their cars are going to come from that money, they would be over zealous about it...(" Zimbabwe Republic Police" ZLP-1998a)

The comment made by Mr. Chigwedere: "... allow the Zimbabwe Republic Police...to retain the funds they collect from traffic fines and use them to enhance their operational efficiency and to improve their working and living conditions" indicates that Parliament

seeks to increase their cooperation with police force. This is one level of local politics. However, at another level, roughly at the same time of this debate, women and men we interviewed told us that the state was using the army and police to abuse their legal powers:

The events of last week were so terrible because it disturbed the whole business. Many things were happening e.g. policemen and soldiers were beating up people and some people were retaliating with catapults (female SLV98-084).

The unfortunate result of passing this motion through Parliament would be that this new law would formally complicate the already very complex state-civil society-legal and justice system triangle. The most likely result would be that those victimized by this new legislation would not bring their cases to the court (Z-MDC - CO 2000).

The key point to take from the discussion above is that it supports the argument made in Chapter Four. Chapter Four offers a formal reason why people would distrust the legal system, police and the law. Chapter Four offered evidence to suggest that the language of Parliamentary Bills and Acts is a language that allows Mugabe to orchestrate his economic and political aspirations under the guise of legitimate economic and political transactions. As argued in this chapter and the last, this is a language that most Zimbabweans distrust. Thus, the common knowledge seems to be that since 1987, the formal political structure had been strengthened to ensure that the executive government could advance Mugabe's agenda as efficiently as possible. Moreover, when Parliament holds debates these debates are really to create more technical tools to reshape the domestic political economy towards his aspirations. Given both these points, it is important to look inside the institutions, and examine the politics of law making, and unravel some of the dynamics. Much of the current literature tends to polarise the ZANU (PF) party to civil society, a representation that is not utterly fair. The point of this exercise is to represent MPs in 1997 and 1998 as complex individuals who are practical, expressing objections and also using the language of the New Institutional Economics (NIE) rather than the language of ESAP (the language of costs and benefits that the ZCTU tends to use). The NIE language evident in this quotation is "institutions", "operational efficiency" and "good governance" (see Weaver 2000).

Yet, as suggested in the last chapter, often Parliamentary Debates are a ritual of deference. As Hatchard (1993) and Dashwood (2000) point out, the ZANU (PF) party is more ritual than real. Most of the masses de-legitimise the theatrics of Members of Parliament - knowing that as speakers on people's issues, especially when new legislation was to be debated, most MPs were protecting their careers. Despite such pressure to perform, MPs seem to be inflecting a small reaction of change. The changes occurring during the debate suggest that MPs do not consider the men and women they represent as inanimate objects, nor are they. For example, the debate between Mr. Chigwedere and Mrs. Tungamirai about market women trying to protect their individual property rights (oranges and bananas) serves to confirm that MPs are not wholly detached from the local economy (see ZLP-1997a, ZLP-1997b, ZLP-1997c, ZLP-1998a, ZLP-1998b, ZLP-1998c). The significance of this point will be illustrated with another example of parliamentary debates.

5.7.3 The *Chidyausiku* Commission

The example of the *Chidyausiku* Commission has direct relevance to the purpose of this dissertation. Chapter One argued that research on the threat of the NIE logic has been characterized by several critical silences. Some of the silences include poststructuralist analysis of power relations and multiscalar analysis of the conflict and tensions created as new ideas affect legal cultures and change international relations. Based on this argument, this study suggests that all legal and justice systems may be affected by the NIE/LDM. However, multiscalar and multi-institutional analysis will help us understand how the NIE/LDM) legal-institution-strengthening initiative is being woven into the legal fabric of domestic laws.

Several readings of this case of corruption suggest that the discursive structures created by World Bank and "corruption watchdogs," such as Transparency International, call for a rethinking of the current analysis which supports global anticorruption campaigns. These readings highlight the struggle civil society and the state have with an

anticorruption campaign imposed from the outside that suggests that legal reform is required (Z-Insider 31/07/01, WB-ACK 2001, Feldstein 1999).

5.7.3.1 Newspaper Stories

Funds from the War Veterans Fund had been embezzled. When I arrived in Zimbabwe in September 1997, I was offered different views on this case of corruption involving billions of dollars. The war veterans are closely connected to the ZANU (PF) dominated government as Mugabe had led and directed ZANU and been a commander-in-chief of the ZANLA forces (Sayce 1987). Suffering from unemployment, and often poverty-stricken, in April 1989, the ex-combatants formed the Zimbabwe War Veterans' Association to campaign for more financial assistance from the government (IRIN 6/02/01). In 1995, the War Veterans Association had elected Dr. C. Hunzvi as the representative chairperson. Since Hunzvi's election, the War Veterans Association grew in its impact upon the national economy. Funds needed to pay War Veterans increased from \$Z 185 million to \$Z 2.6 billion. Under the War Veterans' Act, a war veteran is

any person who underwent military training and participated, consistently and persistently, in the liberation struggle which occurred in Zimbabwe and in neighbouring countries between January 1 1962 and February 29 1980 in connection with the bringing about of Zimbabwe's independence on April 18 1980 (Z-FG 28/08/97)

When embezzlement of the public funds became public, a moratorium was placed on the War Veterans Association Fund (even though this association was publicly supported by President Robert Mugabe). The war veterans took to the streets, publicly petitioning members of parliament. *Chimurenga* (Liberation) songs were sung as a threat. In response, President Robert Mugabe commissioned Judge President Justice Godfrey Chidyausiku to chair an 11-member judicial commission to investigate the spending patterns of this Fund. In May 1997, the commission was entitled the *Chidyausiku* Commission, which eventually reported to President Robert Mugabe, but not to the public. Details from the report, such as the extent of the abuse of public funds, recommendations to repay funds, prosecute impostors and bar medical doctors who have an interest in the fund from examining any more war victims, have never been released to the public (Z-FG 09/08/98 also see Dashwood 2000: 102-103).

On August 11, 1997, the war veterans demonstrated their frustration with the government and the *Chidyausiku* Commission. After August 11, 1997, the President promised to pay new gratuities and pensions to them. By December 1997, 39,500 of the 50,000 Zimbabwean ex-combatants/war veterans/war victims received a \$Z50, 000.00 compensation package. By January 27, 1998, the war veterans' monthly pensions of \$Z2000.00 began to be paid by the sovereign-state. A calculated total of \$Z 2.6 billion had been slated for the exercise from the Consolidated Revenue Fund. The War Veterans Pension is probably Zimbabwean's largest and most visible event of corruption. Given that Zimbabwe has a population of approximately 12 million people, the fact only 39,500 people received these funds has proven to be significant in the events that unfolded between 1997 to the present (IRIN 6/02/01).

5.7.3.2 Local Stories

A local researcher working with me, ZLR- Chijira (1997), told me that her husband had not been publicly recognized by the government for his contribution to the war. A professional acquaintance working for the Ministry of Agriculture mentioned his role in the liberation war had not received public recognition. Although these stories were narrated in a calm manner, they were hiding much deeper emotions. Many became infuriated as more facts were revealed about falsified emergency claims. Two general actions were taken. First, the public called for a moratorium on further payments to the war veterans until there has been a formal inquiry into the spending pattern of the fund. Second, they insisted that the government investigate what had happened to the funds. Thus, Judge Chidyausiku, Head of the Zimbabwe High Court, was appointed (Z-FG 09/08/98-NR).

The political landscape began to shift and change. Many of the men and women we interviewed - although terrified of ZANU (PF) government (ZHR-NGO 1999a, 1999b) - believed that the ZANU (PF) should have made their decisions transparent to the general public. Because many of them felt that their lives could be substantially changed from one-day to the next, and they felt somewhat secure, they were willing to take many risks,

including participating in a public anticorruption protest (ICG 13/07/01, Hatchard 1993). I was in the city centre of Harare on December 9 1997, January 19 1998 and March 3 1998. On each of these days I saw evidence of public protests against the ZANU (PF) government. The purpose of each demonstration was to re-iterate to the ZANU (PF) government that the decisions to provide exorbitant compensation packages to a select few War Veterans was made in direct opposition to peoples' wishes. The economy, and unfulfilled dreams, hopes and aspirations motivated many to participate in an anti-corruption movement. The movement was expressed in conversations on the side of the street, in informal exchanges along transportation routes and with friends and neighbours. The anticorruption demonstrations created new political spaces, symbolic as well as physical.

Many of these emotions, actions, thoughts and rumours culminated in what became known as the December 1997 labour strikes/ The National Day of Protest. The Parliamentary Legal Committee had approved Finance Bill No. 2. On December 9, the Ministers of Parliament were to debate Finance Bill No. 2. If MPs passed this Bill, the Bill would put in motion mechanisms that would increase direct taxes on income by 5% and indirect taxes on electricity, fuel and sales. The funds from these taxes were supposed to go to the Zimbabwean ex combatants'/war veterans'/war victims' monthly income. The ZCTU obtained a court order to hold nationwide demonstrations against these proposed tax measures (Z-TH 9/12/97:1). A reported 3.5 million people organized and publicly participated in these demonstrations. This is indicative of the wide base of public support for the 1.25 million people formally employed in Zimbabwe. Hundreds of thousands of families rely on financial contributions from the formally employed men and women (see ZHR-NGO-SR-03/01). Three million people were celebrating their right to protest. The proposition for the taxes was dropped. Yet, many people appeared to be still dissatisfied with Mugabe's lack of public recognition; a point discussed more fully elsewhere but which will not be repeated here (see ZHR-NGO 1999a, 1999b; ZLP-1997a: 2687-2700).

5.7.3.3 Public versus Private Stories

When he got worried about corruption in the top echelons of the ruling party and government in the 1980s, President Robert Mugabe once wearily asked: "If gold can rust, what will iron do"? *Ikozvino VaMugabe vangoti mwiro-o-o!* (Z-FG 4/12/97-PE)

[In 1997, the Mugabe Administration allowed some] tolerance for private media criticism of official corruption during the Chidyausiku Commission's investigation into fraud and malfeasance in the management of the war victims' compensation fund (USA-Z-HHR 1997/1998)

Whose anti-corruption campaign was it? Were war veterans simply trying to reclaim that which had been promised to them? In doubting that "the government would follow through" with earlier promises (IRIN-Z 14/08/01- Moyo), were they willing to challenge the politico-legal structure of Mugabe's Administration? Or was the anticorruption movement for the sorts of people we encountered, some of whom create the *kutyora mutemo* space just to make the local political economy a little easier?

This question gets to the pivotal point that a microscale anticorruption/civil rights movement exists in an uneasy tension with the state and international funding agencies. While the war veterans seem to be working against the rest of civil society, pushing for their "*mazvake mazvake* (individualism)" (Z-FG 4/12/97-PE), pushing at the boundaries of perceived norms, such agitation created more political space for new voices. The rest of civil society could forge strategic alliances inside and outside the Mugabe Administration to have their issues heard. Without the war veterans' demonstrations to follow upon, who knows whether or not the ZCTU demonstrations would have been so popular. The Supreme Court case - *Munhumeso and Others (1994) vs LOMA* - which allowed the public to legally participate in public demonstration without police authorisation (SA-TST 08/07/2001-Gubbay) protected both the war veterans and other demonstrators. Yet, Minister of Home Affairs Dumiso Dabengwa and the Commissioner of Police (Augustine Chihuri) decided to treat each anti-corruption/civil rights movement campaign differently: "During the ex-combatants' uprisings, police kept a low profile and were not as brutal as they were to the general public [on December 9]" (Z-FG 11/12/97-

NR), suggesting a certain level of favouritism for the War Veterans over the rest of society.

Many ex-combatants had successfully made their case to President Mugabe who publicly acknowledged the “dire circumstances of poverty and begging that characterised the lives of many an ex-combatant” (Z-FG 28/08/97). These dynamics created a shift in the political and economic landscape. The political landscape was now conducive to public complaints about the economic situation in the post-Independence era. The Mugabe Administration became a focal point because of Mugabe’s promise to the ex-combatants. According to our information, widespread rumours about the government took root throughout the landscape (“Simbarashi” SLK-98-01 (male)) because only 39,000 of 11.5 million people were awarded the war veterans pension. The common point of contention was that all had fought in the liberation: “We all made a contribution to the struggle” (ZLP-1997b: 2544). During this time I heard stories told on the street corners which re-iterate life before, during and after the liberation war:

Some men and women say that our sons were forcefully taken to fight, and they lost their sons and now they are getting problems to survive and live a decent life “Tariro” (female: SLI98-01).

Members of Parliament, however, signalled a distinct unease with the promises that Robert Mugabe had made on August 28 1997. Mugabe personally took the blame for the ex-combatants quality of life. Mugabe publicly stated “There is...readiness...to assist you...We will find the money... we can even borrow... Have you ever heard of a country that has collapsed because of borrowing?” (Z-FG 28/08/97). Members of Parliament’s unease were evident in the way that they subtly challenged Mugabe’s public announcement that the compensation package would be paid.

This unease became public when MPs began asking a series of questions. These can be found in the Parliamentary Debates (ZLP-1997a, ZLP-1997b, ZLP-1997c, ZLP-1998a, ZLP-1998b, and ZLP-1998c). Members of Parliament were asking - where were the funds going to come from? What was the cut off point for including or excluding on the basis of the level of participation in the liberation war? Members of Parliament debating

these points argued that only 39,000+ selected men and women would receive the compensation package when literally millions of men and women had psychological and physical scars from the liberation war. Debate focusing on how to create a definition of *who* would be compensated under the War Veterans Amendment Act that sought to incorporate ex-detainees, restrictees and political prisoners, is offered below:

Mr. Saruchera: ...I have a bit of a problem with the definition of a war veteran. Not a single person in Zimbabwe did not participate. But then if we allow too liberally an interpretation of the word then everyone will qualify for the provision. But it is not enough to say people who participated. Some mothers cooked food for the guerrillas, other were beaten and tortured. When they asked of the presence of the guerrillas, they were stamped on by the soldiers. I think we should sit down and try to clarify some aspects of this Bill. We all made a contribution to the struggle, but not everyone deserves to get this benefit but with a precise definition many people will be able to take advantage.

I think that when we say participate we should say war front (ZLP-1997b: 2544).

Mr. Nyarayeberi: ...[re: the definition of detainees] We want to look in all these cases to see exactly how colonial police officers especially how they treated those who spoke politics then, the cruelty with which the people exercise their duties was very much uncalled for. The cruelty was bloody and I do not like us to ignore these people...We must as much as we can try to compensate because some people ended up dying because of the torture...I know we have no money and I do not want to talk of \$50,000 but if we were to talk of \$5000, it would go a long way to make those people realize they had made a supreme contribution to the liberation of their country (ZLP-1997b: 2555).

While the details within these citations suggest high emotion linked to the liberation war, what was at stake was a subtle way of challenging Mugabe's promises (Z-FG 28/08/97). Many members of parliament were agitating for certain members of the public within their constituency. The Parliamentary debates provide a great deal of primary evidence of MPs concern for the future of the country. On December 9 1997, they forced Finance Minister Herbert Murerwa to withdraw the Finance Bill 2, which proposed to increase taxes including the introduction of a five percent war veterans' levy. The public position of the MPs is captured in a newspaper clipping, cited below:

But the MPs were unyielding, insisting...find alternative sources of finance, including reducing the number of Cabinet ministers and their deputies, as well as abolishing the posts of provincial governors. Some parliamentarians said the number of cars allocated to ministers must be reduced while their fuel allocations should be regulated.

Richard Shambambeva-Nyandoro asked the executive to learn to respect Parliament, describing as "dangerous" the current attitude of the executive towards the legislature (Z-FG 11/12/97).

A prevailing interpretation of the *Chidyausiku* Commission, as offered by Dashwood (2000: 102-103) argues that the War Veterans and Mugabe are closely allied. The War Veterans' Compensation Fund was a way to funnel funds to the ruling elite, and that Mugabe was a willing participant in this agreement. This interpretation can be drawn from the published literature that documents the difficult experiences Mugabe shared with the men and women who had helped him win the war against the settlers during Chimurenga II (Hatchard 1993, Barnes and Win 1992, Mittlebeeler 1976, Sampundi 1992, Godwin and Hancock 1997, Kesby 1996, Schmidt 1991, 1997; Sibanyoni 1997, Staunton, 1990, Stott 1989). However, Professor Sam Moyo offers another interpretation:

In 1997... a confrontation between the war veterans' leadership and the ruling party elite... [war veterans] demanded that the government pay them huge pensions. This was more or less at gunpoint (IRIN-Z 14/08/01- Moyo).

This view suggests that Mugabe had little room to manoeuvre, while he looked for ways to maintain his own legitimacy. His perceived alliance with the War Veterans was at a significant cost to the rest of the people. As an astute politician, Mugabe's silence may be telling us that there are multiple stories yet to be told. Moreover, Dashwood's (2000) analysis does not seem to ask the deeper questions of *what role did the media play when it published stories about funds that had been embezzled by the War Veterans' Association* particularly as the Mugabe Administration partially controlled the freedom of participation and freedom of speech? (see also Chapter One, Section 1.9.3: *Different Attempts by the State to Control the Flow of Information* and Chapter Four, Section 4.4.1 *First Reason: Whose International Norms?* for detailed literature review setting the legal context for the 1997/1998 events).

I was fortunate that I had contacted ZLR- Chijira (1997), a research assistant I had worked with in 1994, and asked her to begin collecting newspapers for me in April 1997. She brought to my attention the fact that embezzlement of the War Veterans Pension was allowed to be exposed. In May 1997, the corruption was publicly exposed. In May 1997,

The Independent, one of Zimbabwe's independently owned newspapers began to publicise the corruption.

Table 5.4 : Embezzlement of the War Veteran's Association's Fund (1995 - 1997)

1995- War Veteran's Association claims on the fund = 185 million
1996- War Veteran's Association claims on the fund = 347 million
1997- War Veteran's Association claims on the fund = 605 million

Source: Leybourne 1998a

By August 1997, when President Mugabe was overcome by the threats of violence by the ex-combatants, he promised the ex-combatants financial compensation. In doing so, a line divided those publicly recognized and compensated for their liberation efforts and those who were not. Newspaper article headlines such as

- Mugabe bows to ex-combatants' demands, orders . . . (Z-FG 28/08/97)
- Huge pay outs for ex-fighters: Veterans to get \$50 000 lump sums, free education, health (Z-FG 11/09/97).
- Govt releases \$27m loan guarantee for ex-combatants (Z-FG 11/09/97)
- Cracks emerge in powerful war vets body (Z-FG 23/10/97)
- Date set for fighters' big pay-day (Z-FG 13/11/97)
- Ugly head of tribalism sighted again (Z-FG 13/11/97)
- Zim economy slides into an abyss (Z-FG 11/12/97)
- Collapse of ZANU PF's authoritarian rule (Z-FG 11/12/97)
- Police rapped over brutality against protesting citizens (Z-FG 11/12/97)

tell a story of their own. These headlines are tremendously significant to understanding how events unfolded after January 27 1998, when the war veterans' monthly pensions began and how they began to play out between 1999-2002. But this is not a clear-cut situation where journalists can publish what they wish. As mentioned in Chapter Four, the Official Secrets Act is actively used by the Mugabe Administration (USA-Z-HRR 1996/1997). Newspaper editors print headlines and shift public understandings of *what* is allowed to be represented. A key part of the journalists working with local editors is finding the stories that can be presented without incurring the wrath or the use of the law by the Mugabe Administration (Z-TH 10/12/97:1&5)

Since 1997, the local independent media has publicized some of the findings of the *Chidyausiku* Judicial Commission investigating how the funds intended for victims of the liberation war of Zimbabwe, the war veterans, had been allocated. The *Chidyausiku*

Judicial Commission detailed how many of the funds had been fraudulently allocated and dispersed by Dr. Chenjerai Hunzvi. Between 1997 and 1998, the independent media continued, along with the *Chidyausiku* Judicial Commission, to publicly expose a large-scale corruption scheme of millions of dollars. Since 1997, the word corruption has been equated with President Mugabe, ZANU (PF), Dr. Hunzvi, the War Veterans' Pension and the War Veterans Association. Journalists could use terms such as the *Chidyausiku* Commission to ridicule the public appearance of justice put forward by High Court judge Justice Godfrey Chidyausiku whose recommendations were not followed by President Mugabe. Thus the phrase *Chidyausiku* Commission is used to refer to "\$450 million looted... by mostly top government officials..." (ZW-News Law 2000).

Zimbabwean journalists are aware of their role to inform society. By 1998, the media published the public challenge made by civil society. The legitimacy of the ZANU (PF) government was at stake:

...most Zimbabweans have pointed fingers at the government's flawed economic policies, especially its runaway spending that has spawned one of the highest national budget deficits in the world (Z-FG 22/01/98: 1).

The media provides the framework for important behavioural changes through the language they choose. Although not allowed to use the word *corruption* too widely (USA-Z-HRR 1997/1998), journalists could use terms such as the *Chidyausiku* Commission. Most Zimbabweans knew that High Court judge Justice Godfrey Chidyausiku led the *Chidyausiku* Inquiry. Most Zimbabweans also know that President Mugabe did not follow Justice Chidyausiku's recommendations. Thus the phrase *Chidyausiku* Commission is used to ridicule rather than suggest respect.

While this example suggests that an *idea* from outside institutions can change local forms of transparency and accountability, and underscores the point that legal discourse can alter local social structures, this evidence also suggests that corruption discourse provides a critical angle on the global initiatives that support strengthening the legal and justice system. Moreover, local understandings of the judiciary have direct relevance to this study's attempt to re-conceptualise the threat of NIE to local societies.

5.7.3.4 Stories from Women, Men and Children

Moyo (Jan 1998 per comm) argues, economics rather than politics sustains anti-state commentary. This discourse could be brought into discussions of household gains and losses, arithmetically tallied and taking into account the inflation and devaluation of the Zimbabwean dollar. In December 1997, the War Veterans Bill was passed through parliament, which gave the war veterans \$Z2.6 billion from the Consolidated Revenue Fund (Z-TH 12/12/97: 1). By December 16 1997, the government released 2.5 billion to the war veterans (Z-TH 16/12/97:1). By December 19, individual war veterans began receiving their \$Z50, 000.00 gratuities. Some of the ripple effects created by having such a large amount of cash placed into the local economy include: jealousy expressed by relatives and individuals who believed that they should have been selected (Z-TH 19/12/97:1 and 19, see also appendix field season); cash shortfalls; long queues at the city banks (Z-TH 24/12/97); impostors acting as war veterans (Z-TH 30/12/97) and many others.

Behind the newspaper headlines and articles, different social and economic levels were forming their own responses. What is not publicly stated is the fact that state newspapers actually printed these articles. This suggests that the editor of the Herald allowed journalists to enunciate their own emotions and fears in a manner that would be acceptable to the state. By publishing these reports of war veterans receiving large gratuities, the tension present with the political landscape was exacerbated. Many in Zimbabwe observed and exchanged stories. People's anxiety for their future had not dissipated: we continued to hear stories that people were "suffering".

The phrase *suffering* was heard frequently during the field season. We continued to conduct the field survey after the December 1997 events into January (Table 1.2). By sharing stories of economic hardship: "suffering", many narratives focused on common themes: the present state of the each family's household economics; and the economic future of households and the nation. Points of connection tended to be school fees and food prices. As men and women put it:

I see myself as food insecure because I support 2 families: half of my family is in the rural areas and I stay with the other half here and I am the only breadwinner here. Life becomes hard in a situation like mine...(SLC97-233 (man))

... long back we would drink tea with milk and now we no longer do that. We used to have bread with eggs but now it's so rare. We can't afford all these things. For sadza we now eat one meal a day unlike in the past when we would eat 3 meals a day (SLC97-350 (woman))

... Our income cannot sustain our family. We are not sure what will happen in the future (SLC97-413 (woman)).

These sorts of identity politics - formed through similar economic language - are shared between men and men, and women and women, crosscut gender differences, and form along lines of class and location. The *suffering* was apart of their identity. Although this economic discussion could be interpreted in neutral arithmetic terms, each comment is evidence of the undercurrent of a much larger dimension of political tendencies during this time (Shelley 2001). The language of household economics provides some evidence people were consciously mobilizing against the economic strategy imposed by the Mugabe Administration. Much of this groundswell hinged on the reality that many felt that they did not have a political voice. The groundswell became more fully fledged after January 1998. In January, the Mugabe Administration announced that the price of mealie-meal was going up 21%. Men and women calculated how this rise of a basic food staple would further narrow future opportunities for an improved quality of life for themselves and their families and responded.

The pivotal point is that the language *suffering* eloquently highlights the difficulties urbanised women and men face. Many are not able to pay school fees. Their day-to-day reality involves walking by large department stores and longingly noting the wide array of items but knowing that they will not be able to afford new blankets or cooking pots or shoes; struggling with limited funds from one month to another to pay for basic necessities; being embarrassed because a family could not afford to give food an extended family member (UZR-Mungoshi 1998, UZR-Mapedzahama 1998). Individuals grappled with this economic reality in different ways.

Those who did not have money made choices concerning with whom they would share their money and how they would earn their income, and participate in changing the social norms of the society they lived in - during a time of economic stress. The dialogue of a focus group, which is cited below, suggests all of these points:

Simbarashi (male: SLK98 01): In every house there is a bread-winner (formally or informally employed), who shares the little they have, therefore the family survives.

Zunki (male: SLI98-03): I agree. Men are not suffering. The companies that employ people are supplying people with food. But the father is not thinking about what will be needed at the home.

Tariro (female: SLI98-01): I disagree. Most are suffering. Women and children are suffering the most. Men are suffering some. Men are not able to look after the family; and go to the beer hall and eating their meal there. If a woman complains, he will not give. Few people are sharing....

Zunki (male: SLI98-03): Old women steal simply because they don't have. Some steal from habit, but most times because they don't have any money because they don't have a husband.

Tariro (female: SLI98-01): They are seeing thieves take from shops, so they follow- because the money is not enough, they have to be thieves. But, some are not stealing because of prices have risen, but because the money is not enough, they have to be thieves. But, some are not stealing because of prices have risen, but because they are thieves.

Simbarashi (male: SLK98 01): How can men plunder?... Men will plunder when high prices and low income mean that they cannot afford what they want, even those they are working everyday. They cannot save because there is not enough money for the family.

Zunki (male: SLI98-03): This is a sign that people are suffering- and people are not getting what they want. The unemployed/retrrenched are not happy, they are seated at home, many are loitering and looking for employment. They are harassed by relatives to go and find work. Some will foot into town, to go to the parks to avoid spending all day with the relatives. In Mabvuku, some women hire men to grow sweet potatoes and this gives them temporary money. This money will be used for transport by men, to help those in the rural area to harvest the fields.

When one has no job, they are harassed by the relatives they are staying with.

Your brother's wife will not give you food when he is not there, and she will tell stories about you to your brother. Your brother finds it difficult to provide for all, but it is difficult to go to the rural area when you grew up in the urban area.

The ones who plundered, this sort of life has made them change. If someone spends 1+ year looking for work and does not want to go to the rural area, harassed by relatives, some chose to steal. Stealing means you get a lot of money in a short period, whereas vending takes a long time (your money goes to rent and food).

The transition made in the focus group discussion is significant. The focus group's discussion shifts. First they acknowledge household economic and political stresses. Then they discuss the reality that those who need to provide for their family often engage in theft. Many of these points are suggestive of a mutual understanding. These informants seemed to think that plunder, looting and theft resulted from the surrounding economic environment - "this sort of life has made them change" (Zunki male: SLI98-03). Such deeds were rationalized. With no jobs, no income generating opportunities and increased tension in the home, men and women had to find alternatives. The pressure from family members for extended family members to contribute to household expenses was expressed in overt and covert ways. Some men and women were informally employing themselves in a manner that often transgressed the boundaries of the law. Nonetheless, gender differentiated coping strategies are underscored by Zunki's (male SLI98-03) comment "...your brother's wife will not give you food when he is not there". This comment suggests that complex intra-household politics shapes complex political hierarchies and those political hierarchies inside the community and household were shifting and changing alongside the changing economy. Women in particular seemed fluent in the reality of life in the city. This discussion suggests that women in particular fluidly responded to urban stresses and new opportunities that each day presented.

Suffering in this context seems to have several forms: changing social norms, frustration with being fully employed but not enough money to purchase desired goods, the possibility that dreams of the future will never be realized because of poor leadership of the nation. Perhaps one of the most poignant points is that those who were employed sought to enunciate their own fears and emotions about the fact that they were working fulltime and they "...cannot afford what they want"(Simbarashi male: SLK98 01). While each family had a different way of coping with their economic stresses, as we can see in how each individual in the focus group - Zunki (male: SLI98-03), Simbarashi (male: SLK98 01) and Tariro (female: SLI98-01) - addresses each theme. These gender-differentiated perceptions of how women and men view variations within household

structures help us understand the economic basis of individuals and the community (Monk 1996).

Even school children felt the *suffering* in households during this time. In one case, when a ZANU (PF) member of parliament (MP), Clive Chimbi threatened to convert a primary school into a secondary school, the primary school children expressed their own views with anger and violence. They smashed windows of Chimbi's business (Z-TH 14/12/97, Z-TH 14/01/98:1). Children provide a powerful social commentary of the intra-household discussion (Z-RO 03/98). As a microscopic view into the anger and tension of this two month period, the point that primary school children felt that their future was unstable tells us a great deal about friction and fragmentation within local communities.

Behind the newspaper articles and multitude of stories that people were *suffering*, one point surfaced. Many people's anger was exacerbated by the fact that the *Chidyausiku* Commission, that investigated the millions of Zimbabwean dollars misallocated and granted to a few select war victims, had not been able to use the legal/justice system to make the war victims/veterans accountable for their actions (Z-FG 27/11/97:1; Z-FG 06/11/97:1). The larger message this sent out to the public was that this sort of corruption was condoned by the government and the judicial system. In the words of one key informant, Simbarashi (SLK-98-01 (male)): "It is an unstable situation". The instability he identified grew as more people knew that the real power lay in the rumour mills (Z-TH 26/01/98: 8). On January 19 1998, demonstrations began in Harare, rapidly developing into full-scale riots that spread to other centres. These riots have been fully documented and discussed elsewhere and will not be discussed here (ZHR-NGO 1998, Leybourne et al 1999). While oversimplified, this analysis raises new questions about how an entire political landscape can become destabilised as a result of the publication of a corruption story.

5.8 Discussion and Conclusions

The empirical evidence presented in this chapter suggests that micro scale anticorruption/civil rights campaigns exist in uneasy equilibrium with the state, and

international anticorruption campaigns initiated by the World Bank (WB) and other funding agencies such as African Development Bank and many others (WB-ACK 2001). Many of these institutions would visualize that the local anticorruption/civil rights demonstrations as the antithesis of what “big business” is trying to achieve, because local anticorruption demonstrations tends to disrupt the machinery of the formal economy. The ZCTU December 1997 National Day of Protest provides a case in point.

The empirical evidence presented in this chapter takes the points made in Chapter One and begins to fill in some of the details of Table 1.2. Chapter One acknowledged that individual Commonwealth countries were being advised to strengthen institutions, to use formal economic exchanges and western legal norms to initiate long-term political-legal reform in local contexts (Tshuma 1999, CS- 4/6/99-PI, CS-9/6/1999-PI, USA-Z-HRR 1997/1998) At the same time, this chapter reveals a number of the contradictions of the World Bank’s anticorruption campaign as global processes of economies, politics, law and cultural changes affect a Commonwealth country such as Zimbabwe.

Crudely interpreted, the Zimbabwean case study suggests that the Mugabe Administrations’ use of the legal and justice system suppressed the civil rights movement. However, a somewhat more sophisticated analysis examines the presence of NCA, the presence of World Bank/Transparency International/ Robert Mugabe anticorruption initiative and the social justice/anticorruption/civil rights movement and the flow of information, ideas, patterns of discourse, power and authority. At the global level, organisations and institutions use of the rhetoric of *anticorruption initiatives, good governance, use the legal system to combat black-market economies and bribes* wove together a broad fabric of rhetoric meant to bind the economic transactions of states, society and businesses with specific laws. This broadcloth of legal rhetoric has created a global legal discursive structure which in turn has legitimised women’s, men’s and children’s use of a new legal vocabulary. Under the broad rhetoric challenging corruption, some pockets within civil society have developed their own anticorruption discourses challenging the corruption *within* the Mugabe Administration.

Just by talking, people were creating change. For instance, with women and men talking about the constitutions, or the War Veterans Fund/Pension they could refer to abuses of power by the Mugabe Administration, and some of the fear and silences that many Zimbabweans live with on a daily basis: a fear that makes it difficult for women such as *Amai Tsitsi* to openly challenge economic policies that negatively affects the quality of her and her children's lives. Individuals chose what sort of language they would use to challenge Mugabe's legal power.

These points and many others suggest that *Chikafu Cheupenyu* captured the epistemological base of rule of law views in Harare with many nuances and layers in the local legal culture. In addition, this case study may inform other scholars and researchers wishing to understand how local communities are responding to the 1997 World Bank anti-corruption initiative and the 1999 Commonwealth/World Bank anticorruption policy documents, and the 1999 Organization for Economic Cooperation and Development (OECD) anti-bribery convention - signed by 36 countries (Wang and Rosenau 2001, Salbu 1999). Indeed, this case study acts as a sharp reminder that we need sensitive methodologies in order to examine what happens to real people when international lending institutions circulate the anticorruption idea.

The deeper analysis of this case study is based on discourse analysis of primary documents. Close attention to the language used by different stakeholders at different geographic scales establishes that the World Bank/Commonwealth New Institutional Economics /Law and Development Movement (NIE/LDM) legal-institution-strengthening initiative buzz words have been co-opted and reinterpreted by different interest groups at different geographic scales. These differences can be found at three scales of analysis: the international (the World Bank/Transparency International anti-corruption initiative) the national (Mugabe Administration's politico-legal structure) and the local (the anticorruption/civil rights campaign).

The 1997 Asian Crisis has increased public awareness of the corruption issues around the world. Buzz words such as *curbing corruption*, *economic development*, *political*

accountability, expanding competitive markets, economic and political progress, increasing legal mechanisms, and anti-bribery conventions have been put into the global development initiatives. The imperialistic overtones of the global anticorruption campaigns have created unprecedented tensions and friction in transnational business relations (Salbu 1999). At the national level, the new development discourses have become the political discourse used in parliamentary debates between Mr. Chigwedere and Mrs. Tungamirai - a thin and polite façade of using contemporary development language “institutions”; “operational efficiency” and “good governance” (“Zimbabwe Republic Police” ZLP-1998a).

The local civil right/anticorruption initiative uses a wide spectrum of phrases to socially construct a grassroots anticorruption initiative within popular culture: the language of suffering, stories of day-to-day hardships, *kutyora mutemo*, reference to the Law and Order Maintenance Act (1960), the War Veterans Association, the Finance Bill No. 2, the *Chidyausiku* Commission, the War Veterans Fund/Pension, Dr. C. Hunzvi, President Mugabe, ZANU (PF), the ex-combatants who were granted large gratuities and pensions through the War Veterans Bill, workers’ political right to demonstrate and High Court judge Justice Godfrey Chidyausiku (ZW-News Law 2000). The critical point is that different interest groups at different geographic scales use different discourses to connote corruption, yet many of these phrases share a common commentary about the abuse of power by officials in public office.

This analysis offers some general insights into how different discourses used by different interest groups are constructing new political structures at different geographic scales. This chapter has described the presence of two anticorruption initiatives in a developing country working with, and against, one another. The impact of the global anticorruption initiative needs to be analysed at different geographic scales.

Analysis of international-national level interactions suggests that the World Bank/Transparency International/ Robert Mugabe anticorruption initiative assumes that the Mugabe Administration will “.... establish and implement effective laws, policies and

anticorruption programs” (Wang and Rosenau 2001: 31), and respect civil rights at the same time (Tshuma 1999). This assumption, as has been illustrated, is flawed. This confirms much of the post development literature’s analysis that development initiatives put into the hands of the state are dangerous to local communities (see Watts 2000b).

Analysis of national-local level interactions suggests that the focus has been on the Mugabe Administrations’ response to the *Chidyausiku* Commission. Unfortunately the narrow focus on the *Chidyausiku* Commission has encouraged analysts to focus on how the state appointed a judicial commission to document the fraud of the war victim’s compensation fund, rather than the important political presence of a grassroots anticorruption campaign (see Dashwood 2000). Yet this chapter has presented evidence that activists from the grassroots level were protesting the fraud of the war victim’s compensation fund and the Mugabe Administration’s social construction of the War Victims Fund. This was a local anticorruption campaign challenging the state condoned corruption: a campaign divided along the social axes of gender, class, age, education and location (see Leybourne 2002). These stories differed. Many revealed deeper divisions; some individual’s sense of community, family and neighbourhood had changed because of the corruption (UZR-Shambare 1998, UZR-Mungoshi 1998.). The literature suggests that corruption divides along the social axes of gender, race, class, age, disability, education and location (Kibwana and Okech-Owiti 1996). Yet, corruption also creates new opportunities to speak, act, challenge, inspire and oppress. Many spoke the eloquent language of *suffering* and struggled on a daily basis to provide children with food and pay school fees. Many stories of day-to-day hardships and struggles offer a sharp counterpoint to the anticorruption legal-institution-strengthening initiatives *modernisation/process* logic that suggests that stronger laws will create economic development. Rather, the evidence suggests that laws privilege the state and the economic elite.

Analysis of international-local level interactions suggests that global organisations and institutions use of the anticorruption rhetoric has created a broadcloth of legal rhetoric which in turn legitimised women’s, men’s and children’s commentary about the

corruption *within* the Mugabe Administration. Individuals have drawn together to form new political structures: a coalition that often sought to avoid encounters with the law (believing that they had to challenge the state for formal recognition of their economic and political rights). Many women, men and children we spoke to avoided the police, many wanted changes in the legal and justice system, even though very few spoke the language of International Declaration of Human Rights. Many understood that the legal culture/history they shared was dangerous because of the present silences created through President Mugabe's powerful hold on the society through symbolic laws such as Law and Order Maintenance Act (LOMA (1960)). Many were angry that the Economic Structural Adjustment Program had negatively affected the local economy, which was translated into a harsher economic reality.

The empirical evidence lays the groundwork for a theoretical critique of the critical legal institutional development literature. The literature most critical of the capitalist agenda embedded in the human rights movement is the critical legal development literature. Tshuma's critical argument is that the World Bank/Transparency International anticorruption initiative has a narrow view of rule of law - one that focuses on procedure and institutions rather than "equity and fairness" (Tshuma 1999: 75). The rigour of this literature is based on its acknowledgment that there is a *progress/modernization* logic driving the policies and practices that call for strengthening weak institutions, changing local legal frameworks, altering unclear policy frameworks and the lack of transparency, and reducing local problems of corruption and mispending. Yet, this literature does not tend to acknowledge how politico-legal and economic landscape is affected by the flow of ideas/logic or socio-spatial patterns of action/reaction. Thus, the literature's aspatial analysis impedes an analysis of the spatial diffusion of the NIE logic and how specific locations challenge this logic by creating their own symbolic political spaces.

The empirical evidence presented in this chapter begins to fill in some of gaps in the literature and tells us a little about how local communities respond to global anticorruption initiatives. As documented by the *Chikafu Cheupenyu*, there is much evidence of a changing legal culture. Empirical evidence presented in this chapter

establishes an important point. The flow of ideas connected to the World Bank's anti-corruption campaign has had many unexpected effects upon the local economic and legal culture. For instance, reading local newspapers, listening to men and women talk in the streets and working with local researchers reveals that transnational flows of information often work in tandem with changing local politics. The empirical evidence suggests that the language of international funding agencies spreads beyond the development agencies and documents, and enters the broader discourses of the citizenry at large (see Z-FG 09/07/97, USA-Z-HRR 1997/1998, Z-FG 09/07/97, ZHR-NGO 1999a: 4). The ZCTU response to the World Bank's anticorruption discourse is the most apparent. When ZCTU began their "Collective Bargaining" exercise, by publicizing worker's political right to demonstrate they made it clear to the rest of civil society that many ZCTU members did not condone the Mugabe Administration's condoned corruption, particularly when this abuse of power extended to the laws that governed individuals' fundamental rights, such as the right to demonstrate. ZCTU's focus on the wider legal right to demonstrate became an important icon of many whom wished to speak out against the Mugabe Administration's abuse of power (ZHR-NGO 1999, Z-S 22/03/98). The significance of the empirical evidence is that it points to the direction of future studies which will lay the groundwork for a theoretical critique of the post development literature that refers to legal structures, institutions and ideas as the *solution* to the current problems (see Watts 2000a).

To conclude, this chapter suggests two research topics for future studies. First, examine the local politics of law making, thereby challenge development institutions' emphasis on the need to develop legal procedures. Reviewing primary documents being produced at this time – parliamentary debates, newspapers, and magazines – allows us to understand how the social justice movement/anticorruption/civil rights movement is being legitimised by the Members of Parliament (MP). This study has asked:

- What sorts of questions do MPs ask when many feel the powerful political presence of a national leader being felt within Parliament (see Table 4.3.)? Evidence of all sorts of new questions can be found in the Parliamentary Debates (ZLP-1997a, ZLP-1997b, ZLP-1997c, ZLP-1998a, ZLP-1998b, and ZLP-1998c).

- How do MPs subtly challenge Mugabe's public announcement that the compensation package would be paid, agitating for certain members of the public within their constituency?
- What sorts of new public positions are MPs taking on that suggests a changing legal culture (Z-FG 11/12/97)?

The significance of asking these questions is to reveal that within the Mugabe Administration individual ZANU (PF) MPs are participating in the civil right/anticorruption movements, and to suggest a broader vision of civil rights movements in Zimbabwe. Civil rights movements seeking economic or social justice are often narrowly represented. The replication of information being produced by human rights NGOs is partially to blame (see AI 25/06/02, Z-CIZC-19/06/02, ICG 14/06/02, ICG 22/03/02, N- 20/03/02- NEOM), which in turn is direct cause of the human rights movement becoming more interconnected. This study explicitly adds the issue of representation to this consideration of empowering anticorruption/civil rights campaigns, and has sought to represent individuals from all socio-economic layers.

Two, future studies of how specific NGOs help change the legal culture will be important to future postdevelopment studies. A useful beginning point is to listen to shift in the legal language and become tuned into the local legal culture. The Zimbabwean case study illustrates that women and men did not commonly use the language of International Declaration of Human Rights. Yet, some were talking about the constitutions, an idea connected to the Commonwealth policy documents on good governance. It was in this context that the National Constitutional Assembly (NCA) took root (ZLR- Chijira 1997, Z-FG 11/12/97-NR, Z-FG 11/12/97-PE, NCA Intro 2000). As we shall see in the next chapter, this NGO has made substantial changes to the legal culture.

Chapter Six: The Rule of Law Must be Upheld! Seeing Transnational/Local Legal Activists Politicise the Legal and Justice System

6.1 Introduction: First Steps in a Long Journey

In 1989, participants in the Commonwealth Judicial Colloquium held in Harare agreed to advance Human Rights Principles in Commonwealth countries through several strategies: discover which judicial decisions from other jurisdictions had a reputation for advancing human rights principles and apply them to their rulings; if granted access to these instruments use them to bring innovation to local laws; and envision these as preliminary steps in a long journey. The latter point is suggested in the quotation below.

...the long journey to universal respect of basic human rights will be advanced. Judges and lawyers have a duty to familiarise themselves with the growing international jurisprudence of human rights. So far as they may lawfully do so, they have a duty to reflect the basic norms of human rights *in the performance of their duties*. In this way the noble world of international instruments will be translated into legal reality for the benefit not only of people we serve, but also of the people of every land (cited in Gubbay 1997: 254 emphasis added)

This Colloquium wrote the Harare Declaration, which sets the standards on good governance and human rights for Commonwealth countries. This declaration states that material well-being is reliant upon the rule of law, peace, order and economic development. By 1991, the Commonwealth Ministers sought to develop mechanisms to ensure that member states were committed to the Harare Declaration. They wrote a list of indicators, which include human rights, rule of law, independence of the judiciary, peace and “extending the benefits of development within a framework of respect for human rights, support of the United Nations and other international institutions...” (ZHR-NGO 04/08/01: 5). Evidence could be collated along the themes developed in the “indicators” category. This evidence would be used in judgement of the member countries’ adherence to the Harare Declaration.

In March 2001, the Commonwealth Ministerial Action Group (CMAG), Ministers from Canada, Malaysia, Nigeria, Botswana, Bangladesh, Barbados, Australia and the United Kingdom publicly began to address the violence in Zimbabwe. The CMAG publicly

admonished Zimbabwe, highlighting that all Commonwealth members, including Zimbabwe, pledged a commitment to the principles embodied in the Commonwealth Harare Declaration. Since February 2000, NGOs brought to the attention of the CMAG and SADC leaders evidence of the widespread political intolerance, lack of respect for the law, disorder and instability which led to rapid economic decline, violence and climate of fear (ZHR-NGO 28/09/01-Crisis). In August 2001, a coalition of two hundred civic organisations in Zimbabwe met to confer and to present their resolutions to the international community. This coalition called for comprehensive constitutional reform “before the 2002 Presidential Elections” (ZHR-NGO 04/08/01). In September 2001, Robert Mugabe was invited by the Commonwealth to discuss the current situation (ZHR-NGO 28/09/01-CAA). As a result of this meeting, the Abuja Agreement was brokered with President Mugabe and the Committee of Commonwealth Foreign Ministers in September 2001. This agreement suggested, “Land is at the core of the crisis in Zimbabwe” and the “programme of land reform is, therefore, crucial to the resolution of the problem...” (CS-9/06/01-01/55).

Critics of the Abuja Agreement focused on the language *land* and argued that the Commonwealth had moved away from the previous emphasis on “Zimbabwe's obligations to uphold the rule of law...” (AI 24/10/01). The land issue has always been a thinly veiled civil rights issue that really began in the 1890s. According to Tshuma (1998: 80), a Zimbabwean legal scholar, land is really about civil rights, the right to own property. Tshuma (1998: 80) argues that in 1890s, African people right to self-determination became silenced as they lost their “full legal personality”. This loss became understood as the identity pillar in which national identity was constructed; and land became a mythic symbol signifying freedom, civil rights and full legal personality. Thus, the significance of critics of the Abuja Agreement focusing on the language *land* and arguing that the emphasis was no longer on the issue of civil rights and rule of law suggests that many of these critics were analysing the issue through a Euro-American perspective (AI 24/10/01). This raises the much deeper question of who are the human rights NGOs representing. This is just one of the issues that will be explored in this chapter.

This chapter is divided into five sections. The first section will highlight a conceptual gap in the TAN framework and will offer several reasons why this chapter shifts from the economic rule of law view to the social justice rule of law view. This section suggests that a more critical reading of international law might be produced if one argued that the legal community is becoming increasingly important in global governance. Individual lawyers and judges draw their legal power from a global community which shares legislation and advises legal activists how to cite international law. The argument being made is that the symbolic power from the United Nations' Special Rapporteur on the Independence of the Judiciary and Lawyers has changed the political presence of this community.

The second section discusses NGOs documentation of Mugabe's use of three legal mechanisms: Presidential Powers Act (1986) and Law and Order Maintenance Act/the Public Order and Security Act, and the Constitutional Prerogative of Mercy. This section examines how Mugabe's legal power cuts into the political space of judicial independence. This is followed by a general analysis of how NGOs represent Mugabe and the Judiciary. The third section provides a brief historical geography of two NGOs' activism, the National Constitutional Assembly and Amani Trust. Their activism changes the local legal culture and draws Zimbabweans to the web of inter-connecting global and the local legal communities. The fourth section illustrates that NGO activism connecting the local with the global plays a key role in restructuring international relations, and that each voice does matter. The example of the Abuja Agreement, a diplomatic agreement between the Committee of Commonwealth Foreign Ministers and Zimbabwe, which kept international attention focused on Zimbabwe, provides the basis of this argument.

Against the backdrop of NGOs' documentation of Mugabe use of legal power, the fifth section highlights the main points of this chapter. The purpose of rapidly concluding this chapter is to turn to the next chapter, which will provide the summation of this dissertation.

6.1.1 Institutionalising the Rule of Law

This chapter will focus on the transfer of power between the international community and human rights organisations in Zimbabwe to better understand the impact transnational/local legal activists have had upon the local legal and justice system during Zimbabwe's political and economic crisis. This transference of power materialised with the Abuja Agreement.

The human rights/democratisation/state transformation literature describes the processes through which human rights activists fray sovereign-state power. Sikkink and contributors have described this geographic phenomenon, yet neglect to acknowledge that the symbolic presence of the United Nations' Special Rapporteur on the Independence of the Judiciary and Lawyers may have had an important role to play in the creation of many new human rights laws.

The United Nations' Special Rapporteur on the Independence of the Judiciary and Lawyers became an international political presence after the United Nations (UN) accepted the Basic Principles on the Independence of the Judiciary (1986), and the Basic Principles on the Role of the Lawyers (1990). Tolley (1994) has documented the activism within the legal community to ensure international recognition of the fact that the legal and justice systems have different identity politics than the sovereign-state. But few scholars seem to consider the symbolic presence of this Rapporteur in international relations. For example, there are no known studies of how the United Nations' Special Rapporteur on the Independence of the Judiciary and Lawyers protects and works with specific trajectories of legal activism to affect specific places, or how they shape geographies globally or locally. In sum, our understanding of the political space occupied by legal and justice systems since the appointment of the Rapporteur seems fragmented at best.

In identifying five different responses to the symbolic presence of this Rapporteur, this chapter will suggest that the Zimbabwean case study fills an important gap in the

literature. One of most important responses is the response made by civil society as they learn about the laws that govern fundamental rights such as speech and association (also see Widner 2001). A second important response is found in the donor community, which has become very attentive to issues of governance (Tshuma 1999). A third is the Euro-American governments' interest in the break-down of law and order, crime, violence, weapons and drugs, which have been translated into economic support for democratic institutions such as the media, the judicial and NGOs. Euro-American governments' response to the civil society and the legal and justice system has been a demand for funds to support the legal and justice system and NGOs, voluntary associations and political parties (Carothers 1998). Fourth, international lending agencies that have a theoretical justification to support the legal and justice system with NIE seek to

...build institutional capacity in the judiciary so that courts might meet the new demands placed on them. The new investments took place at a time when domestic demand for legal change and improved justice systems appears higher than it had been just after independence (Widner 2001: 209).

A fifth response, the political position of legal and justice systems has been altered because of the cumulative effect of these local and international changes. As legal and justice systems are very sensitive politically, these global-local changes have created several unintended consequences. For example, the support the legal and justice system may receive from international sources, and the new vocabulary being used by civil society (which suggests a complex understanding of legal knowledge) is perceived as a sign of globalisation and a loss of sovereignty. This perception makes the legal and justice system vulnerable to the reaction of Heads of State who seek to protect its sovereign-state rights, who may challenge activists within the legal and justice system and suppress civil rights movements (Widner 2001).

The impact transnational/local legal activists have had upon the local legal and justice system during Zimbabwe's political and economic crisis is only just beginning to be revealed by NGOs. Sarat and Scheingold (2001b), Scheingold (1994), Cain and Harrington (1994) argue that there has been little analysis or debate regarding legal activists who subvert state legitimacy from inside and outside national borders. This chapter will focus on the key counterpoints to sovereign-state power - judges, lawyers,

members of the international legal community, specific national leaders and NGOs. From 1997 to 2002, each individual has helped shape new legal landscapes within the state, the courtroom, the legal text, and the media by politicising legislation passed by the state and abuses of sovereign-state power (Russell 2001a, 2001b). This chapter makes an important contribution to the literature on legal activism. This chapter will evaluate how social justice/rule of law discourses hold the power to affect the Head of State. Social justice rule of law discourses are rule of law discourses, which have the politico-legal agenda to bind the state with politico-legal structures, which will help to institutionalise local civil rights law. This chapter will consider how the social justice/rule of law discourses hold the power to change practices, concepts and ideas in local legal societies as well as the legitimacy of the legal and justice system through the eyes of local people, the Head of State and the international community.

6.1.2 The Focus on Social Justice/Rule of Law Views

The points above create the analytical framework of this chapter. Although Chapter Five offered a variety of reasons to study the legal culture through the eyes of the informal food distribution network and nongovernmental organisations that use a sensitive methodology to better understand why NGOs advancing the NIE logic seem to be missing the evidence that suggests that this idea is restructuring local societies, this chapter shifts the focus. This chapter will consider how NGOs construct the legal culture in a time of rapid change. Thus, there are three reasons why this chapter focuses on NGO documentation of laws, politics of lawmaking, the Head of State's use of legal mechanisms and ability to cut into the state. One, NGO investigative reports provide historically important evidence of a changing political, cultural, economic and legal landscape. Two, this study wishes to understand how evidence collected by NGOs is used to advocate for civil society. NGOs use this information to collaborate with the legal and justice system to create legal scaffolding to support other social movements (Mutua 2001, Tolley 1994). Moreover, NGOs/activists institutions and organisations' empirical evidence changes the political processes in the legal order at both local and global scales. Evidence presented in this chapter will suggest that transnational, transcultural activism that focuses on reporting "fact and law" can support the civil rights movement (Tolley

1994: 193). Three, this study is interested in the secondary use of this information and how international lending institutions adoption of the NIE logic now supports NGOs collecting information about the “weak” and “corrupt” state institutions (Cameron 2000, Appendix 1.1).

6.2 Mugabe’s Legal Power

This section presents a wide array of new information, some which is available through the Internet. This information reveals that NGOs and the media detail how Mugabe’s political power and legal power are interconnected, and suggests the development of a new Zimbabwean political identity full of friction and fragmented activism which seeks new political openings to freely express local views. Some of the information is part of the electronic advocacy network. Yet even this evidence should be read as if this source of information is the product of legal constraints, because of the risk of surveillance by the Mugabe Administration. As many NGOs and some scholars have noted, the Mugabe Administration has retained and/or written a great deal of legislation that suppresses information (Hatchard 1993: 46, 108, 119, 114-124; Z-CIZC-19/06/02: 30-31 ZHR-NGO 17/12/01-AA: 31, UK-TST 18/02/01 Z- MMPZ 27/09/00; Z-TM 08/05/98; Z-TM 06/04/01-P; Z-TM 07/07/98-O).

In the first several subsections the empirical evidence, which highlights the power struggle between the Judiciary and Mugabe, will be presented. This evidence documents the struggle over who can interpret and administer the law as justice. To focus the discussion on the struggle between the judiciary and Mugabe in the creation of a new legal culture, three specific laws used by Mugabe have been chosen: the Presidential Powers Act (1986) and Law and Order Maintenance Act/ the Public Order and Security Act, and the Constitutional Prerogative of Mercy. Each of these suggests the Mugabe's legal power cuts through the political space of the judiciary. These trajectories of legal power highlight the very real struggle between the Head of State and the judiciary. In all likelihood, many other struggles have not been documented. Various NGOs proffer evidence that the Mugabe Administration interprets these three legal mechanisms with a worldview inherited from the settler era: rule *by* law rather than rule *under* law (see

Matthews 1986). At the same time, this section suggests that some NGOs and newspapers are willing to take the risk of trying to navigate around these laws in order to publicly politicise the justice being drawn into the legal system. This new information has the power to change judicial independence as a relational category to the state.

The second subsection focuses on NGOs representation of the judiciary and Mugabe and the patterns of opinion that are evident in their reports. The primary evidence created by NGOs raises new questions about NGOs rule of law views and agendas being extended into cyberspace and the local legal culture. To investigate such questions, the third section of this chapter presents two NGOs. These two NGOs politicise the legal landscape inside and outside national borders. The sorts of questions this section raises are as follows.

- Can we regard these NGOs as social justice NGOs? If so, how is this information co-opted by international lending institutions?
- What does this tell us about how this information, collected by committed individuals working in NGOs, currently functions in the global political economy?

These will be some of the questions addressed in the analysis. This section will conclude on the point that by documenting the justice being drawn into the legal system, NGOs are creating a territorial presence of their own that is supportive of judicial independence/legal order. This case study suggests NGOs can move laterally and vertically in the making and remaking of rule of law geographies.

6.2.1 First Trajectory of Legal Power: Presidential Powers Act (1986)

Commentary on the President's use of the Presidential Powers Act is loosely divided into three subheadings: legal struggles between the President and the Judiciary, legal struggles over elections; and legal struggles over the land issue.

The Presidential Powers (Temporary Measures) Act 1986 is an elaborate legal counterweight in constitutional law that changes the *normal* politics of law making. By citing the *Presidential Powers Act*, Mugabe has the legal authority to draw upon subordinate legislation when the court is deciding upon their ruling, or Parliament is

drafting a specific law. Mugabe can rhetorically override High Court Orders, Supreme Court Judgements, challenge the Parliamentary Legal System and change the Labour Relations Act and other legislation passed by Parliament and extend “diplomatic and financial privileges to a wide range of organisations...[combining] patronage with ceremonial functions” (ZHR-NGO-SR-09/01: 16, 19). Through the *Presidential Powers Act* Mugabe validates his own version of the law by amending regulations and conferring his Presidential power on individuals *after* a Supreme Court judgment has been passed.

In a stunning collation of information from unknown/unidentified sources, *the Zimbabwe Human Rights NGO Forum* provides exhaustive detail to support the argument that Mugabe’s political power is equated with his use of legal power. Much of their argument is summarised in Table 6.1. Table 6.1 illustrates that the Presidential Powers Act has been used as a multifaceted technical mechanism to change the boundaries of forests, national parks and wildlife reserve in communal lands, arbitrarily alter economic decisions and regulations, re-invent the Zimbabwean cultural identity by creating new holidays and many other “formal [and informal] identity forming vehicles such as education, the law, local politics...organisations rooted in civil society...economic behaviour...social mores...” (MacLeod 2002: 58). Table 6.1 suggests some of the directions in which Mugabe has been able to stimulate, translate and transmit Zimbabwe’s symbolic and institutional shapes, changing some of the meanings and practices of everyday life.

The spatial boundaries of judicial independence/legal order itself have been specified by the ex-Supreme Court Judge Gubbay. Gubbay argues that that Mugabe has grossly abused his powers through the Presidential Powers Act and interfered with the judicial system in the 1980s and since 1999. When deciding on the ruling, the Supreme Court Judges were faced with a choice: displease the President and make a ruling contrary to his political agenda, or neglect their position as *protectors/the moral authority* of the state (SA-TST 08/07/2001-Gubbay). Within these boundaries, Gubbay identifies specific cases, which became the territorial base for the judicial independence/legal order concept. These were:

- Chavanduka & Anor v Commissioner of Police & Anor 2000 (1) ZLR 418 (SC); 2000 (9) BCLR 949 (ZSC)
- Movement for Democratic Change v Mushonga & Ors Judgment No. S.C. 7/2001 (not yet reported)
- Commissioner of Police v Commercial Farmers Union 2000 (1) ZLR 503 (SC); 2000 (9) BCLR 956 (ZH)
- Commercial Farmers Union v Minister of Lands, Agriculture and Resettlement & Ors 2000 (12) BCLR 1318 (ZS)
- Commercial Farmers Union v Minister of Lands, Agriculture and Resettlement & Ors 2001 (3) BCLR 197 (ZSC), more popularly known as land issue
- And the MDC challenge to the results of the 2000 parliamentary elections and the freedom of expression (SA-TST 08/07/2001-Gubbay).

Table 6.1. Presidential Use of Subordinate Legislation Under Statutes

Act	N used	%
Civil Protection	7	1.6
Commissions of Inquiry	12	2.7
Communal Land	4	0.9
Constitution	23	5.1
Control of Goods	26	5.8
Customs and Excise	14	3.1
Electoral	64	14.2
Emergency Powers	14	3.1
Honours and Awards	6	1.3
Income Tax	21	4.7
Legal Assistance etc	2	0.4
Magistrates Court	4	0.9
Mines and Minerals	2	0.4
National Heroes	8	1.8
National Council for Higher Education	3	0.7
Parliamentary Salaries and Benefits	20	4.4
Presidential Pension	3	0.7
Privileges etc	5	1.1
Provincial Councils	2	0.4
Public Holidays	3	0.7
Rural Councils	6	1.3
Rural District Councils	125	27.8
Urban Councils	58	12.9
Water	4	0.9
Other (used once each)	14	3.1
Total	450	100.0

Source: adapted from ZHR-NGO-SR-09/01:22

Many of these cases began in the High Court. Once the Mugabe Administration politicised the judge's ruling, often the case went to the Supreme Court. Details of the court cases that passed from the High Court to the Supreme Court can be found in various Human Rights Reports and will not be presented here (see USA-Z-HRR 1999/2000, 2000/2001, 2001/2002). The key point is that both NGOs and the ex-Supreme Court Judge use many individual cases to support a larger argument - Mugabe interfered with the *normal* administration of justice with his use of the Presidential Powers Act. These cases continue to be referred to, to suggest the institutional need for judicial independence/legal order within Zimbabwe (for more information on the history of the Mugabe Administration politicising the legal and justice system see Chapter Four, Section 4.5.2 *Politics Within Institutions*, Chapter Five, Section 5.7.2 *Parliamentary Debates: The Politics Passing New Legislation* and Section 5.7.3.3 *Public versus Private Stories* and Chapter Six, Section 6.2.4.1 *The Legal and Justice System*).

6.2.1.1.1 Legal Struggles over Elections/Elected Officials

The Presidential Powers Act has had a deeper impact upon the *normal* politics of lawmaking. This law has been used to alter the process of public debate and multiparty elections. For instance, Table 6.1 brings into sharper focus the question of democracy in Zimbabwe. More specifically, Mugabe has used the Presidential Powers Act/subordinate legislation to block *normal* electoral procedures 64 times. Numerical evidence does not tell us much about how *normal* procedures were affected. But if numerical values are placed beside details of the 2000 Parliamentary elections (Table 6.2) and the MDC legal challenges to ZANU (PF) elected officials in the post-election period (Table 6.3), a very different image of law, governance and violence unfolds. Details about how the Mugabe Administration changed the Electoral Act immediately preceding the election, the postal ballot system, the Electoral Supervisory Commission, the Registrar General, the Nomination Courts, the Electoral Act's 21-day provision in addition to making changes to the voter registration have been compiled by an NGO (ZHR-NGO 05/08/01, ZHR-NGO 23/07/01). In the post-Parliamentary election period the MDC attempted to overturn election results for specific areas. The MDC brought legal challenges to the High Court of Zimbabwe in 39 constituencies. They argued that pre-election violence,

killings, beatings and intimidation affected the election results. The pivotal point is that the MDC legal challenges are really a challenge to Mugabe's use of Presidential Powers Act/subordinate legislation to block *normal* electoral procedures.

The legal challenge is based on empirical evidence that many individuals running for political office were implicated in the violence, as suggested by the following statistics provided by several NGOs:

...one-third of...[ZANU(PF)] MPs elected in June 2000 were themselves implicated in violent and illegal acts *during the electoral process*...directly and personally implicated in political violence during their election campaigns (ZHR-NGO-SR-09/01:15-16 original emphasis).

Table 6.4 lists the sitting or former ZANU (PF) MPs or members of the executives and MPs elected through the June 2000 elections who have been charged with violence.

With such information about the political violence condoned by those in public office, divisions between *fact* and myth seem less pronounced. Table 6.2, 6.3 and 6.4 suggest that many previous and present provincial governors, cabinet ministers, deputy ministers and former ministers have been implicated in the violence. Several points can be drawn from this evidence. First, after reading this information, many of us have a better understanding of how most Zimbabweans view individuals in Zimbabwe's Cabinet.

Mugabe's powerful presence as a national leader has been produced and reproduced by MPs in his ruling party. Their constituency, that they represent, are not locations where leaders have been chosen *per se* but locations where the national leader chooses leaders. Moreover, Table 6.4 read alongside the quantitative evidence of violence that NGOs have compiled highlights that many of these "elected" officials have been elected through a process that allowed state condoned violence. This topic is worthy of future research. And the geography of violence represented in Table 6.4 suggests that there is much work yet to be done on this topic.

Second, if one thinks about the bold move of the MDC in challenging the ZANU (PF) elections, a new geographic imaginary of Zimbabwe's political landscape begins to take

shape. Zimbabwe becomes much more geographically differentiated and complex than often portrayed in popular commentary. This empirical evidence suggests a deepening sense of identity crisis in certain locations. As Table 6.3 suggests, each electoral district became a site wherein *law=the Mugabe Administration political power* was contested during and after the 2000 parliamentary elections, at times the contestation materialised as physical violence (see Z-MDC 03/06/00, Z-MDC-Eppel 2000, Z-MDC-Impeach 2000, Z-MDC-ICG-A 2000, Z-NCA Sithole 2000). Third, the numerical results of the 2000 elections, which legitimise a socio-spatial framework of elected officials in specific geographic locations, is no longer *real* (Table 6.3). Moreover, real facts about the election are determined in the courtroom, rather than through the election ballots cast by individuals (Table 6.5). In short, connecting the names to geographic locations in Tables 6.2, 6.3 and 6.4 suggests a shifting vision of violence, myth, and facts to be determined and stories yet to be told. For some, one of the few safe public spaces may be the courtroom, a telling statement on the shifting space-time of *truth* in this location.

Table 6.2: Results of the 2000 Parliamentary Elections

Province	Registered voters	Turnout in %	Votes		Popularity of ZANU PF and MDC candidates (excluding other candidates)	
			ZANU PF	MDC	ZANU PF	MDC
Harare	799452	48.7	84987	296055	22	78
Bulawayo	357281	47.5	22350	142379	14	86
Mashonaland East	506817	53.6	196157	64987	75	25
Mashonaland West	502964	47.9	153107	78923	66	34
Mashonaland Central	418277	57.5	188967	47542	80	20
Manicaland	575404	46.2	117232	125763	48	52
Midlands	658422	51.4	193736	126058	61	39
Masvingo	593778	46.6	163014	92152	64	36
Matabeleland North	317405	45.2	36749	98908	27	73
Matabeleland South	319015	48.3	50663	97127	34	66
Total	5048815	49.3	1206962	1169894	51	49

Source: adapted from N- 20/03/02- NEOM: 13

Table 6.3: Status of some MDC 2000 Parliamentary Election Challenges to Elected ZANU (PF) Officials in July 2001

Constituency	Case (MDC vs ZANU (PF))	Status	Ruling	Appeal
Buhera North	Tsvangirai vs. Manyonda	Completed	MDC	To Supreme Court
Chinhoyi	Matamisa vs. Chinyangwa	Completed	ZANU (PF)	To Supreme Court
Chiredzi North	Mare vs. Chauke	Completed	MDC	
Chiredzi South	Tsumele vs. Baloyi	Completed	ZANU (PF)	
Gutu North	Musoni vs. Muzenda	Withdrawn	-	-
Hurungwe East	Chadya vs. Marumahoko	Completed	MDC	To Supreme Court
Kariba	Sigobole vs. Mackenzie	Withdrawn	-	-
Makoni East	Mudzengerere vs. Chipanga	In Progress		
Makoni West	Makuwaza vs. Mahachi	Completed	No ruling	
Marondera East	Munhenzva vs. Sekeramayi	In Progress		
Masvingo South	Rioga vs. Zvobgo	Withdrawn	-	-
Murewa South	Nezi vs. Matisa	Postponed		
Mutoko South	Muzira vs. Muchena	Completed	MDC	To Supreme Court
Seke	Chiota vs. Mutasa	Scheduled to resume on 2 July		
Shurugwi	Matibenga vs. Nhema	Completed	ZANU (PF)	
Zaka West	Musimiki vs. Chindanya	Withdrawn	-	-
Zvishavane	Maruzani vs. Mbalekwa	Completed	ZANU (PF)	To Supreme Court

Adapted from ZHR-NGO 23/07/01: 2 (see SA- News 24 3/10/01)

Table 6.4: Zanu-PF's sitting or former MPs implicated in Political Violence

Zanu-PF's sitting or former MPs	June 2000* elections, Zanu-PF members
<ul style="list-style-type: none"> • Chen Chimutengwende (Minister of Information in the previous government), • Tony Gara (formerly deputy minister of Local Government and National Housing), • Border Gezi (deceased Minister of Youth Development, Gender and Employment Creation), • Nicholas Goche (Minister of State Security), • David Karimanzira (Provincial Governor, Mashonaland East), • Christopher Kuruneri (deputy minister of Finance and Economic Development), • Joyce Mujuru (Minister of Rural Resources and Water Development), • Herbert Murerwa (previously minister of Finance, and of Higher Education and Technology, and now of Industry and International Trade) 	<ul style="list-style-type: none"> • David Chapfika (Mutoko North), • Shadreck Chipanga (Makoni East), • Chen Chimutengwende (Mazowe East), • Nobbie Dzinzi (Muzarabani), • Border Gezi (Bindura - deceased), • Nicholas Goche (Shamva), • Joram Gumbo (Mberengwa West), • Chenjerai Hunzvi (Chikomba - deceased), • Saviour Kasukuwere (Mt Darwin South), • Ray Kaukonde (Mudzi), • Christopher Kuruneri (Mazowe West), • Marko Madiro (Hurungwe West), • Joel B Matiza (Murehwa South), • Joyce Mujuru (Mt Darwin North), • Herbert Murerwa (Goromonzi)

* Fifteen of them (24,2%) were named as having been directly and personally implicated in political violence during their election campaigns.

Adapted from ZHR-NGO-SR-09/01: 13-14

Table 6.5: Zimbabwe's Cabinet (September 2001)

Ministry	Minister	Deputy
Defence	S. Sekeremayi	
Education, Sport and Culture	A. Chigwedere	I. Shumba
Environment and Tourism	F. Nhema	
Finance and Economic Development	S. Makoni*	C. Kuruneri
Foreign Affairs	S. Mudenge	A. Ncube
Health and Child Welfare	T. Stamps*	D. Parirenyatwa
Higher Education and Technology	S. Mumbengegwi	
Home Affairs	J. Nkomo*	R. Gumbo
Industry and International Trade	H. Murerwa	
Justice, Legal and Parliamentary Affairs	P. Chinamasa*	P. Mangwana
Lands, Agriculture and Rural Resettlement	J. Made*	
Local Government, Public Works and National Housing	I. Chombo	K. Mohadi
Mines and Energy	E. Chindori-Chininga	
Public Service, Labour and Social Welfare	July Moyo*	K. Manyonda
Rural Resources and Water Development	J. Mujuru	
Transport and Communications	S. Mombeshora	C. Mushowe
Youth Development, Gender and Employment Creation	E. Manyika	S. Mahofa
PO: Information and Publicity	Jonathan Moyo*	
PO: State and National Security	N. Goche	
PO: Informal Sector	S. Nyoni*	
PO (V-P Msika)	O. Muchena	
PO (V-P Muzenda)	F. Bhuka	
Deputy Presidents	S. Muzenda, J. Msika	
Attorney-General	Andrew Chigovera	

Source: ZHR-NGO-SR-09/01: 27 * Non-constituency MP appointed by State President

6.2.1.2 Legal Struggles over Land

From the new information about Mugabe's use of the Presidential Powers

Act/subordinate legislation, several fresh conclusions are made about the political pressure Mugabe personally has exerted upon the Parliament to pass new legislation.

Again Table 6.1, particularly details connected to changed Rural District Council and Urban Council legislation helps provide a sharper focus on Zimbabwean private property rights. Mugabe's willingness to use the Presidential Powers Act, meant he could/would threaten to dissolve parliament in order to fast track legislation through parliament, namely, the Rural Land Occupiers (Protection from Eviction) Act 2001. The Rural Land Occupiers Act gives all farm occupiers a six-month immunity from eviction. This Act also suspends and precludes court orders from ordering eviction. The Act thus retrospectively "legalised the invasions of land that had taken place and prevented owners

of occupied properties from taking legal action to recover possession of their land” (Z-CIZC-19/06/02: 35, ZHR-NGO 28/09/01-CAA: 43 also see ZHR-NGO-SR 09/01, USA-Z-HRR 2000/2001, Z-RO 03/98; USA-Z-HRR 2000/2001; AI 25/06/02).

This argument is partially supported by more evidence. In an effort to integrate recent legal developments with political memories about the land, the NGO, *Crisis in Zimbabwe Coalition*, provides a full legislative history of the land issue from the settler era of the Tribal Trust Lands to the most recent Supreme Court ruling on the land issue:

Commercial Farmers' Union v Minister of Lands, Agriculture & Resettlement & Ors 2001 (2) SA 925 (ZSC). The “contentious” land issue is viewed from the perspective of the Commercial Farmers Union (CFU), landless peasants, and farmers, Zimbabwe National Liberation War Veterans Association, the Commissioner of Police, MDC and ZANU (PF) politicians, provincial governors and High and Supreme Court Judges. This report posits a disassociated view. However, long comments by Supreme Court Judges about the case - *Commercial Farmers' Union v Minister of Lands, Agriculture & Resettlement & Ors* (2000) and members of the CFU who have been compiling statistics on who is evicted from where, who has received the reallocated land and what assets have been impounded or seized are included. The following quotation suggests the type of impact the Rural Land Occupiers Act has had upon the local political economy:

...farm owners or managers were evicted from 125 farms by 30 April [2002], and at least 12 201 workers and their families were evicted from 451 farms. Assets worth about Z\$6,4 million have been seized, impounded or looted from 518 farms, and nearly 285 000 head of livestock have had to be disposed of. At least 95 per cent of the land owned by C.F.U. members has been gazetted for compulsory acquisition (Z-CIZC-19/06/02: 36).

In addition, such details suggest a certain sympathy with those who have been affected by the Rural Land Occupiers Act.

Mugabe's use of the Presidential Powers Act appears to have changed the local economy, culture and politics by reaching into the election process and private property rights of individuals, and politicised the political space of Supreme Court rulings. While not denying that many of these reports have a relatively straightforward agenda: *construct an*

image of Mugabe Administrations' abuse of power and create a vision, which will make Mugabe, unpopular in the eyes of the outside world, this information is useful. Overall, this review suggests that the Presidential Powers Act has cut into *the space of judicial independence*. This legislation has also had symbolic and material implications. Some of the material implications have been presented here. Most importantly, these details bring to the forefront some tensions between the High and Supreme Courts and the Mugabe Administration that were not evident before. In contrast, the *full* effects of Mugabe's use of LOMA/POSA cannot be measured, described or presented in any really coherent fashion. LOMA/POSA is the example offered below. This discussion will demonstrate that the security laws have solidified a silence and sense of oppression that few inside Zimbabwe will directly challenge. As shown below, many who try to break the silence are affiliated with large NGOs, lawyers and the media located outside national borders and some Zimbabwean newspapers. These are not the *Amai* Tsitsis from the previous chapter.

6.2.2 Second Trajectory of Legal Power: Law and Order Maintenance Act / the Public Order and Security Act

In December 2001, Neil Hicks, representing the Lawyers Committee for Human Rights based in New York, publicly criticised the Mugabe Administration for passing the Public Order and Security Bill published under General Notice 644 of 2001. He argued, "The Bill's objectionable provisions appear to be designed to mute criticism of the government, and the President. " The Bill, which was passed into law, on January 22, 2002, as Public Order and Security Act, 2002, creates criminal offences for, among other things: "undermining the authority of or insulting the President...advocating acts of civil disobedience... or publishing false statements prejudicial to the State" (LCHR 19/12/01-POSB-HR, N- 20/03/02- NEOM).

The public symbolic struggle over this law is led by civil rights organisations. As noted in previous chapters, the Public Order and Security Bill (POSB) is a revised version of a law put forward by the settlers to control nationalist movements: LOMA (see also USA-Z-HRR 1999/2000 2000/2001). The Public Order and Security Act (POSA) replaced

LOMA. The main theme found in the detailed analysis of POSA, by the Lawyers Committee for Human Rights (LCHR 19/12/01-POSB, LCHR 19/12/01-POSB-HR), is that this legislation transgresses principles outlined in constitutional or international law. For instance, the Lawyers Committee's analysis of the bill shows that the POSA breaches human rights standards contained in: Articles 19, 21 and 25 of the International Covenant on Civil and Political Rights; Articles 9, 11 and 13 of the African Charter on Human and Peoples' Rights; and Article 11 of the Zimbabwean Constitution (LCHR 19/12/01-POSB-HR). And when the Mugabe Administration charged Morgan Tsvangirai under LOMA in June 2001, Tsvangirai's legal team immediately identified and publicised the key tension. A local newspaper provided the public space to publicise this argument: the Law and Order Maintenance Act (LOMA) is an infringement of freedom of expression and all Zimbabweans have "...the right to the protection of law provided for in sections 20 and 18 of the Constitution," (Z-S 17/06/01). While publishing this information in a local newspaper informs other Zimbabweans that they have the right to contest the state's infringements on their civil liberties with constitutional law, few Zimbabweans have the economic resources to do so.

However, as suggested in Chapter Three, Mugabe allowed an illusion that there was an oscillation of power shared between the law and the state. When he did not feel particularly threatened, Mugabe allowed some civil rights to be included in the state's foreign policy. For instance, the signing of Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) suggests that he was supportive of the women's movement (also see ZHR-NGO-SR-03/01). However, when Mugabe felt threatened by too many opinions, individuals within the Mugabe Administration could always use the POSA to control the heterogeneity and cacophony of voices.

LOMA/POSA is represented by different interest groups as having a territorial and symbolic presence connected to stories and memories of the evidence of abuse of state power. NGOs and the media report cases when the POSA was used against civil society in 2002: Demonstrations have been disrupted or cancelled by police (Z-AT-20/05/02-PE 2002), and journalists and MDC opposition activists charged (SA-BD 21/05/02; Z-CIZC-

19/06/02: 31). More important than what is reported is that both NGOs and the media are working within the legal constraints posed by POSA legislation.

The civil rights movement was active in challenging LOMA. An active critique began in 1997 when Mugabe used LOMA against specific individuals such as Reverend Ndabaningi Sithole, an opposition M.P. and long time rival of President Mugabe. Civic organisations also publicly debated the Mugabe Administration's' re-invocation of LOMA by the ZANU (PF) government in July 1997 to ban the demonstrations by the ex-combatants (USA-Z-HRR 1997/1998, Sayce 1987). What is quite profound about this reinstatement of LOMA/POSA is that it tells us a great deal about how technical clauses in a legal text can unsentimentally remove a national leader's sense of justice and moral accountability to citizens who elected the government into power. Such laws support day-to-day acts of violence by law simply because such laws condone the arbitrary abuse of power. The Mugabe Administration's use of LOMA for 22 years has had an instrumental and paradoxical impact upon the legal culture. As suggested in Chapter Four and Five the larger methodological question that LOMA/POSA hints at are *how are political voices given voice if independent political thought is illegal* (see Allan 2001)?

The *Zimbabwe - Media Monitoring Project* notes that while the press is supposed to be a democratic institution, journalists have been controlled by these laws for so long that the term "press freedom" is a phrase which in itself is contested (Z- MMPZ 27/09/00; *see also* Z-TM 08/05/98; Z-TM 06/04/01-P; Z-TM 07/07/98-O) The phrase "press freedom" might indicate some assumptions about the media: journalists have won the struggle for freedom of speech, which in turn suggests a compelling vision of a post-Independence government. However, as a key informant told me in 1998:

People don't have the freedom of speech- there is no freedom of speech...Even if those [newspaper] reporters are hearing of it, they cannot publish it. It is kept secret. They can know that this information will cause a lot of problems with their superiors, and they risk being fired...People are scared, even though they are talking about politics, they are scared of the investigations of the CIO [Central Intelligence....] and the CID [....]. There is not enough protection. They are not discussing the issues openly with people they don't understand...("Simbarashi" SLK-98-01 (male)).

“Simbarashi,” who spoke about the lack of freedom of speech in 1998, was willing to break the silence. Like “Simbarashi”, many yearn to speak. More boundaries were being constructed to silence civil society’s voice. The Broadcasting Services Bill (2001) affects press freedom. The POSA affects civil rights freedom (UK-TST 18/02/01; UK 05/04/01). Such laws constructed by the Mugabe Administration tell us that the settler’s laws provide inspiration for rationalising chaotic laws to restrict local institutions interactions with the outside world. The NGO/media research on the effects of POSA and the Access to Information and Protection of Privacy Act (2002), mentioned below, demonstrates that the Mugabe Administration is attempting to become efficient in controlling those who seek to fray state power with free thoughts, ideas and actions. As Allan (2001: 97) succinctly puts it “the dissident, then, who repudiates the state’s command as illegitimate...is subjected to unlawful and unconstitutional coercion.”

However, the real symbolic power of LOMA/POSA is held by Mugabe. At the core of this discussion is one point: the majority of Zimbabweans feel the weight of the symbolic presence of LOMA/POSA. Perhaps many are not fully able to articulate how such a law constrains their daily lives, or why women and men self-censor in the home, community or a public forum, or why they might publicly or even privately support or dispute some issues and not others. Although memories vary from one individual to the next, one point seems glaringly apparent: LOMA/POSA multiplies the power of other security legislation which can be used concurrently with LOMA/POSA. For instance, in 2002 the Mugabe Administration resorted to legislation to control the Press:

- Section 15 of the Public Order and Security Act [*Chapter 11:17*] (Act No. 1 of 2002) makes it an offence to publish a false statement knowingly or without having reasonable grounds for believing it to be true, if the statement promotes or incites disorder or adversely affects the country’s defence or economic interests or undermines public confidence in any of the uniformed forces. Offenders are liable to five years’ imprisonment.
- The inaptly named Access to Information and Protection of Privacy Act [*Chapter 10:27*] (Act No. 5 of 2002) [AIPPA 2002] requires all journalists to be accredited by a government-appointed commission; non-Zimbabweans who are not permanently resident in the country cannot be accredited except for limited periods. Section 80 of the Act goes further than the Public Order and Security Act by making it an offence for a journalist to “falsify or fabricate information” or to “publish falsehoods”; anyone contravening the section is liable to two

years' imprisonment (Z-CIZC-19/06/02: 30-31, also see ZHR-NGO 17/12/01-AA: 31, UK-TST 18/02/01)

Moreover, as the *Crisis in Zimbabwe Coalition* (Z-CIZC-19/06/02: 31) notes, journalists are being arrested under AIPPA,

NGOs do not offer emotive details about the historical symbolic power of LOMA/POSA. Yet, LOMA/POSA has to be understood in its historic roots. One voice - Amai Tsitsi from Chapter Five – suggests how deeply this law has reached into the psyche of many Zimbabweans. However, reading legal South African scholar, Mathews (1986) alongside other South African legal historical scholars, a different vision of the settler era emerges. Mathews (1986) argues that LOMA (Law and Order Maintenance Act) as a formally written text is the most repressive piece of legislation of the white settler era (1890-1979). The settlers introduced LOMA in 1960 to protect the historical aspirations of a small minority: the white settlers of Southern Rhodesia. When the post-Independence state renewed its state of emergency for a decade after Independence (1980-1990), it left in place complex sub-texts of constitutional rights and state of emergency measures. Public input and participation was modelled on what LOMA allowed, rather than what it did not allow (see Chapter Four and Five). Public voice bore the essence of LOMA: formal opposition was notably absent. External manifestations of LOMA are seen in legal tools that hamper the constitutional right of all Zimbabweans to personal liberty. Moreover, LOMA of Southern Rhodesia is structured along the same lines as the Internal Security Act of South Africa (Hatchard 1993: 163, Dubow 1989, Mamdani 1996 (see Palley 1966: 320 ff, 321)). Freedom of expression and information are controlled with a fine mesh of regulations. Mathews (1986: 139-178) details how these legal tools interface with the day-to-day life of people and infiltrate any social interaction, in any context, as noted in Chapter Five.

LOMA has a wide geographic reach. LOMA offers the executive government a triad of powerful legal tools to control individual freedom: the ability to ban labour organizations, restrict people's right to industrial action and fully control people's freedom of movement (Hatchard 1993). LOMA has the power to justify systematic abuses of individual

freedoms, to entrench the political power of the government, and to eliminate any vague form of dissidence. In summation, this bill appears to take away economic and political rights of Zimbabweans (see Hatchard 1993: 46, 108, 119, 114-124). Most importantly, LOMA/POSA is concrete evidence that the post-Independence Zimbabwean state intends to maintain and sustain the “law and order machine” of the white settler era (Mathews 1986:ix; Palley 1966). It has the capability to erode all safeguards of individual freedoms within the legal system - more commonly known as civil rights - that are in theory protected by international covenant in the constitution. In short, the POSA can de-legitimate both the post-Independence constitution (1980) and more broadly the international covenant, such as the International Covenant on Civil and Political Rights (ICCPR) of the United Nations (see HRW-Z 8/03/02-Land, AI 03/01- Z).

For brevity's sake, two points sketch the power/privilege axis of LOMA/POSA. One, in the sphere of internal security, Mugabe Administration can use this formidable instrument at all opportunities: against assemblies, organizations, individuals and publications. Two, LOMA/POSA places the power of the magistrate upon local authority. For instance, police or a member of the public can impose conditions upon or prohibit any gathering if there is reason to believe that it will endanger the maintenance of law and order. Hence, confers on “...local authority control over processions to central government direction” (Mathews 1986: 145; also see Hatchard 1993, Palley 1966). In addition, the geography of LOMA/POSA extends to geographies of information politics. The presence of LOMA/POSA suggests that those outside the legal system, who write about LOMA/POSA and its power, risk the attention of the Mugabe Administration. And those within the legal system who seek to challenge it risk further politicising the legal system (see Chapter Four, *Section 4.5.3 Respect for Judicial Independence: Shadows in the Justice System*). For example, the Reverend Ndabaningi Sithole trial was extremely high profile (see Chapter Five, *Section 5.3 Chikafu Cheupenyu* and Table 5.3). At the same time, LOMA put the courtroom into the centre of social and political issues. Judges who challenging the Mugabe Administration's use of LOMA/POSA, face the possibility of new legislation being written.

Although the Zimbabwe Human Rights NGO Forum (ZHR-NGO-SR-09/01), Godwin and Hancock (1997) and Hatchard (1993) mention that the political activists during UDI, who were charged with and/or imprisoned under LOMA, were relatively isolated from the rest of the world, it is beyond the scope of this thesis to discuss the geography of LOMA during UDI, or the potential geography of POSA in 2002; expansive geographies of coercion, fear, violence and misrepresentation and bold individuals carve out new political spaces that resist POSA (LCHR 19/12/01-POSB). This too requires further investigation.

The next example will suggest that Mugabe's use of legal clemency cuts through the legal space of the legal and justice system to condone political violence. This law, coupled with a rule of law view nurtured in the Southern Rhodesia legal culture of oppression, torture, suppression and violence to the body and the psyche seems to have been particularly violent (see also Palley 1966, Hatchard 1993, 2000).

6.2.3 Third Trajectory of Legal Power: the Constitutional Prerogative of Mercy

While the threat of LOMA/POSA has been on the political landscape since 1960, another law Mugabe has at his disposal is the Constitutional Prerogative of Mercy. Most Zimbabweans are aware that Mugabe has used this legal instrument to grant the accused legal amnesty. Most Zimbabweans are also aware that Mugabe has used the Constitutional Prerogative of Mercy to threaten dissidents. The Presidential Power of Pardon and Clemency (1953) embedded in the constitution formalizes this legal inequality. Robert Mugabe draws upon his Presidential authority and power to intervene in the judicial rulings of the High and Supreme Court. Although amnesty has been granted to individuals on a number of occasions (see Table 6.6), on three occasions Mugabe has ignored criminal behaviour for overtly political reasons. First in 1979, when the new constitution was being negotiated, Robert Mugabe agreed with Britain to start his rule without bitter recriminations or charging Rhodesians under criminal law. Clemency Orders (Amnesty Ordinance 3 of 1979 and the Amnesty (General Pardon) Ordinance 12 of 1980) were passed which granted blanket amnesties to Ian Smith, other members of the Rhodesian government and the armed forces. By passing the Amnesty, which was

one term of the Lancaster House Agreement, Zimbabwe could hold its first election (AI 25/06/02, Z-MDC-Eppel 2000, Hatchard 1993).

In the cases above, the use of the Presidential Power of Pardon and Clemency (1953) had a practical purpose – maintain peace in the new country. However, this constitutional law has been misused. President Mugabe has used general amnesties, to ensure impunity for those who acted on behalf of the State on a second occasion:

Clemency Order No 1 of 1988 granted a general amnesty for all political crimes committed during the 1980s up to that date... the 5 Brigade, the CIO and other branches of the State. 122 dissidents sought and were granted amnesty (Z-MDC - CO 2000).

The third and most outrageous use of Clemency was when Mugabe granted impunity to those being charged with political violence on Oct. 6, 2000:

... the President issued a Clemency Order, No. 1 of 2000. It granted an amnesty to those who kidnapped, tortured and assaulted people and burnt people's houses and other possessions as a way of politically intimidating them during the period from 1 January to 31 July 2000; (that is, in connection with the 12 and 13 February Constitutional Referendum and the 24 and 25 June Elections). The Amnesty has meant that those arrested and facing trial for such serious offences have had to be released and no new investigations and prosecutions can now take place into these crimes (SA-TST 08/07/2001-Gubbay)

Impunity has been used to bind and divide different political groups in 2000 and 2001. Both examples suggest that Mugabe interprets and exercises his legal powers in a dangerous and irresponsible manner. This danger is enhanced because by allowing selected individuals the freedom to act with impunity, Mugabe has the ability to reach into citizen's public and private lives by permitting individuals acting in his interest to commit acts of violence.

The date, October 6 2000, is significant because shortly after, riots broke out. According to many local newspapers, *food riots* broke out October 16 2000:

...riots to have been spontaneous following big rises in the cost of bread and transport...
On 18 October (8pm bulletins), Assistant Commissioner Mazango said the riots seemed to have been planned. In the same bulletin, Information Minister Jonathan Moyo, accused the opposition of orchestrating the violence.

In what appeared to be a co-ordinated response to the riots in the state owned media, Zimpapers also adopted the "hidden hand" campaign.

Significantly, The Herald and The Chronicle (18/10), The Manica Post (20/10) and The Sunday News (22/10) all carried editorials criticising the riots and referred to a "hidden political hand".

While the private press subjected the National Reaction Force's violent excesses to intense scrutiny, Zimpapers treated the army's deployment as a normal development (Z-MMPZ 16-22/10/00).

With the focus on army deployment, the underground rumours, public politics, violence in the streets, the legally condoned political violence became of interest to a very small section of the Zimbabwean society. The critical point is that lacking in much of the contemporary analysis is an analysis of how the Clemency Order, No. 1 of 2000 and legal activists challenge to the Clemency Order, No. 1 of 2000 correlated with the Oct. 2000 *food riots*. Another critical silence that remains is how the activism within the legal community was effectively erased by a wide array of commentators who focused on the sensationalist *food riots*, as apposed to the protests within the legal community against Clemency Order, No. 1 of 2000.

It is outside the scope of this dissertation to explore the nuances, connections and points of intersection among legal activists, demonstrators and food rioters (Z-MMPZ 16-22/10/00; Z-I 20/10/00; Z-I 20/10/00-LN; Z-News 18/10/00; Z-I 20/10/00-C). Yet, this study acknowledges the point that shortly after the Clemency Order, No. 1 of 2000 was made public, "spontaneous" riots began. The purpose is to raise new questions about how the *media prioritised the riot discourse*, or if the Mugabe Administration silenced the legal activists' challenge by orchestrating the riots with food price increases. The media's political commentary detailed a wide variety of intersecting points among the Mugabe Administration, the ongoing legal and economic reform which had an impact to the quality of life to most women, men and children, and individuals protesting against increased taxes and food prices with food riots (Z-MMPZ 16-22/10/00; Z-I 20/10/00; Z-I 20/10/00-LN; Z-News 18/10/00; Z-I 20/10/00-C). Yet few commentators on the October 2000 food riots connect the points made by Walton and Seddon (1994) that economic

restructuring at the national level is often met with local forms of protest, often-labelled *food riots* by the media and government spokespeople. At the heart of Walton and Seddon (1994) work is the argument that externally driven economic restructuring, authoritarian governments, rising taxes and food prices often leads to riots and demonstrations. Moreover, the global phenomena of rising food prices, the protesting urban poor allows all sorts of different forms of activism to be labelled as a *riot*, or a *food riot*. The critical point is that governments will often incite grassroots social movements – by increasing taxes or food prices – thereby orchestrate a *food riot*. With an economic explanation that the activism is connected to taxes or food, this activism is simplified. Moreover, this activism is labelled and dismissed by the international community as a *food riot*, rather than viewed as a very complex social movement with many different layers. What is not being discussed is the diverse layers within the *food riot*. Some of the individuals who *appear* to be protesting “big rises in the cost of bread and transport...” (Z-MMPZ 16-22/10/00) may be protesting another abuse of power by the Mugabe Administration. Some may have made the connection among the politically motivated violence with the amnesty granted to ZANU (PF) supporters; or in other words, many made the connection between Mugabe’s power and legally condoned political violence, and were protesting this abuse of power (Z-MMPZ 16-22/10/00; Z-I 20/10/00; Z-I 20/10/00-LN; Z-News 18/10/00; Z-I 20/10/00-C). While further exploration of this topic is beyond the scope of this dissertation, it is an important thread of inquiry that requires further investigation.

The pivotal point being made is that legal activists’ important legal challenge to the Mugabe Administration was made secondary in much of the media’s analysis (Z-MMPZ 16-22/10/00): a silence likely produced and reproduced by scholars and researchers drawing from this analysis. The media continued to narrowly describe the struggles among the opposition party, MDC, and ZANU (PF) in a language of political strategies and the June 2000 election violence. Whereas very little commentary has focused on *which* segments of civil society began to discuss, and physically assert its opinion that Mugabe did not have the right to grant amnesty to those who sought to quell the democratic process. Because of these silences are produced and reproduced in the

analysis, the focus tends to shift away from how the Mugabe Administration protects and reproduces its power with the Presidential Power of Pardon and Clemency (1953). In short, through the Presidential Power of Pardon and Clemency (1953) Mugabe holds the power to institutionalise the means of combating civilians and to reward those violating law-abiding-citizens' right to vote or support the opposition party. Mugabe has the legal privilege to call upon the law and many citizens are keenly aware of the violence capable under this law (Z-MDC-Eppel 2000).

Table 6.6: The Exercise of Clemency

Year	Legal Order	Specific Case Details
1988	GN 257A	Vice-President Muzenda amnestied 'dissidents', 'collaborators' and members of ZAPU (General Notice 257A of 1988), following the Unity Accord
1990	GN424A	President Mugabe - General amnesty, repeating GN257A/88 and Security Forces, infanticide offenders, 'politicals' - the State's uniformed forces, who had been responsible for the <i>Gukurahundi</i> in Matabeleland and the Midlands from 1982-7, as well as 'political' prisoners – mainly belonging to Zanu-PF – imprisoned for political violence, including the man who tried to murder and permanently disabled Patrick Kombayi.
1993	GN111C	President Mugabe - General amnesty for pre-31.3.1980 lifers and >12-months-to-serve prisoners
1995	unknown	Clemency Order No 1 of 1995: General amnesty for all politically motivated crimes related to 1995 election.
1996	GN362A	President Mugabe - General amnesty for pre-31.1.81 lifers, infanticide offenders, 'determinate sentences'
*2000	GN457A	President Mugabe - General amnesty for politically-motivated crimes (liability pardon and remission of sentences) from January to July 2000 - the Constitutional Referendum and the General Election
2001	unknown	President Mugabe - (some 7 000 prisoners were released)

Adapted from ZHR-NGO-SR 09/01: 24, D-PHR 21/05/02-PPE , AI 25/06/02

***Domestic Protest:** National Constitutional Assembly and the Movement for Democratic Change

***International Protest:** Amnesty International, the USA, the UK Bar Human Rights Committee, the Commercial Farmers' Union, the *Daily News*, the Catholic Commission for Justice and Peace in Zimbabwe, a Methodist congregation, and many individuals.

In this final example, the paradoxical situation wherein the constitution grants the Head of State the legal power to use Presidential Power of Pardon and Clemency (1953) to negate the application of specific laws suggests some of the contradictions of constitutional law. The Supreme Court, in theory, cannot challenge Mugabe's use of the law, but the Supreme Court can argue that the use of this law impedes *justice* (SA-TST 08/07/2001-Gubbay). Mugabe's decision to grant amnesty to political allies has led to a number of questions about the moral fabric of the state.

The easy response would be follow the work of Allan (2001) and prepare a diatribe about the morality and ethics of leadership. But this rather superficial response in turn begs another round of different questions, much like the ones Mutua (2001) and Odinkalu (1998, 2001) raise: what are the connections between human rights, economics, North and South relations; whose ethics are for whom? More importantly, the profound lesson to take from all three laws cutting into the political space of Zimbabwean judicial independence is that understanding *whose rule of law view* is draped over a political landscape is not simply an abstract theoretical question. The relevance of this argument becomes clear in trying to answer the question – *whose interpretation of the law will be administered as the justice of the state?* In practical terms, as the discussion above suggests, real lives of men and women are affected by these theoretical issues. In the case of Zimbabwe, Mugabe has the legal power to interpret and administer the law to perpetuate violence against citizens.

In light of the empirical evidence presented above, many NGO reports treat the judiciary very different than they do Mugabe. The analysis below separates how NGOs tend to represent the Mugabe Administration and the Judiciary. At the same time, this discussion suggests that the processes of globalisation pull both Mugabe Administration and the Judiciary closer together as well as outward to join alliances across political borders and boundaries. Additionally, the processes of globalisation nudge both the Judiciary and the Mugabe Administration to recognise a wide variety of intersecting points: both must deal with the postcolonial politico-legal structure riddled with a long history of injustice and complex political hierarchies (Palley 1966). The next section takes up this argument in the examination of how NGOs create new rule of law geographies as they politicise Mugabe's rule of law views to Zimbabweans, the Southern African region and the global community. The significance of NGOs carefully documenting how Mugabe has transgressed into the *space of judicial independence* is that they are writing for a specific audience. They are the key architects constructing *the problem*. Moreover, the next section points out that NGOs have worked together since 1998 to critically unravel and transform the image of Zimbabwe and the Mugabe Administration in the imaginary of many scholars, multilateral development banks, international and regional organisations

of nation-states, NGOs, educational institutions, and research organisations. NGOs work together to point to locations where the sovereign-state holds a different rule of law view than theirs. This process of politicising the landscape, as Shivji (1995), Mutua (2001) and many critical legal development scholars argue has far reaching effects both locally and globally. The third section will demonstrate that some NGOs building alliances with the legal community hold the power to transform the future of a nation.

6.2.4 The Law and the State: Different or the Same?

This section will separate NGOs representation of the state and the law. This section will examine how the images support and change the territorial institutional shape of the social movement seeking to bind the state with the law, and how this information is politicising outside perceptions of Mugabe's rule of law views. A variety of NGO reports represent the President in the institutional domain of the State. They carefully document how the Mugabe Administration is reshaping its politico-legal power with the use of violence and brutality. These images are captured in a variety of NGO reports. The details in many NGO reports are alarming. The details support the argument that the Mugabe Administration is using its legal power to combine political power with violence. The overall effect is quite alarming. The reports begin with the 1997 publication of *Breaking the Silence, Building True Peace* by the Legal Resources Foundation and the Catholic Commission for Justice and Peace (SA-HSF-Focus 18, 06/00). Often these discussions focus on the violence and silence connected to the *Gukurahundi* era; more specifically, on how rural civilians, the ZAPU leadership and the dissidents themselves have remained silent on the fact that thousands of unarmed civilians died, were beaten, or suffered loss of property during the 1980s (ZHR-NGO 1999b, *Z-Today-CCJP* 1997). Another theme that tends to arise is how the law legitimises violence in the day-to-day lives of Zimbabweans, as noted in the three examples above.

Other reports focus on the 2000 violence initiated by the Mugabe Administration. For instance, the Commercial Farmers Union Farm Invasions and Security Report (Z-CFU 20/09/01-SR) and the Zimbabwe Human Rights NGO Forum Political Violence Reports (ZHR-NGO 2002-03) are published on the Internet. They document that since February

2000, the army and police have become notorious for inflicting terror upon civilians. Many of these reports follow one or the other of two general arguments. One argument is that the Mugabe Administration will not hold the police and army accountable for political violence used to intimate public opponents of the government, the uniformed forces will not be brought to court. Nor will the uniformed forces be brought to be judged through the legal and justice system. The other argument is that human rights abuses during most of 2000 reflect state-condoned political violence. Much of this started just before the Constitutional Referendum in February and continued for months after the June elections (ZHR-NGO-SR-01/01).

Both of these views are reproduced in more recent reports portraying violence. Physicians for Human Rights, Denmark (D-PHR 24/01/02) and others (Z-CFU 20/09/01-SR, ZHR-NGO 2002-03, Z-AT-20/05/02-PE 2002) acknowledge the ever-present threat of violence currently condoned by the justice system and the state. In addition, in May 2002, Amani Trust reports the forms of torture currently being used to control the masses:

[Amani Trust confirmed]...types of injuries seen in systematic torture. Systematic beatings were extremely common, with a wide variety of instruments being used that were applied to supposedly non-vulnerable areas of the body; namely, the back, the buttocks, and the feet. There was a massive increase in the number of cases in which *falanga* – beatings to the soles of the feet – was used, and a correspondingly wide number of geographical areas from which *falanga* was reported. Electrical shock, burnings, and mock drownings also increased in frequency. There was a sudden increase in the number of cases of sexual torture, mostly involving women, but also an increase in the number of men. Forced intercourse, both between men and women, and between men, became more frequent. Sexual humiliation – stripping, oral sex, etc – became more frequent. There were massive amounts of psychological torture – threats, abuse, etc – and enormous numbers of people reported witnessing torture. The evidence as a whole indicates that torture techniques are widespread geographically, and this leads to the very strong presumption that these techniques are being taught, probably through “in-service” training.

The victims were mostly, but not exclusively, members of the MDC. Men, women and children were all seen at the Amani Trust . Men were more likely to be the victims of physical torture, but a distressingly large number of women too experienced physical torture. Women and children were more likely to have experienced psychological torture, most frequently through the witnessing of their

male family members being tortured. Age did not seem to protect, and there were victims from all age bands. The oldest person seen was over 80 years, whilst the youngest was under 10 years. The victims came from both the urban and the rural areas, but there was a trend for the Trust to see more cases from the rural areas. There were some members of Zanu(PF) who sought assistance from the Trust, but these were virtually all victims of Zanu(PF) violence or intimidation. Several of these latter victims had to be assisted to seek safety outside the country due to the threats against them.

The perpetrators were disproportionately supporters of Zanu(PF). The so-called *war veteran* militia, the youth militia, Zanu(PF) Youth, Zanu(PF) supporters, the ZRP, the CIO, and the army were all identified by their victims, and also by witnesses to these victims torture. In the latter half of 2001, the youth militia became rapidly the most common perpetrators identified, and it was of particular concern that the injuries inflicted by these militia showed evidence of the use of systematic torture. In the vast number of cases, the perpetrators made no or little attempt to conceal their identity or their political affiliation. As the Trust has commented before repeatedly, impunity, both through legal amnesty and partisan policing, leads to a belief that people can be above the law, and this is certainly the view that all the victims gained from their tormentors (Z-AT-20/05/02-PE 2002: 9-10 sic).

The Zimbabwe Human Rights NGO Forum provides locations of operating militia bases scattered around the country and confirms reports such as this one. The size of militia groups varies: some militia bases only have 20-30, others have hundreds. Most bases have been established at schools and growth points. For example, the bases that have been set up in Nkayi are at: Nkayi Community Hall, Gwelutshena Primary School, Zinyangeni Primary School Ingwalithi Primary School, Guwe Primary School and Lukona Primary School (ZHR-NGO 19/02/02).

These NGOs provide details on the effects the Mugabe Administration, the legal system and security forces are currently having on women, men and children. The ZRP is represented as having the reputation of being under the direction and control of the Mugabe Administration in assaulting citizens who are exercising their constitutional rights of expression and assembly. Numerous reports of police refusals to accept complaints, particularly against members of the ruling party and ‘war veterans’ suggest partisan policing “applying the law selectively” (ZHR-NGO-SR-01/01: 30). To follow on

this image, many NGOs suggest that tacit understandings between civil society and law enforcers have been broken, as the following quotations suggests:

...the public see it as a waste of time reporting 'political' violations to the police when four of every five reports yield no redress at all (ZHR-NGO-SR-09/01: 32)

Some victims refrain from making reports to the police out of fear of further victimization often because of a perceived link between the assailants and members of law enforcement agencies. The police, as evidenced by statements of victims, have shown little intention of taking the reported matters seriously or investigating them with diligence... (ZHR-NGO 2001-05 see also Z-TH 26/02/02).

These reports offer quantitative and qualitative evidence of brutality. The law enforcement's response to civilians' calls for help underscore how economic and social structures are being affected and eroded. The ZRP ignore court orders from magistrates and some members of the High Court, while they intervene on behalf of war veterans: "Eyewitnesses report that police officers told the residents that the "militia" were "untouchables" and could not be removed nor restrained" (AI 25/06/02: 16). This quotation suggests that the armed forces have their own, non-transparent military policing and courts. In many cases, the army acts as if it is above civilian law and its enforcement. Court messengers are refused entry to military barracks and cantonments. Numerous examples exist of police refusing, or being unable, to use the law against army personnel (ZHR-NGO-SR-09/01). Such reports underscore the lack of balance and/or separation of powers between legislature, judiciary and executive.

The alliance between the Mugabe Administration and ZANU (PF) Members of Parliament is represented in a manner that suggests that these women and men produce and reproduce the legal power (LCHR 19/12/01-POSB, LCHR 19/12/01-POSB-HR). Many of these studies acknowledge that the POSA has threatened the new oppositional party on a number of different occasions. And many of these reports describe subtle effects that this violence is having on the psyche of women and men, as noted in the quotation above (Z-AT-20/05/02-PE 2002).

6.2.4.1 The Legal and Justice System

In contrast, representation of the Legal and Justice System, specifically High and Supreme Court Judges, is more illusive and fragmented, with a hint of mysticism attached to it. While NGOs provide details of the constitutional foundations of the judiciary, including appointment and dismissals of member of the judiciary and method of judicial selection and appointments (ZHR-NGO-Sr 09/01, SA-TST 08/07/2001-Gubbay), they tend to leave intact the illusion that judicial imagination, foundational myths and practical politics intersect and entwine with NGOs who seek to report alleged human rights abuses to the international community. This mysticism is produced and reproduced. For instance, many represent Supreme Court Chief Justice Gubbay's resignation as a willingness to push against the solid political boundaries of the Mugabe Administration. Gubbay's challenge began after 2000 (ZHR-NGO-SR-09/01: 42-43, AI 25/06/02: 23-26, UN- COHR 11/02/02).

How NGOs represent time is telling. Representation of the Judges before 2000 tends to be mentioned in sweeping terms. Often the Courts are represented as remaining independent, tough on the government during the State of Emergency and carefully interpreting the "draconian Law and Order (Maintenance) Act...[upholding] applications brought by human rights lawyers" during the 1980s and 1990s. This is the extent of the historical vision offered by Amnesty International (AI 25/06/02: 23-26). In addition, this vision is supported by ex-Supreme Court Chief Justice Gubbay (SA-TST 08/07/2001-Gubbay) who provides the key cases in which the Supreme Court sought to include international human rights law into the standing laws of the Zimbabwean legal system. He notes that after 1985, when the IDHR became justiciable under domestic law, Zimbabwean judges, as did many post-colonial African judges played the part of activist (Widner 2001, ZHR-NGO-SR-09/01). His paper is important for two reasons. One, he argues that the Judiciary has always tried to incorporate the IDHR into the standing laws of the land. Two, this report can be found on the World Wide Web, suggesting that judicial activism has taken a turn into cyberspace: Anthony R Gubbay submitted his paper for the Bergen Seminar on Development 2001 (June 19 and 20 2001) to *The*

Sunday Times (a South African newspaper) who in turn posted it on the internet. This is a new form of legal activism, which has not been documented in the legal activist literature (see Chapter Three, *Section 3.3.2 Political Practices of Legal Activists and the Legal Community*).

Gubbay (SA-TST 08/07/2001-Gubbay) offers a moving imaginary of how judicial activism produces complex rule of law geographies in its wake. First, he acknowledges that judges need to push against and challenge conceptual boundaries of justice with Heads of State. He acknowledges that the ability of the judicial system to put pressure on a government is through the ruling a judge will make. Many judicial systems in many countries are faced with a critical tension: elected members of state pass legislation. Such legislation usually has a political agenda. Many judges are aware that such legislation does not safeguard the constitutional rights of citizens. While many Judges will defer to the text of the legislation, they must also consider the International Declaration of Human Rights contained in the constitution and evaluate whether or not the citizen's fundamental rights are at stake. From this point, a judge will make their ruling: supportive of civil liberties or the legislation of the state. In some case, the direction of the rulings underscores the underlying political pressure on the judges by the state (SA-TST 08/07/2001-Gubbay).

This complex image of pulling legal power from an array of different geographic scales, different legal systems and entwining international and domestic law is solidified in the writing and re-writing of the legal text. Yet, Gubbay furthers this powerful image by suggesting that a judge's closing statement during the final ruling can reawaken visions, hopes, fears, which might in turn reawaken the masses. An important facet of judicial political activism is that the decision - outside the courtroom - puts the discourse of law into the voices of the people. Men's and women's conversation about the legal case create important breaks in the silences created by the courtroom. Men and women rename the issue of justice in their own words, from their own lived experiences, and the context from which they hope and dream for a more just future. Thus, the rights discourse offers legitimation and recognition whereas, once a ruling of the case has been made - creating a

new law - law does not offer this same opportunity (SA-TST 08/07/2001-Gubbay).

While these processes are difficult to trace and perhaps harder to assess, this vision of an activist changing men and women's ideas is a fascinating one, worthy of future geographic inquiry. As Gubbay explains that the inclusion of international human rights laws standing in the Zimbabwean legal system has been quite limited, in another way, he elevates the activism of judges to a high level of moral leadership. Gubbay suggests that a judge's ruling can change the way civil society views their civil rights. His paper offers a hopeful vision for the future. It suggests that in popular imagination, the courts' decisions create legitimacy for the rights in two ways. First, decisions create a focal point of discussion - advocating change in local politics and practices. Local demands, rather than the judge, articulate universal notions of rights. At the same time, the judges ruling tends to create a sense of a shared community within the Zimbabwean national border. The history of civil rights is considered alongside the hope of civil rights in the future. We can see how civil society brings their vision of justice, and by including the IDHR into the new text, the judges' politico-legal power can be drawn from the local up through and into the international sphere to direct diplomatic power onto a nation state, effectively eroding sovereign-state territoriality over its citizens. These abstract global processes in the legal order create these local struggles, negotiations and multi-cultural legal interactions, much like Paasi (1991) suggests.

Nonetheless, a darker theme is found in this text. Gubbay (SA-TST 08/07/2001-Gubbay) acknowledges that High and Supreme Court judges come to terms with their marginal ability to reshape Zimbabwe's laws, that many of them have to conform with an oppressive government without harming their long term objective of including human rights in the standing laws of the land. The limited scope of Gubbay's power, even as Supreme Court Chief Justice, is found in Gubbay's acknowledgment that Mugabe's use of the Constitutional Prerogative of Mercy, the Presidential Powers (Temporary Measures) Act (1986), the 1987 "Unity Agreement", and the retention of emergency legislation changed the politics inside and outside the courtroom: different political factions within the legal community created more differences and divisions as current laws were interpreted through increasingly polarised agendas (see Hatchard 1993).

Gubbay focuses on Presidential Power of Pardon and Clemency (1953) to argue that much of the High and Supreme Courts' ability to use reliable procedures and precautions to make sure their judgements were *just* was eroded by the Presidential Power of Pardon and Clemency (1953). The intention behind this law is to pardon cases that cry out for mercy. In most countries strict conventions govern the invoking of this power. But impunity in Zimbabwe was implemented by creating laws to protect perpetrators of injustices as well as ensuring deliberate inaction by authorities which created a *defacto* impunity (Z-MDC - CO 2000, SA-TST 08/07/2001-Gubbay).

NGO representation of judicial activism as a spatial presence in Zimbabwe shifts and changes after March 2001 when Supreme Court Judge Gubbay was forced to resign. This clear temporal division roughly follows the rhetorical lines of: *good activist judges/Gubbay era – pre March 2001* versus *bad political alliances between the Judiciary and Head of State/ Chidyausiku era –post March 2001*. In many democracies many features of a democracy include a written constitution, constitutional guarantees, and separation of powers. Williams (2001: 178) declares that in the ideal world the “administration of justice and protection of rights” will remain at the heart of every judge's ruling. Yet despite the idealist imaginary of the ideal work, as contributors to Russell and O'Brien (2001) argue, practical politics continue to infringe on the judiciary's independence (see also UN- COHR 11/02/02).

As suggested in Chapters Four and Five, the name *Chidyausiku* is associated with the Mugabe Administration in a manner not befitting a judge (see Dodson and Jackson 2001). However, many reports focus on establishing empirical evidence of political affiliation between the Supreme and High Court Judges and the Mugabe Administration (ZHR-NGO-SR 09/01) and proving that members of the judiciary are not fulfilling either of their two general functions: to administer justice; and safeguard the system of governance. However, recent NGO reports suggest that this information is breaking down some of the silences and assumptions of political favouritism. They provide evidence that there is not a separation of the elected government and the judicial system, thus neglecting the legal space that should ensure that citizens' rights remain protected. The

overall effect of NGOs simplistically juxtaposing Gubbay's activism against Mugabe's interest in advancing his own agenda is that these images tend to demonise the new Supreme Court Judge, as the quotation below suggests:

Chief Justice, Anthony Gubbay, was forced into early retirement...March 2001... His resignation was enforced five days after the Supreme Court had struck down as unconstitutional Statutory Instrument 318/2000 – the State President's attempt, using his Presidential Powers (Temporary Measures) Act, to nullify the MDC's petitions against the election results. The Bar Council called on Government to protect Gubbay from 'war veterans' threatening to occupy his home. *The Herald* attributed to 'misunderstandings between the Government and the judiciary' the chief justice's 'early retirement'. (The Supreme Court had also ruled unconstitutional the September 2000 police raid on the MDC offices and the banning of political meetings on UZ campus.)

Justice Godfrey Chidyausiku was sworn in as Acting Chief Justice in mid-March 2001. In April, participants in a closed seminar organised by Zimbabwe Lawyers for Human Rights reportedly called for judicial appointments to be free of political influence. Some 200 black lawyers petitioned the Judicial Services Commission (JSC) against Chidyausiku's appointment as Chief Justice. But in August 2001 he was appointed substantively to the highest judicial post in the land, even though his reported desire to have all four sitting Supreme Court judges removed first was not met.

Justice Chidyausiku has reportedly shocked lawyers over his recent conduct...The JSC was rumoured to have been split on their recommendation to the President on Chidyausiku's appointment as Chief Justice. The lawyers who protested to the JSC were reportedly described by Information minister Jonathan Moyo as 'so-called black lawyers ... speaking for Rhodesians', 'the usual black Uncle Toms' fronting for 'the usual white liberal gang in the judiciary'. He urged them 'to desist from compromising the judiciary by making unfounded, irresponsible and malicious political attacks on targeted individual judges (ZHR-NGO-SR-09/01: 42-43).

Many NGOs who represent Zimbabwe's judiciary in 2002 have one goal. They seek to ensure that local notions of justice, rule of law and making laws incorporate the IDHR, which as noted in Chapter Three, are three different categories in the legal and justice system. Part of the strategy of keeping the Gubbay mythology intact is to sensationalise the political struggles between Gubbay and the Mugabe Administration, and minimise or deny the existence of significant silences about some of the activism of other judges.

Nonetheless, as suggested by the quotation above, this information offers a fresh and critical message to the outside community: Zimbabwe Lawyers for Human Rights, Supreme Court Judges, the Zimbabwean Bar Council and the Judicial Services Commission have provided a critical commentary on the justice being drawn into the legal system in the post-Gubbay era (UN- COHR 11/02/02. Many legal organisations have taken strong positions on the MDC election challenges that were brought to the High and Supreme Courts, the political activism and violence perpetuated by war veterans and others and the land issue. All are concerned that the justice and legal system is being de-legitimated by Chief Justice Supreme Court Judge Chidyausiku following Mugabe's political agenda. In addition, the Mugabe Administration's interpretation of the law seems to be administered as the justice of this society, rather than the interpretations of lawyers and judges. For instance, in April 2002, the Law Society noted that they had

...seen a number of judgements, which have caused us some anxiety...[and] observed a significant departure from the culture of upholding the Bill of Rights in the Supreme Court (Z-K 19/04/02-PLS).

The critical differences between the Judiciary's and Mugabe's interpretation of rule of law in the post-Gubbay era is that some members of the Judiciary hold tightly to the long-term ephemeral objective – justice – and navigate through the daily practical politics. In contrast, the Mugabe Administration focuses on current and specific focal points to achieve an expected result. Mugabe is able to call upon subordinate legislation when the court is deciding upon their ruling, or Parliament is drafting a specific law. The President can validate his own version of the law by amending regulations and conferring his Presidential power on individuals *after* a Supreme Court judgment has been passed. Moreover, the Presidential Powers Act (1986) and the Law and Order Maintenance Act/the Public Order and Security Act, and the Constitutional Prerogative of Mercy allow Mugabe the legal power to exert his will over the justice system.

These theoretical struggles over notions of justice, rule of law views, coupled with legal mechanisms hold the power to change individual's lives. The evidence collected by NGOs suggests that the theoretical struggles between the Judiciary and Mugabe have begun to materialize. Violence is restructuring political relationships in society – spatial

processes and patterns of the militia, police and the judiciary - all have been affected and altered by Mugabe's interpretation of rule of law. Mugabe's rule of law view extended over the Zimbabwean landscape has created fear, terror, violence and psychopathic stress. These laws are being used to promote all sorts of violence in local communities. The issue is not with the law *per se*, but with the real evidence that the Mugabe Administration is projecting an idea "...from outside on the empty form of law ...effective realization of some particular purpose" (Weinrib 1987: 67-68). Stated in other words, the interpretation of the law, in this case Mugabe's rule of law view is interpreting these laws as the mechanism to legitimate these terrible deeds. In contrast, the pre-2001 Supreme and High Court Judges are represented as carefully weighing the evidence provided by NGOs, key witnesses and experts, interpreting the law and carefully evaluating how constitutional law, legislative law and quasi-emergency laws are woven into the political landscape of Zimbabwe. Judges focus on small incremental changes to the legal text that allow subgroups the opportunity to participate and deepen and broaden their agenda through the political landscape. The actions, strategy and agendas of NGOs have been quite influential. Different NGOs have instigated a broader activism of people wishing to have their points of view heard.

Thus, the issue of rule of law views is not purely a scholarly puzzle, it has real material implications, as the NGO reports seem to suggest. Geographies created in the wake of Mugabe's interpretation of the Presidential Power of Pardon and Clemency really need to be studied from two angles: the empirical – the quantitative evidence of violence, as well as the symbolic - political/conceptual landscapes created by one man's interpretation of the rule of law and how this challenges the justice of the courts.

These reports offer many different readings. If read in linear time, Gubbay worked as a Supreme Court Judge for 18 years under the Mugabe Administration. During this time the Zimbabwean Supreme Court, carefully respected and barely encroached upon Mugabe's Presidential Powers, as the judiciary are part of the institutional fabric of the state. Judges can challenge the public record of justice. Judges can also weave international human rights norms into their rulings, which will gradually change the legal

culture of the nation. Yet judges function within a broader legal culture of the state - the national leader who has the sovereign right to protect his/her resources. The significance of their silence must be read against who hires and pays the wages of judges. Generally speaking a sovereign leader selects the High and Supreme Court judges with the intent to re-imagine the administration of justice for the future of the country. Depending upon the national leader's vision of justice, certain judges are granted tenure because they support or refute certain international human rights norms. Read this way, the Supreme Court does not seem to be making overt attempts to connect the civil rights movement to connect with NGO advocacy network (Gubbay 1997, ZHR-NGO-SR-09/01: 18-19, USA-Z- HRR 2000/2001, Z-RO 03/98:7, SA-TST 08/07/2001-Gubbay (see Chapter Four, *Section 4.5.2 Politics Within Institutions*)).

However, read with a spatial and temporal perspective, the broader effects of judicial activism become clearer. Space and time began to shift and change when considering how the single action of an individual can alter justice in the long term. Several examples are offered. High Court Judge John Fieldsend cited the IDHR in 1968 on the ruling of *Madzimbamuto vs Lardner Burke* case – against political pressure of the Rhodesian Front Government. He eventually resigned protesting legislation passed under the Ian Smith regime (1962-1979), and because of the pressure of his colleagues. In February 2001, when John Fieldsend publicly admonished Mugabe's interference with the independence of the court, he invoked the foundational myth of civil rights. Moreover, there are some fascinating similarities between Gubbay's activism and that of John Fieldsend. This pattern of the judiciary forcing the issue of including the IHDR in their rulings suggests that the judges have been willing to initiate a "political controversy" in the past and present (Hatchard 1993: 12). Perhaps Gubbay's politics are connected to the foundational myth of Judge John Fieldsend's activism. Shortly after Gubbay resigned, as Chief Justice of Zimbabwe, he posted his article on the Internet. The fact that I can download this article from a South African newspaper website suggests that Commonwealth Judges have taken a turn to cyberspace (Williams 2001, ZW-News 24/04/01, ZW-News 15/02/01, SA-TS 08/01/01, Sayce 1987: 136, Palley 1966). It also

suggests that the activism of Supreme Court Judges in Southern Rhodesia/Zimbabwe has always been innovative.

Another example of reading judicial activism spatially is based on the 1995 Supreme Court ruling that the Private Voluntary Organizations Act (PVOA) was unconstitutional (USA-Z-HRR 2000/2001); this was a direct challenge to the Mugabe Administration (SA-TST 08/07/2001-Gubbay). The Supreme Courts' efforts to leave NGOs' institutional capacity intact also reveals that NGOs could develop varying political and cultural shapes that were under state control. On several levels, with renewed sense of political voice, NGOs have created a wider geography of resistance to the state than the Judiciary could. Consider the connections between the 1995 ruling and the plethora of NGO reports available today, as a way to think how Mugabe's power was diffused through judicial activism. Reading a number of NGO reports highlights the pattern of Mugabe's concern. When different High and Supreme Court judges made contrary rulings that directly challenged Mugabe, Mugabe would pass new legislation to challenge the judiciary's authority. Examples include: 2000/2001 Broadcasting Services Act (3/2001, Cap 2:06) originated from the Presidential Powers (Temporary Measures) (Broadcasting) Regulation 2000, Labour Relations Amendment Bill (HB 21/2000), presidential decree banning electoral petitions - SI 318/2000, an attempt to cancel the MDC's electoral challenges in 38 constituencies, Land Acquisition Amendment Act (15/2000; Chapter 20:10) (LAAA) (ZHR-NGO-SR 09/01). In turn different High and Supreme Court judges challenged this new legal text. The extensive information offered in this section about the Presidential Powers Act (1986) and Law and Order Maintenance Act, which became the Public Order and Security Act in January 2002, and the Constitutional Prerogative of Mercy is posted on the Internet.

Mugabe's passing of more legislation might seem to be an intensified hostility to democratic institutions. Yet, this suggests that the overlapping attempts of Judges and NGOs have diffused Mugabe's power so he felt threatened. This coalition has connected the outside world to Zimbabwe's justice system, and they have refined their multidimensional strategies to contest Mugabe's imaginary that he has legal power over a

place (UN- COHR 11/02/02). As the NGO reports in cyberspace suggest, this is no longer a place-based social movement. The territorial strategies of the human rights movement include wide use of the Internet (Sikkink 1998).

The Judiciary's and NGOs' interdependent relationship suggests that differing boundaries between the two groups are constructed out of different sets of social relationships, and political power. Yet both are built on a need: advance the social movement. The judicial activism in 1995 is connected to the broader social movement in 2002. Judicial activism offers new ways of thinking about law, governance and power, and all sorts of other interesting questions about space-time interactions in and through the politics of knowledge. Such questions/comments are offered as a provocation and stimulus for further thought. Such an example suggests that a rule of law view has been extended spatially, in broadening and deepening circles since 1995. This also suggests the sort of vision that legal geographers might want to nurture, interrogate and build upon.

6.3 Nongovernmental Organisations

This section highlights some of the strategies used by NGOs to politicise the Mugabe Administration's rule of law view, which brought the Mugabe Administration under international criticism in 2002. The National Constitutional Assembly politicised the legal discourse of national constitutions. Amani Trust politicised the Mugabe Administration's use of the Constitutional prerogative of mercy. Through these two NGOs' activities a complex pattern of political and legal activism, offering a vision of a just society as a way to open political space for dialogue, begins to unfold. At the same time, the tensions, conflicts and challenges of different rule of law views shift and change old alliances into new forms. These geographies will be discussed in the next chapter.

The presence and activism of these two institutions/organisations raises the important question: *to what extent will Mugabe be required to alter his rule of law view?* While previous chapters suggested that the political-legal structure of his government provides the framework to ensure that his interpretation of rule of law will be protected, the multitude of voices waiting to be heard provide a constant pressure point.

6.3.1 The National Constitutional Assembly Radicalising Legal Discourse in 1997

The people are the ultimate source of legitimacy, power and authority and the people have a duty to act in defence of these basic freedoms (ZHR-NGO 04/08/01:2)

This section begins with an analysis of how a new NGO, the National Constitutional Assembly (NCA) radicalised legal language and the justice system from 1997 to 2002. In 1997/1998, the NCA was predominately an elitist organisation that spoke the language of constitutions, civil rights, etc, somewhat disconnected from civil society (see Chapter Five, Section 5.5.1 *First View: Broadening Narrow Views of the Law (?)*). But by 2001, the political presence of NCA had expanded. The NCA was reaching into sources of global funding as well as the psyche of the local civil rights movement (Madhuku per comm. 2001, Z-NCA-26/06//01, Z-NCA-Sithole and Mangongera 2001). This section will then proceed to argue that the NCA offers some interesting insights into how a local dissent group undercuts the state's power, privilege and authority at a nation-wide level with the *idea* that the legal/justice system could be more inclusive.

The identity of the NCA is created on a number of themes. One is mythological, based in the civil unrest in the African community that was connected to 1961 Southern Rhodesian constitution and the boycott of the 1962 Federation Constitution. As will be suggested, parallels between the historical legacy of the people trying to regain their legal power and the current activism of the NCA must be understood if one is to appreciate the ability of the 1997 grassroots initiative to draw from the deep geohistorical presence of political activism that sought to write the people's constitution upon before, during and after the February 2000 referendum (Z-NCA- Madhuku 03/01). The NCA draws from the 1950s/1960s African nationalist movement. The 1950s/1960s social movement sets the foundation of the NCA which uses parallel forms of activism, agendas and language (see Hatchard 1993). Three facets of the 1950s/1960s social movement lay the mythological foundation for the NCA: 1) the people's constitution, 2) constitutional conferences, and 3) a vision that more inclusive laws will be written in the future.

The first is the vision of the people's constitution. The language of the people's constitution began shortly after the Southern Rhodesian Constitution Letters Patent 1923 was drawn up. More specifically, parallels can be found between Hatchard's (1993: 9-10) historical account of [Rhodesian] *Constitutional Developments up to 1961* and Dr. Lovemore Madhuku's description why the NCA refused to collaborate with the Mugabe Administration. Both historical descriptions reveal that the majority have been agitating to write a people's constitution since 1923. The 1963 anti-Ian Smith social movement is mirrored by the 2000 anti-Mugabe Administration social movement seeking to write a new constitution (Z-NCA-Sithole and Mangongera 2001). Hatchard's (1993) analysis of why the majority rejected the 1962 Federation Constitution will not be repeated here. But it should be noted that Madhuku (Z-NCA- Madhuku 03/01) uses almost the same language as Hatchard (1993) to justify why the majority rejected a constitution written by the state:

NCA rejected the Chidyausiku Draft Constitution was that the whole PROCESS itself had not been formulated by the people. The people of Zimbabwe had not been involved in deciding the timing, composition, modus operandi, and terms of reference, legal framework and other aspects of the commission...(Z-NCA-Madhuku 03/01).

The second facet in the mythological foundation is the role of constitutional conferences to bring together like-minded individuals. Sayce (1987) documents that in 1963 an African nationalist movement held a constitutional conference to encourage Africans to have a voice in writing the constitution. The contemporary version of this nationalist movement is found in the March 2001 NCA All Stakeholders Conference that is "...premised on an unshakeable belief in the view that Zimbabweans have never had an opportunity to craft a genuine PEOPLE'S CONSTITUTION" (Z-NCA- Madhuku 03/01). The purpose of the All Stakeholders Conference was to allow 1000 delegates to ... converge at the Harare International Conference Centre for one and half days with a view to reaching consensus on one critical issue: How do we go about ensuring that Zimbabwe gets a NEW PEOPLE'S CONSTITUTION (Z-NCA-Madhuku 03/01).

The third facet is a vision that domestic law will be more inclusive: now and in the future. Palley (1966) acknowledges that the 1923 and 1961 constitutions were constructed upon

the original 1922 text negotiated through the triangulated attitudes among the British Southern African Company (BSAC), the settlers and the Imperial Government: Africans were not invited to contribute to this discussion. What is important about the 1961 Constitution is that the 1961 Constitution held a promise for the future, whereas the 1962 Federation Constitution did not. The 1961 Constitution contained the IDHR, thus provided the mythological foundation for future social movements, particularly those led by legal activists seeking to develop domestic legal architecture for future civil rights movements (see Section 6.2.4.1 *The Legal and Justice System*, ZW-News 15/02/01, Hatchard 1993). As will be subsequently noted, the NCA's willingness to encourage discussion about the basic principles behind the legal system has planted a seed of desire within a variety of grassroots organisations to advocate for human rights and a constitution that ensured that legal activists could call upon the IDHR without being threatened by the Head of State. To summarise, the NCA is advancing the agenda of the 1950s/1960s social movement that rose in 1963 to write an indigenous constitution during the height of the anti-majority-sentiment led by the Ian Smith government (Palley 1966, Hatchard 1993).

The identity of the NCA is constructed upon another theme: *anti-Gukurahundi* era terror and violence. For instance, according to a few NGOs, in 1997, when men and women began to discuss the contents of the recently released report entitled *Breaking the Silence, Building True Peace* (ZHR-NGO1999a, ZHR-NGO1999b), many conversations focused on the five year research project which presented testimony from more than 1000 people. The report angered and horrified the public (HSF-Focus 17 03/00). Against this backdrop, the Zimbabwe Council of Churches (ZCC) and other civic groups took the initiative and called for national constitutional dialogue grounded in a new NGO, the NCA (Z-NCA-Intro 2000).

Another theme is the nation-wide frustration with the Mugabe Administration. For reasons mentioned in Chapter Five, 1997 was the beginning of a new politico-legal landscape. 1997 ZCTU activism created the foundation of the large-scale civil rights movement that we see today. Especially notable were the nation-wide social anti-

corruption/civil rights movements of December 1997, January 1998 and October 2000 (ZHR-NGO1999a: 9-10, Z-MMPZ 16-22/10/00, ZHR-NGO-SR-09/01: 22, ZHR-NGO-TM 10/01). An outcome of the 1997-2000 mobilisation was that NGOs provided more information about how the law worked in practice.

Urban residents' interest in the law increased during demonstrations and strikes, particularly those against increased food or tuition costs, when the police and army were called in to assault rather than to contain the demonstrators (see ZHR-NGO 1999a). The key idea to take from the events that occurred in 1997 to 2000 is that many Zimbabwean's came to focus on *how* the President could use legal instruments to achieve his own objectives, including extending diplomatic and financial privileges to a wide range of state institutions, organizations and individuals (ZHR-NGO-TM 06/01, ZHR-NGO-SR-09/01:16-24). In short, legal discourse became politicised and polarised: Morgan Tsvangirai, affiliated with three civil rights organisations - Zimbabwe Congress of Trade Unions, National Constitutional Assembly, and Movement for Democratic Change - became equated with workers' rights and legal reform (Table 6.7). Whereas President Mugabe's use of legal instruments to achieve his own objectives was often equated with patronage, corruption and violence (ZHR-NGO-SR-09/01).

This study envisions that the NCA is a constellation of all these ideas, memories, emotions, frustrations and hopes for the future, contained in a nation-wide territorial shape that has a very specific intent: use women's and men's socio-spatial power (embodied in the demand for a new constitution) to unsettle a national leader. A leader who condoned the *Gukurahundi* era violence (SA-HSF-Focus 18, 06/00); and used the law to economically support political allies and suppress most formal political opponents. As the Head of State had been defined through amendments to the constitution, as discussed in Chapter Four (Table 4.3), the NCA needed widespread support to challenge the legal power consolidated at the Head of State (ZHR-NGO-SR-01/01). The NCA began initiating, organizing and maintaining a nation-wide initiative to develop a campaign for constitutional reform (Z-NCA-Intro 2000). It sought to enlighten the public on the current constitution of Zimbabwe, identify shortcomings of the current

constitution, encourage broad based education and develop a local understanding that a constitution should be made *by* the people *for* the people. A key point that the NCA stressed is that the British had written the Lancaster House Constitution, otherwise known as the Lancaster House Agreement (LHA) which is presently Zimbabwe's Constitution in 1980 (see Hatchard 1993 for extensive discussion), and it was time for Zimbabweans to write their own constitution. Some of the NCA aims and objectives are noted in Table 6.8 below. At the core of the NCA agenda was to question the retention of quasi-emergency legislation such as LOMA/POSA and to alter the amendments that had created the complex combination of the 1987 "Unity Agreement" and the Presidential Powers (Temporary Measures) Act 1986. Local concerns and local initiatives were highlighted to enough women and men that many were encouraged to re-examine their assumptions about the conditions. Through this re-examination, many also began to understand how the constitution of Zimbabwe provides the legal framework for elections, civil rights and limiting presidential powers (ZHR-NGO-SR-01/01).

6.3.1.1 Territorial Pedagogical Shape

The NCA strategy of educating the masses brings to the forefront some of the on-the-ground politics connected to challenging the politico-legal fabric the Mugabe Administration had woven. Given the politico-legal context previously discussed, the NCA began in a delicate position. Individuals within organisations took a tremendous chance in attempting to fray the Mugabe Administrative power. Although such activism might have the symbolic support of the Commonwealth and the United Nations Special Rapporteur on the Independence of the Judiciary (Kent 2001, UN- COHR 11/02/02, Z-CIZC-19/06/02: 28, Gubbay 1997), there were many pragmatic difficulties. For instance, while at the same time trying to not jeopardise the local activists' safety, activists sought to incite the common woman or man to mobilise, and to offer them a basic legal education on the power differentials between law, justice and the state so that the individual could explain these differences within their own community or home.

Table 6.7: Several Influential NGOs Established between 1997-1999

Key figure in Executive	Political and Civil Rights Coalition	Issues
Morgan Tsvangirai ZCTU secretary-general	Zimbabwe Congress of Trade Unions	<ul style="list-style-type: none"> Organising peaceful demonstrations Protesting imposition of taxes and levies by the government Seeking to improve the living standards of workers and their families
Morgan Tsvangirai chairperson of the National Constitutional Assembly	National Constitutional Assembly (established 1997)	<ul style="list-style-type: none"> Private property rights (land) Restructuring power relations between executive government, parliament and the judicial system 1997, the NCA advocated for a new constitution the would reduce the power of the president and offer greater protection of civil liberties 1999, the NCA had called for the creation of an independent electoral commission, abolition of presentation appointments of members of parliament and they sought to bar the Register General from running the elections
	Zimbabwe Human Rights NGO Forum (established 1998)	<ul style="list-style-type: none"> Political Violence Reports Analysis of the legal consequences of state condoned political violence
Morgan Tsvangirai Leader of MDC	Movement for Democratic Change (established 1999)	<ul style="list-style-type: none"> legally altering the structure of government through the process of impartial elections legally changing the governing style: re-drafting the constitution with the input of the people, protecting the constitutional rights of individuals, increase the independence of the judicial system which includes removing the President's power to exercise the prerogative of mercy insuring the independence of the Judicial system d) ensuring civil liberties which includes freedom of speech and freedom of citizen to change government fundamental constitutional change.

Sources: ZHR-NGO1999a, Z-MMPZ 16-22/10/00, ZHR-NGO-TM 10/01, Z-TM 2/03/01, Z-MDC-Intro 2000, USA-Z-HRR 1999/2000, 2000/2001).

- Zimbabwean Congress of Trade Unions (ZCTU) represents 90% of organised labour groups in Zimbabwe

Table 6.8: NCA Mandate

<p>To strive to protect, promote, deepen and broaden the concepts and practice of democracy, transparency, good governance, justice and tolerance in the Republic of Zimbabwe.</p> <ul style="list-style-type: none"> a. engaging in the process or processes of enlightening the General Public on the deficiencies and weaknesses of the current or any constitution of Zimbabwe. b. participating in any for an organised to discuss the current Constitution of Zimbabwe. c. prepare a draft or drafts of a new Constitutional order for Zimbabwe. <p>To strive to protect, deepen and foster a Human Rights culture and the Rule of Law in Zimbabwe.</p> <ol style="list-style-type: none"> 1. To work with other similarly minded organisations or individuals in Zimbabwe in establishing or striving to establish in Zimbabwe; <ul style="list-style-type: none"> a). a new, tolerant, transparent and democratic, legal, political, social and economic order b). a new Constitutional framework upon which good governance can be founded
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Source: Z-NCA-Intro 2000

The NCA alliances with the media, other organisations and in an oppositional position to the Mugabe Administration means that the NCA has a unique territorial shape. NCA is a mix of interest groups: over 30 different groups - community groups, trade unions, human rights lobbyists, political parties, journalists, churches, media and women's organizations. This complex weave of organisations, individuals, broadened and deepened the NCA's reach through the landscape. Under the NCA's umbrella, organisations and individual activists reached into the community: to organize debates and activism; to educate the general public on the current constitution and around constitutional reform; to create a culture of popular decision-making, and to entrench the principle that constitutions are made *by* and *for* the people. Individuals encourage civic activism and supported advocacy on issues such as democracy and human rights. Their workshop topics ranged from gender and the constitution, to the Bill of Rights, workers' rights, and the electoral process. This NGO has played a major role in re-shaping the political landscape (SA- HSF 2000a: 9). Constitutional issues became the centre of political debate and awareness on issues of governance and leadership was raised to new levels (Z-I 27/07/01). According to Kagoro, a key organiser, NCA has a membership of approximately 500 members (including some organisations and institutions), representing approximately 7 million Zimbabweans all who seek to have a voice in the revision of the constitution of Zimbabwe (Z-NCA Kagoro 2001). Given the source, the

figures are likely to be somewhat suspect, while the general message remains the same: that there is a wide geographic dispersal of vociferous anti Mugabe Administration views.

Part of the NCA's territorial presence has been through the independent media (ZHR-NGO-SR-01/01), as suggested by the following quotations. The latter quote boldly makes the point that the Mugabe Administration could dominate society with legal power:

...but to argue that it is the Lancaster House Constitution that has prevented us from solving the land issue is downright dishonesty. The Lancaster constitution ended in 1987 or at the latest in 1990, some 10 to 13 years ago, and all know it (Z-FG-24/02/00-PE).

It is the current constitution which gives ZANU PF the best legal framework for winning a presidential election...a government armed with a constitution" (Z-FG-7/03/01).

The territorial presence of the NCA was made and remade from 1997 to 1999, alongside changing politics. Events happening in 1997/1998, described and analysed in Chapter One and Five (see Table 5.3), deeply established Morgan Tsvangirai as an important figurehead actively challenging the Mugabe Administration and working in a variety of NGOs (Table 6.7). Some of the momentum gained by the NCA came after the government was invited to discuss the framework of constitutional reform at the national level on September 6 1997 (Z-NCA-Intro. 2000). By 1998, the Mugabe Administration formed its own Constitutional Review Commission, later known as the Constitutional Commission (CC) to review the LHA, in response to the NCA's public challenge. Moreover, between 1997 and 2000, two organisations began two different attempts to re-write the constitution. Many could detect a contemporary oppositional identity quietly being forged. The CC was put in place to restrain this movement (ZHR-NGO-SR-01/01).

In one way, the Mugabe Administration granted the CC legal authority to construct the constitution. The Mugabe Administration sought to fold the constitution referendum into its own administrative mechanisms, and tried to discourage the real activism from taking root. The NCA, which had already begun the subversive act of educating the people and

scripting a draft constitution, was doing so without formal approval. In fact, trumpeting the need to re-write the constitution, the NCA displayed little support for the Mugabe Administration. To many, the NCA symbolised rebellion: both implicitly and explicitly criticising the Mugabe Administration. Because the NCA sought to re-write the constitution independently of the Mugabe Administration, this suggested a much deeper criticism, a political space that would harbour dissident views. Thus, as early as 1997 those who wished to express dissatisfaction with the government could do so under the rubric of NCA activism. Those who were interested in the NCA's message were taught the basic principles behind the law, including the notion that in theory law is not supposed to threaten their well-being (Z-NCA-Intro 2000). By November 1997, the NCA had set up its own press union. A series of workshops – a nationwide awareness campaign- were scheduled from May 1997 through to February 1998. The intent was to encourage Zimbabweans to participate in shaping a new constitution: a "popular constitution". The NCA hosted public meetings to create a public venue for dialogue. Panellists were invited from different fields of expertise to hold discussions with members of the public. One objective was to create a culture of consultation between public and leaders (Z-NCA-Intro 2000). Yet, their educational package on leadership is somewhat subdued, as suggested by the pamphlet on leadership, of which a portion is cited below in Table 6.9.

Table 6.9: NCA encouraging Discussion on Leadership

<p>Traditional leadership in Africa</p> <p>These ideas of leadership and the positive use of power are expressed in many Zimbabwean proverbs:</p> <ul style="list-style-type: none"> - The power of the fish is in the water - <i>Amandla enhlanzi asemanzini</i> (Ndebele) - A leader is only leader because of the people - <i>Inkosi yinkosi ngabantu</i> (Ndebele) - Even leaders should be humble - <i>Gudo guru peta muswe vadiki vakutye</i> (Shona) <p><i>Discussion questions</i></p> <ol style="list-style-type: none"> 1. Do you think our leaders in Zimbabwe have enough controls on their use of power (checks and balances)? 2. Discuss the above traditional proverbs on leadership, and any other relevant proverbs, in relation to leadership in Zimbabwe today.
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Source: Z-NCA-Leadership-2000

The pedagogical focal point was on the argument that the Mugabe Administration did not

pioneer constitutional debate and process after the Lancaster House Agreement (1980-1990) ended. The Mugabe Administration *could* have responded to public needs and pressures and initiated a successful constitutional process, one eliminating the Lancaster House Constitution constraints. Individual women and men who had participated in the discussion began to extend the NCA's geographic reach by talking about power, authority, and leadership, law parallel to their interests and hope for the future.

As the independent media provided more information about the politics of making new laws, women and men responded. For instance, as more men and women understood that the constitution was supposed to protect their rights, they became aware of how President Mugabe had amended the Lancaster House Constitution to grant himself security of tenure. Many also became aware of the difficulty of removing an unpopular leader who was entrenched in the electoral system through the legal powers of a public office. The independent media played an important role in politicising the issue. Newspaper articles documented external constitutional experts' view that the CC had some methodological problems (Z-FG 17/02/00-PE, Z-FG 24/02/00-PE-PE). Full details of the flawed methodology and the politics of constitutional reform are provided in the report written by the Zimbabwe Human Rights NGO Forum (ZHR-NGO-SR-01/01: 10-11).

Some of the public now knew the idealised role of law and national leadership, an ideal compared and contrasted to the current situation. And given that they had been kept informed about many problems in writing the new constitution, they also were learning that this gap between rhetoric and reality would not lessen. For instance, the independent media kept them informed that the CC refused to learn from, use or accept the information collected by the NCA; the lack of collaboration between the two organisations was only the starting point. The CC's methodology used to collect information from the public was further questioned once the information had been received, collated and interpreted by the CC. For instance, in the consultation process, there was poor representation of peasant farmers, unskilled workers and the unemployed. And there was a bitter struggle among the members of the CC as discussion led to how the CC would recommend the restructuring of the executive organs of state. Up to the

final plenary session in which members of the Commission approved the draft constitution, the independent media brought the methodology of CC to the public eye and allowed them to critique it (Z-FG 17/02/00-PE, Z-FG 24/02/00-PE-PE).

With two nation-wide movements seeking to present two draft constitutions, one legitimated, the other not, legal phrases held significantly different meanings, interpreted through individual's understanding of leadership roles and the use of power (HSF-Focus 17 03/00). The NCA unsettled the political landscape. By challenging mainstream assumptions about the Mugabe Administration's institutional fabric, and demonstrating that this Administration was entirely reliant upon the legal/constitutional foundations - which are connected to a much broader set of power relations that legitimise national borders and boundaries - the NCA argued that each individual voice could make a difference in eroding and reshaping the politico-legal fabric created by the Mugabe Administration. Women's and men's response to the CC's draft constitution suggests that such a lesson was taken away and digested.

Buttressed against the broad-spread support of the media, organisations and the "rumour mill", the most reliable source of information inside Zimbabwe (Z-TH 26/01/98: 8, Simbarashi (male: SLK98 01), the NCA created an expansive foundation which focused on the legal motif – the constitution. As NCA initiatives pushed forward their agenda, myths, the present political and economic conditions and hopes for the future created the momentum behind much of this activism. At the same time, the Mugabe Administration's power had been repoliticised through the focus on the leadership issue. Furthermore, by using an education strategy, the NCA legal activists, human rights groups, constitutional specialists were able to impress their views upon civil society as part of the public dialogue. The Mugabe Administration could not control the flow of legal discourse. Thus an uneasy situation was created as members of the public repoliticised legal discourse and used this discourse to voice their own demands. For instance, according to the ZHR-NGO, Zimbabweans told the Constitutional Commission they wanted,

....a ceremonial president with no immunity from prosecution; an executive prime minister accountable to Parliament and presiding over a small cabinet; parliamentary control of the executive; a prohibition on the existing incumbent

running again for the (ceremonial) presidency and a strict limit of two terms for future incumbents; a completely independent judiciary, Electoral Supervisory Commission and media; a completely enforceable declaration of fundamental rights, including equality before the law for all persons; and a small and inexpensive legislature elected by proportional representation (ZHR-NGO-SR-01/01: 15).

Perhaps individual wants and desires were translated by the lawyers, but this quotation suggests strong legal language emphatically and articulately claiming a right to a democratic process. Nonetheless, these assertions have been misinterpreted and misrepresented in the text of the CC's draft constitution. The revised/draft constitution proposed to strengthen the executive presidency still further. Many commentators argued that such provisions were responsible for the rejection of the whole draft (Z-FG 17/02/00-PE, Z-FG 24/02/00-PE-PE), suggesting that the methodological issue became a touchstone for many Zimbabweans to define how they wanted to shape the legal and justice system, and its administration in the present and the future. In many respects, the CC's attempt to write the constitution was interpreted as an attack on the individual voice of the people. This political insensitivity most likely helped those who might not have cast their Referendum ballots. This response emerged as a strong *no* to the CC.

6.3.1.2 The Referendum: 12-13 February 2000

On February 12 to 13, 2000, Zimbabweans went to the polling stations to vote on whether or not they would accept the revised constitutional proposals. In this Referendum in February 2000, the Government's constitutional proposals were rejected. The result of the referendum and its aftermath has been discussed in detail by analysts (Z-NCA-Sithole and Mangongera 2000, Z-NCA- Sithole 2000, Z- FG-17/02/00-PE, Z- FG-24/02/00-PE, ZHR-NGO-SR-01/01), and will not be discussed here. At the heart of this discussion is an attempt to answer why the public rejected the 1999 draft constitution prepared by the Mugabe Administration. One answer is offered below:

Core electoral body indicating that they were rejecting the methodology used by the CC to collect, collate and interpret the public's contribution to the constitution, because this information has been re-written to safeguard the interests of Zanu-PF. The people began to understand that by voting no, they were not suggesting satisfaction with the existing constitution. Rather they were articulating that they had the right to participate and shape their own vision of a

new draft constitution: the "...outcry that the views of the public had been ignored, even discarded, was deafening, in all, including state-owned, media" (ZHR-NGO-SR-01/01: 11).

This quotation suggests that three key activities were connected to the no vote. First, the action of voting. Previous elections provide a context for the no vote (see Chapter Three). Opposition to the Mugabe Administration was rooted in non-participation which is revealed in low participation and a high number of ZANU (PF) elected officials (see Z-TS 17/01/98, Z-NCA Sithole 2000). The cross antagonism of the opposition party, which is at the heart of multiparty politics, was thus lacking. Moreover, security conscious legislation such as LOMA and the Constitutional Prerogative of Mercy has had a general tendency to fragment and disenfranchise political opposition and informal political coalitions. After the referendum results were revealed to the Mugabe Administration, this evidence of active resistance – especially in "Bulawayo and Harare, the centres of the No vote" (HSF-Focus 17 03/00) meant that the new opposition party, the MDC had a new platform to move forward on. They were aware that individuals' were willing to undertake activism to support their political beliefs.

Connected to this point, while acknowledging that Zimbabwean women and men rejected the 2000 referendum, the numbers - in the quotation cited below - suggest the need to look forward and more deeply appreciate geographies resisting the Mugabe Administration. This resistance is partially represented in these numbers. These numbers can tell us much about particular spatial patterns of Zimbabwean legal culture and legal consciousness as well as changing ideas about legal institutions and the role of the law, Head of State and state-condoned violence:

The result was decisively against the draft constitution. Of 1 312 738 ballots cast, 36 774 (2,8%) were spoilt... (578 210 (44,05%) were in favour and 697 754 (53,15%) against adopting this draft. It is unclear how many people were not permitted to vote, but 4 294 were turned away in Midlands province alone. Although six (largely rural) provinces gave an overall affirmative, *62 of 120 constituencies voted no. Of these, 50 were urban and 12 rural...*

The urban vote was overwhelmingly negative, and included all of the smaller towns except Beit Bridge, Shurugwi, Zvishavane and Kariba. Peri-urban areas (Goromonzi, Seke, Vungu, Matobo, Umzingwane) also voted no, as did some

surprising rural constituencies (Binga, Mutasa, Makoni East and West)...(ZHR-NGO-SR-01/01: 20 emphasis added)

In February 2000, Zimbabweans rejected the new constitution. Since then, the Mugabe Administration has been quick to present this as a public rejection of a new constitution (Z-I 13/10/00-LN). But as the current activism of the NCA suggests, the statistics from the NO vote should be carefully reflected upon, particularly against the details provided in Chapter Four, which highlighted main characteristics of the historical legal culture. The NCA in the post-2002 Presidential elections has created a potential new challenge and seems to threaten the Mugabe Administration even in April 2002 (Z-TH 24/04/02-O). Because the numbers hold the potential to de-legitimise his presidency, the Mugabe Administration seems to fear the numerical outcome of another constitutional referendum.

Second, the no vote represents people's resistance to the Mugabe Administration as a space, located in specific locations, associated with legal literacy within civil society, and places touched by the civic education on political participation. This spatial pattern has been somewhat reproduced in the June 2000 parliamentary election results: the new opposition party - only nine months old - won 57 of the 120 contested seats despite the politically motivated violence against their followers (Z-MDC-ICG-A 2000). Although "only 1.3 million people voted in the [constitutional] referendum", each vote must be read as a willingness to demonstrate that each individual would not be intimidated by threats. One by one, individuals were willing to challenge ZANU (PF) supporters, who made public statements such as: "If you vote No we'll know and we'll bring back the troops from the Congo [war] and shoot you "(SA-HSF-Focus 17 03/00). The point central to the discussion of this chapter is that the NCA example suggests an individual interest in the constitution, and an engagement with questions about law and legal power, and violence within the post-Independence legal culture (SA- HSF 2000a: 9).

The Helen Suzman Foundation, aptly captures the changing mood created by the NCA. In an article entitled *Goodbye Mugabe*, the word - "want" is repeatedly used in a paragraph that contains the sentence "... a sense sweeping the country that it is time for a

change” (HSF-Focus 17 03/00). This desire for change had been planted in rural and urban areas, through the newspaper and the radio. Through the NCA public outreach and education agenda, the general public became aware of the power of the 1980 constitution, the extent of the President’s power and the pressing need to re-write the constitution rather than continue to allow the government to amend the constitution. What they learnt from NCA was that many of these amendments strengthened the Executive (creating and extending the Executive Presidency powers), re-shaping the Executive Presidency relationship to the legislature and judiciary.

Third, NCA asked the people if they thought that the "Lancaster House Constitution of 1980 has been the major constraining factor in addressing the "land question" " (Z-NCA-Sithole and Mangongera 2001). Many women and men came to realise that land did not equate to political rights. Before the NCA, many post-Independent women’s and men’s self-perception was that they were people without land, people without citizenship rights; thus land was the context of returning civil rights back to the people (Tshuma 1998). In recognising this real world belief, the Mugabe Administration assumed that the land-constitution rhetoric embodied in the CC draft constitution would have been favourably received. However, this connection had been destabilised by the NCA. The NCA constructed a different set of connections about the land, constitutions, civil rights and leadership: Mugabe’s neglect of the land issue is embodied in the retention of the Lancaster House Agreement (1980-1990), which prevented the land distribution when the country became independent. In short, the NCA argued that Mugabe had neglected to attend to basic needs when the Mugabe Administration neglected to change the constitution (see Z-FG-24/02/00-PE). As one key informant told me:

The government is trying to cover up with the land issue so people will not think about the real thing with high prices. The government is talking about how it will take land from the whites - but the real thing is that people are expecting changes that the government will respond to their demands positively (“Simbarashi” SLK-98-01 (male)).

6.3.2 Amani Trust

Amani Trust politicised the Mugabe Administration’s use of the Constitutional Prerogative of Mercy by collating evidence of politically motivated violence. This

organisation has made use of the Internet through The International Rehabilitation Council for Victims of Torture (IRC). Amani Trust 's affiliation with IRC seems to have removed Amani Trust from direct control of domestic law (further discussion on domestic legal control of telecommunications is outside the scope of this thesis). Established in 1993, this Zimbabwean-registered NGO provides a lesson about how reports of violence are used in court to overturn election results (see Table 6.3).

Amani Trust focuses on one issue: Everyone should have the right to live without the threat of violence from government-sanctioned torture. As Amani Trust research suggests, in some regions, "1 adult in 10 attending a health facility may be a torture victim". By torture victim, it is meant either one of two categories: " Primary victims (those with direct experience of organised violence and torture) and Secondary victims (those indirectly affected by organised violence and torture)". During the 2000 elections, almost everyone was affected by the state-organised violence, be it on the side of the state, or supportive of the opposition party. Amani Trust does not single out the instances of beatings, or assault threats for criticism. For example, death threats are situated in their report as one practice within the broad category of organised violence against the opposition party (Z-MDC-Impeach 2000). At this point, threats, threatening of life of individuals becomes diffused and legitimated, and outsiders can begin to make the connection between politically motivated violence and key political events.

Amani Trust defines violence in very specific terms:

"organised violence" means the inter-human infliction of significant avoidable pain and suffering by an organised group according to a declared or implied strategy and/or system of ideas and attitudes. It comprises any violent action, which is unacceptable by general human standards, and relates to the victims' mental and physical well being (ZHR-NGO 19/02/02)

Amani Trust documentation of local perceptions of civil society-political intimidation orchestrated by the ZANU (PF) government during the pre-election period seems to have four effects on the current perception of civil liberties abuses. One, the data is readily available to the international community. The reports, some of which are cited below, can

be ordered through their website that supports the Zimbabwe Human Rights NGO

Forum:

- AMANI [1999], *Living with Torture: Justice and Reparation after the Liberation War*. Harare: AMANI.
- AMANI [1999], *Impunity and True Unity – Forever Opposed? Seeking Ways to reduce the Gap*. Bulawayo: AMANI.
- AMANI [1999], *A Report on the Exhumation and Reburial Exercise overseen by the Amani Trust in Gwanda District*. Bulawayo: AMANI.
- Zimbabwe Human Rights NGO Forum [1999], *A Consolidated Report on the Food Riots, 19- 23 January 1998, Report written by the Amani Trust* . Harare: Zimbabwe Human Rights NGO Forum.

Two, these reports provide qualitative and quantitative evidence of violence: different practices of violence such as physical torture, deprivation, sensory over-stimulation, psychological torture, witnessing of violent death, extreme violence or torture. They unify a series of reports that connect politically motivated violence and intimidation with psychosocial trauma, torture, repressive violence and institutionalised violence. Thus under the definition of violence, diverse themes are woven together to illustrate the deeper impact violence is having upon the landscape, mapping locations of fear and trauma that have become part of women's and men's lives since the February 2000 Constitutional referendum (Z-AT-20/05/02-PE 2002). For instance, if one visits their website one can review literally thousands of transcribed narratives of women and men who have come to Amani Trust since February 2000 (ZHR-NGO 28/09/01-Crisis).

A key point to note is that, in the Amani Trust reports, the socio-spatial patterns of fear connected to organised violence running through local communities suggests that the entire fabric of a society is destroyed when government sanctioned torture occurs. While details of the physical evidence of torture will not be repeated here, the key point to take from this discussion is that Amani Trust is connecting the violence to the political use of a specific legislative tool. This point is missing in many of the reports by the Helen Suzman Foundation, which also has been watching the political violence, but has not connected the violence to specific laws (SA-HSF 2000a, 2000b and 2000c).

Three, activists within Amani Trust have gone one step beyond making the connection between torture and the 2000 parliamentary and 2002 presidential elections; they have been contributing to the international discussion about Zimbabwe as well as changing the local political landscape (Z-CIZC-19/06/02, UK-TG 12/04/02 and N- 20/03/02- NEOM: 12). The new opposition party, the MDC, has taken the Mugabe Administration to court for beating and torturing MDC supporters during the pre-election period. By using Amani Trust reports as evidence in local courts, MDC has overturned several ZANU (PF) election results (Z-MDC-AT - ZPE 2001, Z-MDC - SI 318- 2000, also see ICG 14/06/02:15). As High Court judges evaluate the *facts* (for example, the political violence which occurred in the pre-election period), these judges have found fault with the Mugabe Administration for supporting the violence and/or neglecting to ensure that the Mugabe Administration followed the procedures of administering justice for all. In some cases High Court judges annulled ZANU (PF) elections based on the evidence of violence collated by Amani Trust (ZHR-NGO –SR 03/01: 18, ZHR-NGO 28/09/01- Crisis).

Four, the findings of Amani Trust have been supported by the findings of several international organisations and observer teams including International Rehabilitation Council for Torture Survivors (IRCT), National Democratic Institute (NDI), the Commonwealth Observer Team, the European Union observer team and Amnesty International, which also documented human rights violations. These reports were used during the pre-election period by elected representatives of Zimbabwe in a *Request made to the Speaker of the Parliament of the Republic of Zimbabwe in terms of Section 29 (3) of the Constitution of Zimbabwe* that the President not escape criminal liability for these actions (Z-MDC-CO-GN. 2000). In other words, the statistics compiled by Amani Trust were used by the MDC to advance the motion through Parliament to impeach President Mugabe (Z-MDC-Impeach 2000).

Five, in this case, data from Amani Trust information and documentation on the effects of torture and psychosocial trauma has been a key way of building allies across the globe. Stories of the torture that occurred in the pre-election period have focused the discussion

on organised violence by the state. Torture provides the most common denominator possible - the belief in the importance of citizens being protected from abuses of power by the state.

A key point to take from the Amani Trust example is that Amani Trust provided details of the organised violence and government sanctioned torture related to the parliamentary elections. At the heart of their work, they document what breaks the tacit agreements between civil society and the state. By publishing the names of people who were tortured and the ways that torture has affected these individuals psychologically, Amani Trust has helped re-enforce the argument that the Mugabe Administration's rule of law view is not the people's voice of justice. These reports detail some of long term effects that the violence has had upon the psyche of the individual who in turn must continue living and functioning as individuals, husbands and wives in a community. This method of collating information can be more broadly read *as a way to understand the changing legal culture*. While many became more distrustful of the Mugabe Administration, many were willing to offer their stories to Amani Trust .

As noted in the example above, the NCA activism produced restlessness in some communities. In some cases this feeling led to individual activism. Some individuals chose to participate in day-to-day activities that brush against, and/or create interactions with the state and the law. Many of these interactions have also led to violence. Sparking hopes, dreams and ambitions of individuals faced with unemployment, low income, few formal employment opportunities, etc, all the sorts of issues *Amai Tsitsi's* children are faced with, this creates a landscape of activism which may or may not become legal power.

The state transformation literature seems to help explain the choice of issues that Amani Trust has chosen to focus on – the collection of data, the method to distribute the information. However, as discussed in Chapter Two and Three, the next section will make the argument that an analysis of the overlapping social movements within the legal order can tell us much more about *how* institutions and organisations politicise the legal

and justice system. These outside visions offer their documentation and interpretation of specific laws and the use of specific laws through a specific worldview. Through the analytical lens – rule of law as a philosophical/political practice– highlighted in Chapter Two, we can see that different groups create very different political positions. Local and global communities responded to the geographic expressions of the February violence. Some supported the political activism around a new constitution. The key point is that these shifting positions changed the world power relations running in and through the legal and justice system, in turn changing the institutional space of judicial independence (see Risse and Sikkink 1999, Sarat and Scheingold 2001b).

6.4 Global-Local Electronic Advocacy Networks and the Abuja Agreement

In September 2001, an NGO reported:

...President of Zimbabwe Robert Mugabe agrees in principle to the Nigerian Abuja-brokered agreement on the land reform programme and says that the accord [negotiated with the Committee of Commonwealth Foreign Ministers] will have to pass through cabinet and the ruling party's politburo (ZHR-NGO 9/10/01 AT-SNS-Sept).

President Mugabe did sign the Abuja Accord, otherwise known as the Abuja Agreement (UK-DT 29/10/01). With his signature, Mugabe agreed to address specific issues, restore the rule of law, stop violence, uphold human rights and democratic values, end fresh land invasions, remove illegal occupiers and embark on a "just and fair" land reform program. The Abuja Accord is just one of many times that the Mugabe Administration promised to respect human rights (Z-I 26/01/01; SA-TS 07/09/01; UK-DT 10/09/01). Agreeing that

...there will be no further occupation of farm lands...[Mugabe was] committed to restore the rule of law and to freedom of expression as guaranteed by the Constitution of Zimbabwe (ZHR-NGO 9/10/01 AT-SNS-Sept).

The commentary cited above is from an NGO formed in the aftermath of the December 1997 National Day of Protest, the Zimbabwe Human Rights NGO Forum (ZHR-NGO). This forum of nine human rights NGOs has conferred with civil society, written reports from a wide array of professional views and brought civil society's voices to the Mugabe Administration and the international community. The ZHR-NGO has also made use of

the Internet to widely distribute its reports, which it has been producing since 1998. In addition, in 2001, this NGO played a key role in calling members of other Commonwealth countries and the Presidents of SADC countries to review their position concerning the Mugabe Administration. With evidence compiled in numerous reports, ZHR-NGO urged the international community to take steps toward publicly reprimanding the Mugabe Administration.

Such actions gained the attention of African and Commonwealth leaders. By September 2001, 20 months of NGO activism had placed the Mugabe Administration under international surveillance. International and domestic pressure focused on the government's fast-track land resettlement program and political violence, a focal point partially created through the government's refusal to obey several Supreme Court rulings and military operations in the Congo, which benefited a few generals and top ZANU-PF officials, but drained hundreds of millions of dollars from the economy (ICG 25/01/02).

Table 6.10: Zimbabwe Human Rights NGO Forum - Member Organisations, Reports and the Abuja Agreement

Core member organisations of the Zimbabwe Human Rights NGO Forum⁺	Research* Unit Reports	Monitoring the Abuja Agreement^{**}
The Amani Trust , The Catholic Commission for Justice and Peace The Legal Resources Foundation Transparency International (Zimbabwe) The University of Zimbabwe Legal Aid and Advice Scheme Zimbabwe Association for Crime Prevention and the Rehabilitation of the Offender Zimbabwe Human Rights Association Zimbabwe Lawyers for Human Rights Zimbabwe Women Lawyers Association	Reports on Political Violence Press Releases Monthly Violence Reports Human Rights Monitor Election Challenges Newsletters Annual Reports Special Reports	Commentary on the Abuja Agreement: Two Months Report Complying with the Abuja Agreements Crisis in Zimbabwe: A Time to Act Resolutions

*The Human Rights Forum operates a Legal Unit and a Research and Documentation Unit.

+The Zimbabwe Human Rights NGO Forum (also known as the "Human Rights Forum") has been in existence since January 1998. Nine non-governmental organizations working in the field of human rights came together to provide legal and psychosocial assistance to the victims of the Food Riots of January 1998

**Reports Given to Abuja Foreign Ministers, Commonwealth Ministers and SADC leaders

Source: adapted from ZHR-NGO 04/08/01, ZHR-NGO 28/09/01-CAA, ZHR-NGO 23/10/01

As a contact zone between North and South, the ZHR-NGO, other NGOs and the media posting information on the World Wide Web created a significant difference in the way that the international community thinks about rule of law in Zimbabwe. This coalition of views also played a pivotal role in ensuring that the Mugabe Administration respected the conditions of the Abuja Agreement. The electronic advocacy networks offer information about the new Zimbabwe. Through NGOs, the media and other voices from websites such as Z-News, this “grey” literature has an important role to play in representing and constructing the new Zimbabwe. Through the World Wide Web, we can hear some vociferous groups critical of the Abuja Agreement text. Part of the Abuja Agreement text cited below highlights the formally agreed upon definition of the problem and the solution constructed by the Committee of Commonwealth Foreign Ministers on Zimbabwe in Abuja:

Land is at the core of the crisis in Zimbabwe and cannot be separated from other issues of concern to the Commonwealth, such as the rule of law, respect for human rights, democracy and the economy. A programme of land reform is, therefore, crucial to the resolution of the problem...

The Way Forward

- (i) Commitment to the Harare Commonwealth Declaration and the Millbrook Commonwealth Action Programme on the Harare Declaration;
- (ii) There will be no further occupation of farmlands;
- (iii) To speed up the process by which farms that do not meet set criteria, are de-listed;
- (iv) For farms that are not designated, occupiers would be moved to legally acquired lands;
- (v) Acceleration of discussions with the UNDP, with a view to reaching agreement as quickly as possible;
- (vi) Commitment to restore the rule of law to the process of land reform programme;
- (vii) Commitment to freedom of expression as guaranteed by the Constitution of Zimbabwe and to take firm action against violence and intimidation; and
- (viii) Invitation by the Foreign Minister to the Committee to visit Zimbabwe (CS-9/06/01-01/55)

Although the language chosen to encapsulate the Commonwealth members’ concern about the violence appears neutral, another core issue was at stake. The Commonwealth community was attempting to be inclusive in the final wording of the documents. Thus,

the Abuja Agreement offers some interesting insights into diplomatic relations' methodological complexities. As one South African newspaper mentions, the final document presented by the Commonwealth ministers was a

...mild (final) statement because the mission was operating under rules of consensus and with Zimbabwe being part of the process...it had to reflect Zimbabwe's position (SA- News24 28/10/01).

Analysts were critical about the Abuja Agreement for its focus on land reform rather than the Mugabe's Administration inability to uphold the rule of law (AI 24/10/01) and the fact that the Abuja agreement "...is not a legal but a political agreement" (SA- News24 28/10/01). Such rhetoric suggests that without mechanisms to monitor the implementation of the Abuja accord, the Abuja accord is meaningless. Many NGOs have argued that the rhetoric "land is at the core of the crisis" (Z-CFU/CMG-AA 27/10/01) misdirects the focal point. Many argue that the focus "land reform [meant that the focal point]...had moved away from the previous emphasis on Zimbabwe's obligations to uphold the rule of law... " (AI 24/10/01). The ZHR-NGO furthers this critique, yet uses NIE/LDM rhetoric to frame their argument, as noted in the quotation below.

...The Agreement focuses upon ways to resolve the land issue. It states: "land is at the core of the crisis in Zimbabwe." This is not a correct assertion. The main cause of the crisis in Zimbabwe is bad governance. There has been serious misrule and abuse of power. This has consisted of systematic, violent intimidation of opponents of the Government, gross mismanagement of the economy, and endemic corruption by Government officials. This has led to catastrophic economic decline and, in turn, to rapidly diminishing popular support for the ruling party. When it was faced with the prospect of losing power, the ruling party embarked upon ever more desperate and destructive measures to cling to power (ZHR-NGO 28/09/01-CAA).

Amnesty International takes this critique a few steps further to argue that important freedoms such as freedom of movement, association and expression, the media coverage and freedom of expression and civil society's access to the media have become increasingly constrained. So too, are international observers' freedom to meet with NGOs and victims of violations and collect reports of human rights abuses. The focus on the land reform rather than "the deliberate, state-sponsored pattern of repression of any form

of opposition" (AI 24/10/01) has meant that the international community has focused on a material rather than symbolic issue: land, rather than rule of law.

The second criticism of the Abuja agreement is that "Abuja is not a legal but a political agreement" (SA- News24 28/10/01). British, South African and Zimbabwean newspaper reports identify the limitations of the political framework in different ways. Several newspaper analysts have focused on exploring the numerous ways in which the text and objectives of the Abuja Agreement have not been upheld and honoured by the Mugabe administration (see SA-TS 07/09/01). Some note the scepticism within Zimbabwe from the day the agreement was signed (UK-TG 07/09/01); others question how a general framework could be developed among all stakeholders - the government, farmers and donors into a fully-fledged land reform program (Z-I 19/10/01). Others focus on why other African leaders should become involved in reprimanding Mugabe as a leader (SA-BD 09/10/01). Different commentators identify that the final document produced by the Commonwealth delegate and the Zimbabwean government (see Z-CFU/CMG-AA 27/10/01) was really a struggle over larger concerns. Some comment that the way in which the issues were framed highlighted procedural technicalities and shrouded the real issues such as political will and violence. A related argument is that this focus on procedural technicalities before and after the Abuja Agreement had been signed allowed the international community to turn its back on Zimbabwe, which in turn mean condoning some of the political violence (ZHR-NGO 28/09/01-CAA).

A third criticism is that the Abuja agreement (a symbolic instrument) and a diplomatic mission by Commonwealth representatives are not powerful enough mechanisms to motivate the Mugabe Administration to alter its course of action. This criticism follows several different views. One view focuses on the "Text of the Abuja agreement on Zimbabwe" (SA-TS 07/09/01) provided by the Nigerian Foreign Ministry and assumes that the Mugabe Administration will honour commitments made at Abuja. This view has the tendency to argue that the agreement had been "violated...called for land reform within the rule of law" (UK-DT 29/10/01). In many cases this sort of argument would suggest that in Abuja communiqué, signed on 7 September 2001, the Zimbabwe

delegation made two broad assurances. There would be no further occupation of farmlands and they were committed to restore the rule of law to the process of land reform (CS-9/06/01-01/55).

Another view argues that stopping the violence should be a matter for the international community. Those concerned with social justice should intervene. The undercurrent in this rhetoric stresses the necessity of taking firm action against the Mugabe Administration for not attending to the agreement conditions, or preventing the violence and intimidation. This view focuses on a leader's negative response to international treaty monitoring, and highlights the threat of punitive action such as economic and political sanctions: "possible EU sanctions" (UK-DT26/10/01)

The European Parliament adopts a resolution calling on the European Commission, the executive arm of the European Union and member states to suspend all development co-operation assistance to Zimbabwe until democracy and rule of law are fully restored (ZHR-NGO 9/10/01 AT-SNS-Sept).

An additional view assumes that the Abuja Agreement is part of the process of "international bodies to apply pressure" (UK-TG 29/10/01) on the sovereign-state. This view focuses on the notion of progressive steps taken toward integrating the demands of the Abuja Agreement into the day-to-day administration of the state. The words *progress* and *process* characterize this view. As one local newspaper reported: "This is a process...some progress has been made in complying with the Abuja agreement" (Z-S 28/10/01). Several views acknowledge the process through which diplomatic power flows through the spatial hierarchy of local NGOs - constrained by domestic law - up to the international NGO. For example, a British newspaper suggests that the Abuja Agreement has created a space where the ZANU (PF) government can be legally challenged for not adhering to the agreement:

Western diplomats said it would be counter-productive to declare the Abuja agreement completely dead as it served the useful diplomatic purpose of at least keeping international attention focused on Zimbabwe... (UK-DT 26/10/01).

In a similar vein, if one focuses on the differences between rhetoric and reality, one can find new political spaces. NGOs are constructing an important dialogue, which

documents the gap between rhetoric and reality. They document that the Head of State, in principle, agreed to the Nigerian Abuja-brokered agreement on the land reform programme. Then the Head of State neglected to take this international agreement to parliament for debate, or to take specific steps to ensure that the Abuja Accord was passed through cabinet and the ruling party's politburo. In short, NGOs are documenting that the Head of State neglected to activate this international agreement in domestic law, which in turn would be administered by security forces. The key point is the dialogue is being created. In this discussion, one can find the hope for change (ZHR-NGO 9/10/01 AT-SNS-Sept).

6.4.1 Who is Constructing the Narrative?: The Gap between Reality and Rhetoric

While the Mugabe Administration offered public assurances that the rule of law was being upheld and the conditions outlined in the Abuja Accord were being respected, a flurry of reports were produced between September 2001 to March 2002, before the Commonwealth decided to suspend Zimbabwe from the Councils of the Commonwealth for one year (C- 19/03/02-PI- 02/26, SA-News 24 28/10/01). Many voices offer evidence that the government had not fulfilled its obligations to the Abuja Agreement. Evidence offered in a number of different reports suggests three themes connected to the land issue. The first documents the number of farms still occupied by squatters. The complex situation of the themes - private property rights, state condoned violence – is linked to the lack of cooperation by law enforcement officers:

...25 September 2001 a CFU survey had found that 1 948 of 3 829 farms were still occupied. Of the 3 555 remaining members of the CFU, 350 (10%) had closed down, while another 550 (14%) were operating only partially. The Agricultural Labour Bureau said 950 of 1 150 occupied farms were unable to continue normal production and confirmed 350 had ceased operating. On 570 farms, tobacco production was reported to have been stopped by farm occupiers.

Colin Cloete, chairman of the CFU, was quoted by *The Daily News* as saying:

'What's happening on the ground and what's happening at the political level are two different things. The chaos carries on ... The police are not being helpful.'

After Abuja and the start of the new crop season, 65 000 tonnes of potential tobacco on 26 000 ha, valued at Z\$12,5 billion, was lost. Farm occupiers uprooted the seedbeds or forbade planting (ZHR-NGO-TM 10/01:2).

The second theme is the violence cloaking the landscape. One NGO documented that at least 108 individual abuses occurred after the Abuja Agreement between September 8 and October 31 2001 (ZHR-NGO-PV 10/2001, ZHR-NGO 28/09/01-Crisis). Another report (ZHR-NGO 9/10/01 AT-SNS-Sept) suggests that in the month of September 2001 alone:

...3 more deaths, hundreds of assaults... Harassment of the opposition, including attempted assassinations, false arrest, beatings and abductions has continued, as have attacks on journalists from independent papers.

This NGO and others have adopted a method of compiling evidence as part of the process of reporting human rights abuses to the international community.

A third theme is the acknowledgement that the violence is disrupting communities with the broader socio-spatial effects of the violence. Since January 2001, nearly 14 000 farm workers and their dependants, 70 000 people in all, have become destitute (ZHR-NGO-TM 10/01). Under the Land Acquisition Amendment Act, commercial farmers have lost their property, as the Government need only pay for 'improvements', not the land itself. This fast-tracking resettlement has been severely criticized by the General and Agricultural Plantation Workers Union (GAPWUZ) and the Farm-Workers Action Group, which represent farm-workers (a group much larger than those to be resettled). They suggest that

"...two of every three farm-workers will lose their jobs. This means that 240 000 farm-workers will be out of work. Their 1,5 million dependants will have no money and no land on which to grow their food. In Mashonaland Central alone, 43 000 workers have already lost their jobs on 600 farms. Many are 'foreigners' who have lived all of their adult lives in Zimbabwe. They cannot simply 'go home' without money or identity papers. Some were asked to pay Z\$500 to 'war veterans' occupying the farms if they wished to be resettled ZHR-NGO-TM 01/01).

Many NGOs have taken on various tasks during this time: collect information, interview 1000s of individuals, review international and national law, etc. with an eye to the prevailing themes that will make the international community pay attention. The significance of connecting laws to the current crisis is the topic of next chapters as well as the section below.

6.5 Discussion and Conclusions

The empirical evidence presented in this chapter suggests that there are interconnected patterns of action/reaction among different interest groups at different geographic scales. Six patterns have been identified. First, the response made by civil society as they learn about the laws that govern fundamental rights such as speech and association (Widner 2001). Second, the response of donor communities, which has become very attentive to issues of governance (Tshuma 1999). Third, Euro-American governments' interest in the break down of law and order, violence and weapons has been translated into Euro-American governments' economic support for democratic institutions such as the media, the judiciary and NGO, voluntary associations and political parties (Carothers 1998). Fourth, with economists citing NIE as a solution to state institutions' inefficiency, international lending agencies have theoretical justification to support the legal and justice system (Widner 2001: 209). A fifth pattern of action/reaction is found in the new political position of local legal and justice systems. The political position of legal and justice systems has been altered because of the cumulative effect of these local and international changes. As legal and justice systems are very sensitive politically, these global-local changes have created several unintended consequences. For example, the external support legal and justice system may receive and the new legal vocabulary and knowledge being used by civil society is perceived as a sign of globalisation and a loss of sovereignty. This perception makes the legal and justice system vulnerable to the reaction of Head of State. The Head of State may challenge activists within the legal and justice system and suppress civil rights movements (Widner 2001). Sixth, with new democratic institutions changing political landscapes, and more empirical evidence of violence, crime and weapons available, scholarly discussion has been increasing (see Chapter Two, Section 2.2.1.2 *Historical Events Facilitating the Process of Institutionalising Human Rights and Peace*).

More generally, this empirical evidence reveals legal discourses threaded throughout NGOs reports. NGOs focus on how specific domestic laws such as Presidential Powers Act (1986) and Law and Order Maintenance Act/ the Public Order and Security Act, and the Constitutional Prerogative of Mercy, Rural Land Occupiers (Protection from

Eviction) Act 2001, Electoral (Amendment) Regulations, 2002 (No. 15) (S.I. 42A of 2002) affect local communities (Z-CIZC-19/06/02: 28 ft, N- 20/03/02- NEOM). The phases - Chief Justice of the Supreme Court Judge Chidyausiku, militia bases, violence by the uniformed forces of the state, and the police, the army inflicting terror in civilians and carrying out state condoned political violence – create a very strong impression of *who* is perpetuating the violence. These details are often used to suggest specific abuses of sovereign-state power through individuals and institutions (ZHR-NGO 05/2001 see also Z-I 18/05/01, ZHR-NGO-SR-01/01). In addition, frequent reference has been made to international agreements such as the Abuja Agreement and specific legal activists' organisations such as United Nations Special Rapporteur on the Independence of Judges and Lawyers (AI 25/06/02: 26-27).

What becomes quite profound about NGOs use of legal discourse is that the context of these details, local memories about these laws, and even the meaning of a specific law as a political discourses is lost when the analysis moves to a coarser geographic scale. Many NGOs use the language of *civil rights, human rights, food rights, social movements, empowerment, popular participation*, etc as carefully selected prose meant to shame the Mugabe Administration. However, this discourse when read in the post conflict period, away from the details and the local political memories may justify and legitimise the Commonwealth/World Bank 1997-2002 good governance development agenda. In other words, the abstract legal concepts will become inverted to become an economic rule of law discourse which uses the language of *good governance, institutions, efficiency, law and order, foreign policy, development programs*, etc. has changed the global legal structure, economic theory, increased globalisation, human rights has permanently changed the power relationship between the state and the law.

This chapter has provided evidence of the powerful presence NGOs have come to represent in the Zimbabwean landscape during the politico-legal and economic crisis. In many ways this evidence confirms the points made by Sikkink (1999), Kent (2001), Chandler (2001) and Price (1999), NGOs have a geopolitical voice in international relations and NGOs are changing traditional state-international community power

relations by triangulating these power relations. NGOs collected information at the local level, which was transferred to international organisations of nation-states such as the Commonwealth and regional organisations of nation-states such as SADC. Many NGOs brought evidence of widespread political intolerance, lack of respect for the law, disorder and instability, which led to rapid economic decline, violence, and a climate of fear. This evidence was brought to the Commonwealth Ministerial Action Group (CMAG) and SADC leaders (ZHR-NGO 28/09/01-Crisis). In September 2001, Robert Mugabe was invited by the Commonwealth to discuss the current situation (ZHR-NGO 28/09/01-CAA). As a result of this meeting, the Abuja Agreement was brokered with President Mugabe and the Committee of Commonwealth Foreign Ministers in September 2001 (CS-9/06/01-01/55). The Abuja Agreement symbolises the powerful voice NGOs have in geopolitics.

This new geopolitical voice raises many new questions about the new political structures being developed, based in part on the contents of NGO reports (Chandler 2001). As Tolley (1994) suggests, some NGOs compile evidence to expose specific politico-legal structures of a specific location. As argued in this chapter, NGOs have been positioning themselves to take legal power from the state, since 1997. Some are funded by Euro-American nations supporting the state transformation/human rights/democracy legal-institution-strengthening initiatives (EIU CP 2001: 11, 18, Jamali per com 1997/1998, Madhuku per com. 2001, Jackson per com 2002, Coltart per comm. 2002). Backed by this funding, many NGOs have been focusing on three issues: the space of judicial independence, the politics between elected officials and their political opposition and the Head of State's use of law. These three issues will be briefly mentioned because they tell us a great deal about how the broadcloth of legal discourse solidifies political structures that serve the North rather than the South.

One, NGOs focus on which laws the sovereign state is using. Based on this evidence, NGOs demonstrate that through the *Presidential Powers Act* Mugabe validates his own version of the law. Mugabe can override High Court Orders, Supreme Court Judgements, challenge the Parliamentary Legal System and change the Labour Relations Act and other

legislation passed by Parliament. Mugabe can amend regulations and conferring his Presidential power on individuals *after* a Supreme Court judgment has been passed (ZHR-NGO-SR-09/01: 16, 19). The key argument many NGOs are making is this: the Mugabe Administration interprets these three legal mechanisms with a worldview inherited from the settler era: rule *by* law rather than rule *under* law (see Matthews 1986). Moreover, each legal case that NGOs document is supportive evidence of Mugabe's rule of law view and his abuse of office. For instance, the Rural Land Occupiers (Protection from Eviction) Act 2001 simply provides more evidence that the Mugabe's Administration has abused its power (Z-CIZC-19/06/02: 35, ZHR-NGO 28/09/01-CAA: 43 also see ZHR-NGO SR 09/01, USA-Z-HRR 2000/2001, Z-RO 03/98; USA-Z-HRR 2000/2001; AI 25/06/02).

Two, NGOs provide evidence of the struggle among Morgan Tsvangirai (MDC opposition candidate in the Presidential election), members of the original Supreme Court and Mugabe over the Electoral (Amendment) Regulations, 2002 (No. 15) (S.I. 42A of 2002)(Z-CIZC-19/06/02: 28 ft, N- 20/03/02- NEOM). The key point is that Mugabe created the legal mechanisms to legitimately win the multiparty 2002 President Elections. A very coarse reading of the Norwegian Election Observation Mission reports is that Mugabe won the 2002 President Elections. In theory, Mugabe has been re-elected and Zimbabwe continues to retain the political categorisation of being a *democracy* (Z-NCA Sithole 2000,). Yet the purpose of the Norwegian Election Observation Mission was to document in detail the legal technicalities, which created a "weakening of the trust in the voting process" at the grassroots level, and granted "highly questionable powers...to the executive" (N- 20/03/02- NEOM). By focusing on the Electoral Act, NGOs have de-legitimised the multiparty 2002 President Elections. They documented that laws created *before* the elections substantially changed how the political struggles at the grassroots level would be recognised in a court of law. This documentation has had a far-reaching effect. March 9 2002, days before the 2002 Presidential election was held, the United Nations Special Rapporteur on the Independence of Judges and Lawyers publicly de-legitimised the Mugabe Administration to the international community (AI 25/06/02: 26-27). The international community and the United Nations Special Rapporteur on the

Independence of Judges and Lawyers began to respond approximately at the same time. The international community began to impose formal and select sanctions on specific members in the Mugabe Administration. In March 2002, the European Union and the United States of America placed a targeted sanctions regime on the Mugabe Administration. In March 2002, the Commonwealth suspended Zimbabwe from the Councils of the Commonwealth (ICG 10/03/03: 1-2, 15). The critical point being made is that the Commonwealth, EU, USA and the United Nations Special Rapporteur on the Independence of Judges and Lawyers both responded quite strongly to the NGOs' information about politics of lawmaking, the interpretation of laws and the legal and justice system and documenting if law is an interactive process between the legal system, public opinion and public behaviour (UN- COHR 11/02/02, ICG 22/03/02, ICG 17/10/02, especially ICG 25/01/02). This example raises many new questions about law and legal discourse being a Eurocentric construct.

Three, NGOs closely examine how the space of judicial independence is being used, and by whom. NGOs establish that the appointment of Chief Justice of the Supreme Court Judge Chidyausiku has led to the breaking of many tacit understandings between civil society, law enforcers and the legal and justice system. After establishing the close alliances between Chidyausiku and Mugabe and focusing on the argument of the Law Society (which is convinced that the culture of the Supreme Court has changed after Chidyausiku was appointed as Chief Justice Supreme Court Judge), NGOs establish that legal system and security forces serve the sovereign-state, not the people (Z-Kubatana 19/04/02-PLS). Moreover many provide careful documentation of militia bases scattered around the country, established at schools and growth points. These militia bases intersect with people's daily lives (ZHR-NGO 19/02/02). The evidence is constructed in a certain manner. Initially NGOs tend to suggest that the ever-present threat of violence is condoned by the justice system and the state. Then, they will provide evidence of violence by the uniformed forces of the state, and the police, the army inflicting terror in civilians and carrying out state condoned political violence. These details leave a very strong impression of who is perpetuating the violence (ZHR-NGO 05/2001 see also Z-I 18/05/01, ZHR-NGO-SR-01/01). The significance of this argument is that it leaves the

impression that Mugabe entirely dominates the space of judicial independence. This point will be discussed in Chapter Seven.

The key conclusion we can take from the empirical evidence is that it opens many new areas of inquiry about the geopolitical voice of NGOs. This evidence also lays the groundwork for a theoretical critique of the TAN framework and more generally the state transformation/democracy/human rights literature. Details about the political practices inside and outside the legal and justice system are extremely important. Such details are precisely what is being glossed over by the TAN framework. The empirical evidence underscores the very real struggle between the Head of State and the judiciary. More importantly, this evidence highlights a key and critical silence in the TAN framework itself: analysis of legal activists, the discourses they use and the political implications of this activism.

This chapter will conclude on the note that there is a need to critically examine the empirical evidence of legal activism found in NGO reports. For instance, by collecting information on the struggles of ideas about justice among members of the legal and justice system and the sovereign-state, opposition parties and the international community many NGOs tend to over simplify the power struggle. This point is not being acknowledged in the TAN analytical framework. This analysis also suggests why the TLAN approach was developed which has offered deeper understanding of the legal practices used within the legal community to take legal power away from the state. The TLAN analytical framework appears to have offered some insights into the politics, practices and patterns of local and transnational legal activists, international organisations of nation-states and international lending agencies driving the *institutionalisation of rule of law* with little interference from specific sovereign-states.

This chapter reveals that NGOs representation of the legal and justice system and the state is a form of legal activism. Many NGOs have positioned the legal and justice system against the state. NGOs representation of the High and Supreme Court Judges tends to be illusive filled with foundational myths of reawakening visions, hopes, fears, and a desire

to reawaken the masses. Practical politics are represented as the judiciary's willingness to include international human rights law into the standing laws of the Zimbabwean legal system and willingness to push against the political boundaries of the Mugabe Administration (ZHR-NGO-SR-09/01: 42-43, AI 25/06/02: 23-26). However, in contrast to the way that the judiciary are represented, this chapter has acknowledged that the state is represented as condoning brutality, allowing economic and social structures to be altered with state condoned violence. Quantitative and qualitative evidence collected by NGOs support this image (AI 25/06/02: 16, see also Kent 2001 and Mutua 2001). Moreover, in many NGO reports, the impression left with the reader is the difference between the Judiciary and Mugabe's interpretation of rule of law in the post-Gubbay era. NGOs provide evidence of how State condoned violence restructures a local society. They provide evidence of the political relationships in society – spatial processes and patterns of the militia, police and the judiciary – all have been affected and altered by Mugabe's interpretation of rule of law. Mugabe's rule of law view extended over the Zimbabwean landscape has created fear, terror, violence and psychopathic stress. In contrast, the Supreme and High Court Judges are represented as carefully weighing the evidence provided by NGOs, key witnesses and experts, interpreting the law and carefully evaluating how constitutional law, legislative law and quasi-emergency laws are woven into the political landscape of Zimbabwe. Through these reports, we can envision that some members of the Judiciary hold tightly to the long-term ephemeral objective – justice – and navigate through the daily practical politics. Whereas Mugabe calls upon subordinate legislation, amends regulations and confers his Presidential power on individuals *after* a Supreme Court judgment. Mugabe uses the legal power to exert his will over the justice system. These points and several others support this theoretical critique of the TAN analytical framework. Moreover, these details suggest that the TAN analytical framework produces and reproduces a number of assumptions about how international law is drawn into domestic law.

This chapter has presented three points, which all support the earlier reservations made about NGO reports being used in international relations, and using the TAN framework

to explain how a sovereign-state incorporates international human rights norms into the standing laws of the land.

First, the dynamics have become increasingly complex as several large human rights NGOs such as the Zimbabwe Human Rights NGO Forum (see Table 6.10) and Amani Trust and the National Constitutional Assembly (NCA) have become a powerful presence on the political landscape. All three of these NGOs are tremendously powerful for several reasons. To begin with, they provide empirical evidence of a changing legal culture to Euro-American donor countries that have withdrawn funds from the state meant for development initiatives and have redirected funds to human rights NGOs (Z-MDC-17/09/01-IRIN). In addition, through NGO reports we can trace some of the changes in Zimbabwean legal culture, which have occurred alongside the World Bank-Commonwealth conversations. The information these NGOs are collecting and presenting to donor countries and lending agencies tends to be framed in NIE rhetoric. Lastly, the more that these human rights NGOs focus on *problems* in the local political economy and discuss the current state of affairs under the themes mismanagement, corruption, governance and leadership issues (Table 6.9), and use anti-ESAP rhetoric and/or provide the statistics that suggest the country has been mismanaged, the more likely that NGOs are to construct the text upon which Zimbabwean present and future interactions with the international community will depend.

These details provide a theoretical critique of the TAN analytical framework, and those who take inspiration from the TAN analytical framework and focus on the symbol of violence used in many NGO reports. Unfortunately most NGOs focus on the victimisation of civil society rather than the small acts of resistance to the state. The focus is significant: institutions and the imagery advance fundamentally Eurocentric norms and practices, including the idea of political democracy as a “panacea” to the world’s problems (Mutua 2001: 205). The TAN analytical framework does not provide for an analysis of how information about violence tends to have the opposite effect than these human rights NGOs might wish. Rather, this information justifies the World Bank’s and

other donors' current position to withhold funding because Zimbabwe is a mismanaged economy (IRIN-Z 14/08/01- Moyo, SA - News 24 25/09/01).

Second, many NGO reports cloak the political changes shaping the local legal landscape. The political violence tends to be represented by NGOs as if the Mugabe Administration is perpetuating the violence. However, if we read the landscape another way, we can see evidence of a rising social movement (Z-MDC-17/09/01-IRIN, ICG 10/03/03: 3) in a wide array of places (Z-NCA - Kagoro 2001, Z-I 27/07/01).

Third, this study began on the note that it was offering a re-conceptualisation of how the state is forced to cede some sovereignty to activists within the national borders. The purposes of categorising diverse voices as nongovernmental organisations (NGOs) is to allow the reader to see the patterns of information moving from the South to the North and to evaluate how NGOs try to find a way to structurally support the civil rights movement by using strategies to help institutionalise local civil rights. We see positive outcome of this information: it allows NGOs to gain more power over the state and begin to change the global-local legal order. However, the negative outcome is that many NGOs are emulating a logic that suggests that stronger politico-legal structures will improve the quality of life for women, men and children, and that civil society is helpless. NGOs do not acknowledge that since 1999, the civil rights movement began to take on a form, shape and international presence supported by complex networks and alliances throughout the world. For instance, the National Constitutional Assembly. They began to educate the masses. Moreover, the *no* vote represents people's awareness that the constitution gives the Mugabe Administration the legal power to abuse his public office: this is evidence of a changing legal culture (Z-FG-24/02/00-PE, Z-FG 17/02/00-PE, Z-MDC-ICG-A 2000, Z-NCA-Kagoro 1999, Z-NCA - Kagoro 2001, Z-I 27/07/01, NCA Intro 2000).

In light of this empirical evidence, more theoretical critiques of the TAN framework are necessary and urgent. We will now turn to the next chapter, which will provide a summation of the Zimbabwe/Commonwealth/World Bank case study. Chapter Seven will

provide an analysis that seeks to understand how other Commonwealth countries can be affected by the Commonwealth/World Bank coalition and the rhetoric of good governance and corruption. The analysis will suggest that these reports – if read together – establish one point: NGOs are attacking the politico-legal structure by documenting the violence, transgressions on private property and collecting information to support the argument that the economy has been affected by the violence. Chapter Seven sweeps aside the fine-grained details and examines how NGO reports strengthen the position of international lending institutions' post conflict NIE/LDM. This analysis seeks to evaluate the political implications of this information and to better understand how NGO reports feed into NIE/LDM logic and also hold the power to damage Zimbabwe's future political economy. Chapter Seven will provide a re-reading of much of the evidence presented thus far.

Chapter Seven: Summation - The Politics and Practices of International Development in the New World Order

7.1 Introduction

March 9 2002, days before the 2002 Presidential election was held, Dato' Param Kumaraswamy (United Nations Special Rapporteur on the Independence of Judges and Lawyers) made a public statement. He expressed grave concern over the defiance of court orders by the Government and the attacks, harassment and intimidation of the judiciary by the executive and others. He stated:

...Zimbabwe is no longer a government of laws but of men who have no regard whatsoever for the independence of the judiciary and the majesty of the law... Defiance of court orders in effect is defiance of the rule of law. When it is the Government and its agents who defy then governmental lawlessness becomes the order of the day (AI 25/06/02: 26-27).

Cumaraswamy's authoritarian language: "... no longer a government of laws but of men who have no regard...[for the] majesty of the law..." strikes at the core of what legitimises a government. More importantly, we have evidence suggesting that the human rights advocates have shifted from making claims for individuals to crossing a nebulous boundary into the space that advocates for the abstraction – *the judicial independence/legal order* – with a certain amount of power and authority legitimised by the international community.

In a more recent report, Dato' Param Kumaraswamy reviewed the following case:

On 3 February 2003 the treason trial of MDC President Morgan Tsvangirai, MDC secretary-general Welshman Ncube and MDC parliamentarian and shadow agriculture minister Renson Gasela opened at the High Court in Harare. Police tried to prevent diplomats and journalists from attending, threatening U.S. Ambassador Joseph Sullivan with truncheons and forcefully shoving British and German diplomats. Journalists were beaten and two were arrested and released without charges 24 hours later. High Court Judge Paddington Garwe ultimately issued a court order to allow diplomats, journalists and the interested public to attend.

High Court Judge Benjamin Paradza was arrested on 17 February 2003 after rendering judgements against the government in a few high profile cases. The UN Special Rapporteur on the independence of judges and lawyers responded that the

cumulative impact of this and similar government actions “have left Zimbabwe’s rule of law in tatters” (ICG 10/03/03: 12-13)

From 1997 to 2003, according to the most powerful voice in the legal community, the Zimbabwean legal and justice system has become tattered. The past three chapters have suggested the process through which the legal and justice system became an object of friction as the Head of State and transnational legal activists and externally driven legal-institution-strengthening initiatives have struggled over who should dominate.

The literature review on the institutionalisation of the rule of law revealed that the emphasis of past research has focused on sovereign-state - international community interactions to the exclusion of how local communities respond to legal-institution-strengthening initiatives. Furthermore, most of the research has focused on NGOs and institutions rather than local communities (Trubek 2000). For instance, the state transformation/human rights/democracy literature examines how NGOs expand the territory, visibility, activism, and pedagogy of legal activists and strengthens the politics within the legal and justice system to make it even more distinct from the sovereign-state (Sikkink 1996). And the critical legal institution development literature asks why should we reform legal systems to create transparency, create clear policies and regulations, clarify governmental decision-making, reduce corruption and change weak financial accounting and auditing systems? How will citing *good governance* and the need for institution building, and creating new laws ensure economic efficiency and stabilise legal and financial institutions (Carothers 1998, Weaver 2000)? Thus, our present understanding of how the international community responds to a situation when the Head of State reacts to these legal-institution-strengthening initiatives, and strengthens legal institutions to legitimate laws that allow him to unfairly win the 2002 Presidential Election, and to legitimate a legal and justice system which passes laws that are not supported by the people is fragmented at best. Chapters Four, Five and Six have sought to fulfil some of the gaps in the literature that examines the institutionalisation of the rule of law. This chapter will establish how externally driven legal-institution-strengthening initiatives, transnational legal activists and the legal and justice system take legal power

from the state. However, the main purpose of this chapter is to establish some of the political implications of this activism.

This chapter ties together the analysis in the dissertation in a comprehensive manner and provides a synergy to the whole study. This chapter will also suggest that a way to ensure that the original purpose and objectives of the dissertation have been answered in the length of the dissertation is to pose them again here – slightly paraphrased - as the purpose and objectives of this chapter.

Because the Commonwealth - World Bank (1997-2002) conversations appear to set the political context of the Commonwealth Committee advocating human rights, development and rule of law (legal and economic reform), and then imposes economic and political sanctions upon Zimbabwe, this chapter will suggest that there is an urgent need to reconceptualise the threat of the NIE/LDM logic in a manner that acknowledges that NIE ideas are being diffused through local and transnational legal activists, international organisations of nation-states and international lending agencies which use legal discourse to attack the sovereign state, thereby creating more space for the NIE/LDM logic which seeks to reposition the legal and justice system against the state for the purpose of creating economic development (CS-04/03/02-PI, CS-04/06/99-PI, CS-28/04/99-PI, CS-09/06/99-PI, CS-19/03/02-PI).

This chapter has three objectives. The first is to identify how transnational legal activists take legal power away from the State. The significance of this line of inquiry is to understand how transnational legal activists have become increasingly important in global governance. The second is to examine the political structures of the legal and justice system. The intention is to understand what are the political implications of externally driven legal-institution-strengthening initiatives and transnational legal activists? The third objective is explore what the Zimbabwe case study can tell us about the unexpected consequences of the NIE/LDM legal institution strengthening development initiatives. Based on the Head of State's response to transnational legal activists (judges, lawyers, NGOs and the media) and the international community

advocating for legal and economic reform in Zimbabwe, this chapter will provide evidence that suggests that transnational legal activists advancing NIE/LDM logic have had a tremendous impact on the local legal and justice systems, and that the practices, tactics, strategies and the theoretical underpinnings of international development have changed in the postcold war period.

7.2 General Conclusions

Five reasons will be offered to justify shifting the focus of the dissertation from establishing *how* externally driven legal-institution-strengthening initiatives, transnational legal activists and the legal and justice system take legal power from the state to establishing *what* are the political implications of this activism. The purpose of offering these five reasons is to provide a summation of the main ideas offered in previous chapters. Some new literature will be added in this chapter to develop the argument and to highlight how previous chapters set the context for the analysis presented in this chapter. This section will conclude by presenting some very general conclusions of the dissertation at this point

7.2.1 The Post-Cold-War Legal Order

First, this study is set in the broader context of the recent changes in the post-cold-war legal order. This study has made an important attempt to relate the changes happening in the global legal community to changes in the Zimbabwean politico-legal-economic culture and legal and justice system. For instance, the past three chapters have illustrated the process of how legal power is taken from the Head of State. Yet, as suggested in Chapter Two, Three and Five, very little attention is paid to the political implications of these global-local connections.

7.2.2 World Wide Changes in Legal Cultures

Second, legal cultures around the world have been affected by trajectories of legal activists writing new or rewriting international economic laws and international human rights laws (Salbu 1999, Fenster 1999). Zimbabwe is just one in many nations affected by the World Bank/Transparency International anticorruption initiatives. Changes in the

international economic laws have affected many countries. For example, in 1999, 36 countries signed the Organization for Economic Cooperation and Development (OECD) anti-bribery convention (Wang and Rosenau 2001, Salbu 1999). African, Latin American, Eastern European, Asian and Middle Eastern countries have been affected by the post-1997 Asian financial crisis and the World Bank anti-corruption initiative (Tshuma 1999). Commonwealth countries have been affected by the World Bank/Commonwealth anticorruption and good governance policy documents (CS-9/6/1999-PI). During the 1990s, Zimbabwe – like many African, Latin American, Eastern European, Asian and Middle Eastern countries - was exposed to a paradigm shift occurring *within* the IMF/WB, as a response to empirical evidence that ESAPs were failing to deliver basic needs. Zimbabwe, like so many other countries, has been exposed to ideas propounded by multilateral development banks which have adopted New Institutional Economic (NIE) logic, and which now focus on strengthening legal infrastructure and re-writing laws to facilitate faster economic growth and institutional capability (Keefer and Knack 1997, WB-WD-2002, Chhibber 1998, Harrison 1999). Yet, as noted in Chapter Five, little is known about how externally driven legal-institution-strengthening anticorruption initiatives affect the informal economy and local legal culture. And even fewer ask the difficult question of what are the political implications of externally driven anticorruption initiatives?

The change in the international economic architecture is mirrored by the number of recent changes in humanitarian law. Since 1997, we have been observing the increase of legal discourses. 1997 signals the year the United Nations (UN) began to celebrate the 50th anniversary of the inclusion of the International Declaration of Human Rights in the United Nations' Charter. Falk (2000:53) notes that the post-1998 celebration has created a proliferation of human rights discourses, which have changed the “discourse of international relations”. Before, during and after 1998, journalists, nongovernmental organizations (NGOs), makers and managers of websites, political scientists, legal theorists, geographers and others have responded with a wide array of printed and cyberspace text (see Donnelly 1998, Felice 1998, Odinkalu 1998).

Political commentary about human rights issues has been rising. For instance, Mutua (2001), Kent (2001), Chandler (2001), Carter and Trimble (1999), Charlesworth and Chinkin (2000) and many others note that transnational legal activists all over the world produce information, detailing how the Head of State has mismanaged the economy, dominated the political structure and electoral processes, abused human rights and abused the power of office.

Sikkink and others suggest that these patterns of politics, violence and information flows can be seen all over the world. Moreover, Sikkink and others have offered a conceptual framework – the Transnational Advocacy Network framework ((TAN framework) Risse and Sikkink 1999) with which to understand how activists' organizations and institutions, which have successfully mobilized to protect the rights of citizens, affect local places and change legal space. All these points suggest that the state transformation/human rights/democracy legal-institution-strengthening initiative is gaining in popularity, which is translated into funding for NGOs.

The response of scholars, NGOs and researchers to the 50th anniversary of the IDHR in the UN Charter may be overwhelming. But very few who are engaged with human rights issues seem to be asking the deeper questions of what vision is driving this activism. Mutua (2001) is one of the few voices. Mutua (2001: 237) makes an important argument. He states: “institutionally, saviours [human rights advocates] constitute a broad range of actors and interests which are driven by a belief in the redemption of non-liberal, usually non-European, societies and cultures from human rights abominations.” Mutua (2001) begins to provoke some of the deeper questions about the human rights agenda perpetuating North/South patterns of oppression/domination through the “[human] rights industry” (Sarat and Scheingold 2001b: 11). While Chapter Six has examined how the legal and justice system, the Head of State, civil society, the international community, and international and regional organizations of nation-states respond to state transformation/human rights/democracy legal-institution-strengthening initiatives, this dissertation has yet to explore the political implications of this activism.

7.2.3 Zimbabwe as a Contemporary Case Study: One Postcolonial Country Among Many

Zimbabwe has been the focus of this study. Yet, Zimbabwe's experience with the externally driven legal-institution-strengthening initiatives could be seen anywhere in the world. Zimbabwe is similar to other Commonwealth countries, such as Australia, Bangladesh, Ghana, India, Jamaica, Kenya, Malaysia, Nigeria, Papua New Guinea, Samoa, South Africa, Sri Lanka and Canada, insofar that these ex-British colonies share the legacy of British colonization. Moreover, like Zimbabwe, many Commonwealth countries have two global initiatives running through their political landscape. The first evaluates how a government uses the law to protect the material rights of the market economy. The second evaluates how a government strengthens politico-legal structures, which help to institutionalise local civil rights. More specifically, Zimbabwe is just one of many Commonwealth countries that have a legacy of colonization which take a tremendous risk with the NIE theory driving development policies, particularly as colonial laws remain as a shadow woven into the state's administrative procedures and policies. These laws protect the state and they suppress civil rights movements.

Zimbabwe is similar to many other postcolonial countries that belong to the United Nations' community of 183 member states. Zimbabwe, like so many other postcolonial countries, has signed the Universal Declaration of Human Rights. According to international law, specifically Article 7 of the Universal Declaration of Human Rights (UDHR), the sovereign state has a legal obligation to protect the rule of law, and thus protect all human rights equally before the law (ZHR-NGO SR 09/01). Zimbabwe is like other post-colonial nations that have been empowered with the Declaration on Granting of Independence to Colonial Countries and Peoples (1960). With such a law, colonial empires should have been disintegrating. Moreover, after World War Two, the 51 original members of the United Nations welcomed post-colonial countries. The rise of post-colonial nations has meant that post-colonial nations dominate the UN (Carter and Trimble 1999, *The Economist* Dec. 1998). As the new states of Asia and Africa gained political independence many pressed their claims within the United Nations system. Yet, the more critical human rights literature argues that this legacy produces and reproduces

North-South inequalities. Moreover, when Zimbabwe and other postcolonial nations use UDHR, they serve Euro-American interests rather than the real postcolonial agenda (Mutua 2001).

Nonetheless, Zimbabwe is different because Zimbabwe appears to have been excluded from the Commonwealth Committee to highlight the importance of the World Bank economic rule of law discourses. Moreover, Zimbabwe's exclusion from the Commonwealth highlights the importance of a symbol, wherein the Commonwealth decided "...to stand up for fundamental principles" (ICG 22/03/02:13). Zimbabwe provides us with a case study of how the economic rule of law discourse is marketed between the G-8 and NEPAD, between African countries and the Commonwealth. The actions of Mbeki and Obasanjo suggest that the language of *good governance*, *democracy* and *anticorruption* constructs the model of NEPAD's good governance agenda which in turn has become the discourse used by African leaders trying to please the G-8. Unfortunately, the ones who pay for this rhetoric may be many Zimbabweans who have lost basic freedoms such as "free speech and regular political activities" and the power to directly challenge the militia's shadowy presence (AI 25/06/02: 16, N- 20/03/02-NEOM:6). In short, Zimbabwe is different because when the Commonwealth used the NIE logic to judge the rule of law/good governance in Zimbabwe, they focused on procedures and institutions to uphold the law, rather than the more nebulous issue of what is social justice in a society.

Moreover, Zimbabwe is different because Zimbabwe was suspended from the Commonwealth on March 19 2002 for one year. Zimbabwe appears to have become the "precedent" for the good governance model, an example for the Commonwealth/World Bank attempt to create mainstream values. Yet mainstream values such as – good governance/bad corruption - in ex-British colonies holds a strangely ironic twist, particularly when read against the work of legal historian Claire Palley (1966), a specialist in Commonwealth constitutional law, and Okafor (2000) a specialist in International Law (CS- 4/6/99-P, CS- 4/6/99-PI, CS-9/6/1999-PI). As noted in Chapter Four, International law made Commonwealth countries such as Zimbabwe. Colonists

were encouraged to create their own laws that deepened the reach of the law in people's lives so that colonised peoples could be governed. Britain condoned Lugard's strategy of indirect rule and administrative decisions that allowed settlers/colonists to extend British/Imperial power throughout the colonies (Mamdani 1996). While the World Bank might champion legal development for Commonwealth countries, and the Commonwealth provides the sort of politics that legitimate this development initiative, this is a dangerous path to take unless the World Bank broadens its interpretation of rule of law. As mentioned in Chapter Two, the critical legal development literature expresses reservations and concerns with this development initiative and the logic that desires to technically change local social norms.

Zimbabwe is also different from many other postcolonial and/or Commonwealth countries because it has a unique legal, colonial, cultural and social history. The Unilateral Declaration of Independence (UDI (1965-1979)) made the legal, economic and cultural identity of Zimbabwe especially unique. During this 14-year period of international ostracism, unique communities were created. When the borders finally were opened to trade, aid and international ideas in 1979, African and White communities had to open their ideas to new ways of thinking. Godwin and Hancock (1997) offer a recent and comprehensive examination of the period of UDI from a White Rhodesian perspective. This work carries to the extreme the view that Rhodesia created a sense of Rhodesian patriotism through a "...need to manufacture Rhodesian-ness" (Godwin and Hancock 1997: 17). The chapters: *We are All Rhodesians* (p. 15-50) and *Let this be a Rhodesian Solution* (p. 212-243) capture how the Rhodesian identity were constructed during the time that Rhodesia was isolated internationally. The authors argue that after 1965 - the year UDI was declared - Whites shared the experience of living in a rebel colony:

Legally, Rhodesia was a rebel colony, and the imposition of economic and various political and social sanctions from 1966 had consigned it to a pariah status. Admittedly, the British and foreign governments maintained offices in Salisbury, loopholes in sanctions policy were officially approved on humanitarian or educational grounds, and the lines remained open for outside contact through Portuguese Mozambique and South Africa (p.17).

Godwin and Hancock (1997:17) offer the view that Rhodesia's participation in international affairs was based on "...ostracism, isolation and political uncertainty" while illicit financial activity and trade occurred. The key point is that UDI was a defining moment for Rhodesia to develop its legal culture, which has extended in space and time into Zimbabwe. Ian Smith had control over the airwaves and newspapers (see Fredriske 1980). Mugabe has also retained control over information. Information transmitted through the Internet, newspaper and radio is under censorship. No private radio stations are allowed to go on the air until the Government drafts the necessary regulatory framework governing the entry and participation of private broadcasters. The Mugabe Administration controls all domestic television broadcasting stations, and passed legislation that permits the government to monitor all international e-mail messages entering and leaving the country. It is unknown to what extent the security services have used this authority to intercept e-mail communication. Moreover, the power of the legislation is also manifested in justifying systematic abuses of individual freedoms. The legislation, as Chapters Four, Five and Six have illustrated, is being used to eliminate any vague form of dissidence. It affects the movement of people and products. It is almost impossible to conduct legal collective job action. If people try to participate in non-violent demonstrations; these are often suppressed by violence. Police continued to require that groups obtain permits for marches or demonstrations (USA-HRR-Z 1999/2000, 2000/2001, Z-MDC-Eppel 2000, ICG 22/03/02:11, LCHR 19/12/01-POSB, LCHR 19/12/01-POSB-HR, Carter and Trimble 1999: 93).

Again, in the context of the literature that details the unique legal constraints created during UDI, and the NGO reports that use the Commonwealth/World Bank coalition anticorruption/good governance language to justify why Zimbabwe was suspended from the Commonwealth Committee, we begin to see a complex formula that allows the Mugabe Administration to continue to technically alter the entire legal and justice system. For example, in November 2002, the Mugabe Administration mobilised a longstanding law to exclude some NGOs such as Amani Trust (AI-Z-16/11/02). This international isolation allows the Mugabe Administration to technically alter the entire legal and justice system to make the most powerless even more vulnerable because their

access to the legal and justice system is no longer protected by the daily diplomatic economic negotiations that hold the promise of social justice to many Zimbabweans.

The argument being put forward is that the legal history of Zimbabwe, while unique, is not that different from other developing Commonwealth countries. The politico-legal justice system of many Commonwealth countries assumed that Eurocentric, Enlightenment era values were *normal*. The Declaration on Granting of Independence to Colonial Countries and Peoples (1960) passed by the United Nations is quite recent. Taking the points made by Odinkalu (1998) and applying them to the Zimbabwean case study, suggests that in all likelihood, individuals like Robert Mugabe remember a time and the legal space when he was excluded from joining the 51 original members of the United Nations (Carter and Trimble 1999). He, like other African liberation leaders had to fight to defend their right to vote, become educated and to have their voices heard by the justice system (see Palley 1966). While individuals such as Robert Mugabe might seem to be pushing at the boundaries of what is *normal* behaviour for a nation-state leader, the legal culture he grew up in was not *normal* (see Chapter Four). He might forge alliances with leaders of South Africa, Angola, Mozambique, who have also led liberation movements (ICG 22/03/02:7) and who have shared similar struggles. These alliances create an important element of legitimisation within the African region. Furthermore, because of Rhodesia's legacy of being a rogue state, excluded from the Commonwealth; and, because their identity is bound up in challenging authority around them, countries such as Zimbabwe become examples of what is not *normal* democracy.

The distinct characteristics of Zimbabwe's interaction with the global community and human rights activists make Zimbabwe an important case study with which to evaluate the political implications of this activism. At present, Zimbabwe is a contemporary case study of a sovereign-state responding to transnational legal activists (judges, lawyers, NGOs and the media) and the international community advocating for legal and economic reform in Zimbabwe. Yet, this study argues that Zimbabwe is similar to many other countries. International and domestic laws have always served to exclude rather than include the voice of the people. The Berlin Act (1885) granted Britain the legal right

to govern territories on the African Continent. Yet, inside these British Territories, the settlers' moral framework of law, which was used to differentiate race, is a unique method that "alienated" the voices of Zimbabwean women, men and children up to the present (Mittlebeeler 1976: 207-208). These strategies of controlling African's political participation suggests that Zimbabwe has unique characteristics which make Zimbabwe an interesting case study through which to explore the political implications of transnational legal activists' activism (Palley 1966, Okafor 2000: 522).

7.2.4 Transnational Advocacy Network Framework

A fourth reason to shift the focus of the dissertation to examine the political implications of transnational legal activists and externally driven legal-institution-strengthening initiatives is to suggest that the Transnational Advocacy Network framework ((TAN framework) almost too readily offers an explanation for the chaos, violence, torture and trauma of the Zimbabwean case study. The TAN framework does provide a superficial analysis of how externally driven legal-institution-strengthening initiatives, transnational legal activists and the legal and justice system take legal power from the state. This analytical framework emphasizes the legal power waiting to be released through an individual's voice. Moreover, the TAN framework traces how political power flows from the citizen through to the international community to bring political pressure on the sovereign state. While partially agreeing with this approach, Chapter Two presented the argument that the TAN framework has tried to produce a general model. Chapter Two also provides conceptual and methodological concerns raised within the TAN framework, which will not be repeated here. Chapter Two also suggested that combining the literature review approach and the TAN framework approach and Transnational Legal Activists Network (TLAN) approach will provide a more sensitive analysis of the role of legal institutions, legal activists and legal discourse intersecting, entwining and shifting global-legal relationships.

Given these concerns, if this study remained focused on interpreting the evidence presented in Chapters Four, Five and Six through the TAN framework, this study would miss the subtle interactions between the political structures of the legal order. This study

seeks to understand what will be the political implications of NGOs using social justice rule of law discourses such as *civil rights, human rights, food rights, social movements, empowerment, and popular participation*? What laws will be strengthened in response to this rhetoric? And why is there the tendency for this language to be inverted into an economic rule of law discourse which uses the language of *good governance, institutions, efficiency, law and order, foreign policy, development programs*, etc? In short, this study would like to understand the political implications of these global-local NGOs, judges, lawyers, and civil rights activists and trace some of the complex interactions to some sort of conclusion. While Chapter Six argues that NGOs collect the sort of information that solidifies their position in global governance, this study would also like to offer a sense of what happens at the grassroots level while these information politics are ongoing. How is civil society made even more vulnerable after international agreements such as the Abuja Agreement are made and the Head of State further resists the intrusion of the international community, challenge the human rights advocates and dominates the space of the judiciary to define the justice begin drawn into the legal system.

7.2.5 The Transnational Legal Activists Network Approach

A fifth reason to understand – *what* are the political implications of this activism, is because this study has used a different approach to collect, analyse and present the empirical evidence than other studies. The analysis presented in Chapters Four, Five and Six differs from the TAN framework in conceptual, methodological and empirical ways.

Conceptually, this study has used a combination of the literature review approach and the Transnational Advocacy Network (TAN) Framework and poststructuralist/postcolonial analysis to develop the Transnational Legal Activists Network (TLAN) approach to examine how the state transformation/human rights/democracy legal-institution-strengthening initiative and NIE/LDM legal-institution-strengthening initiatives, transnational legal activists and the legal and justice system agitate to legal power from the state. This approach has allowed this study to investigate how transnational/local legal activists seek to change the day-to-day minutiae of legal ideas - changing legal

texts, words, phrases, and the occasional clause of legal text. This is the process by which rule of law views are made into legal power.

The critical difference of this approach to other approaches is that this is a geographic approach. The geographic approach has been offered in many different ways. Three will be offered here. First, *space* - in this study - is defined by the points of intersection among the legal and justice system, the sovereign-state, transnational legal activists and externally driven legal-institution-strengthening initiatives. Transnational/local legal activists understand these points of intersection, and use these to take legal power away from the state. This study suggests that the space of judicial independence with its complex spatial relationships reveals much more complex political processes in the international communities legal-institution-strengthening initiatives. Thus, this study defines space somewhat differently from the other geographers (see Dalby 1990, Paasi 1991, Agnew 1994 and others). Moreover, this study suggests that the focus remain on the space of judicial independence, and the connection between judges and nongovernmental organisations to investigate the critical power relationship between the sovereign-state and the legal and justice system. This space, as noted by the state transformation/human rights/democracy approach, is the place in which new laws are debated. Rule of law views are offered by civil society, the sovereign-state, externally driven legal-institution-strengthening initiatives, and the local legal community. Rule of law views matter in this space, and rule of law views create political tensions and alliances in and through the space of judicial independence. These tensions are universal irrespective of the part of the world under investigation.

Second, this study has offered geographic interpretation of legal architecture. For instance, this study began by establishing the political structure of the legal and justice system and the state by deconstructing the international communities' desire to institutionalise the rule of law. The point of this exercise was to illustrate, with empirical and historical evidence, the trajectories of legal power separating the state from the legal and justice system. These trajectories illustrate the location of the real struggle between the state and the legal and justice system. The different literatures - the international law,

the state transformation/human rights/democracy and the critical legal institution development literature - identify different social movements, which interpret constitutional law, international law, economic law, etc, from different perspectives. However, this study argues that they share a commonality: they often coalesce in a common desire to strengthen local legal and justice systems to take more legal power from the state. In short, this study establishes an image of the state, legal and justice system and the legal order as overlapping and intersecting socio-political cultural spaces, which share the common space of legal space, as the legal and justice system is aligned, but do not directly intersect with either the international community or the state. To make the complexity of the political structure of the legal and justice system evident to the reader, this study has used several terms such as *externally driven legal-institution-strengthening initiatives*, the *space of judicial independence*, and the *space of judicial independence/legal order* and *trajectories of legal activism*, the *legal order*, *externally driven legal-institution-strengthening* and *transnational/local legal activists*. These terms are important because they establish that there are many layers, nuances, overlapping communities, spatial relations and complex identity politics and processes constructing the legal architecture.

Third, this is the first geographic study to have suggested that there are six socio-spatial cultural patterns renewing the political space of judicial independence. For example, because this study argues that the focus must remain on the space of judicial independence to understand the changing power relations between the state and the legal and justice system, this study also reviews some of the literature that offers a sense of the changing spatial relationships in the space of judicial independence. This study has identified six spatial patterns renewing the cultural politics within the legal system. 1) A judge's political space, her jurisdiction granted to her by the state is her space through which she tries to shape the future legal culture. 2) The space where a local judge draws upon international covenants. 3) The "extrastatal" institutional space created in 1986 when the United Nations (UN) offered public support to the notion of judicial independence (Bibler Coutin 2001: 135, Tolley 1994). 4) The patterns created through the support of popular culture, the media and human rights NGOs. 5) The socio-spatial

patterns constructed by international lending institutions, which advocate for more separation between the judiciary and the state. 6) The institutionalisation of rule of law - triangulated, complex relationships shared between the state, civil society and the judiciary based on civil society's perception that the judiciary is separate from political and economic forces in society (Russell 2001a, Z-K 19/04/02-PLS). The significance of providing a complex conceptualisation of space and spatial relationships in and through the space of judicial independence in which externally driven legal-institution-strengthening initiatives, transnational legal activists and the political space of the legal and justice system connect, and disconnect, is to suggest intricate political relationships of the state and the legal and justice system at different geographic scales.

Based on this conceptualisation of legal space, dramatised by Paasi's (1986, 1991, 1996) treatise on *institutionalism*, this study sought to understand how the ideas shared within different legal communities (i.e. civil society, judges, NGOs, the state and the international community) affect specific locations such as Zimbabwe.

Methodologically, this study has used poststructuralist/postdevelopment/postcolonial analytical tools - deconstruction/discourse analysis. This study gave three reasons why it used poststructuralist, rather than Marxist, analysis to understand how rule of law views are made into legal power. One, rigorous poststructuralist critiques take apart the social constructs of law and legal systems. This method seeks to understand how law, as a discourse, alters and influences intricate power relations (Kennedy 1987). Two, post-structuralism allows scholars to deconstruct the legal system and modern law through a critical commentary, and to examine legal texts for silences and omissions (, Priban 1997, Sarat and Kearns 1992, 1996). Three, the post-structuralists' analysis articulates an important analytical point - the power of rule of law originates *within* society, not within the courts. Societies participate in asking who will govern them by asking the question of *whether or not his/her rule of law views is respected by the legal and justice system* (Allen 2001); and whether or not lawyers can bring broader rule of law views to the court and have them heard. The critical point is that the poststructuralist analysis provides a

way of thinking about the rule of law as a nuanced power relationship among the individual, the legal and justice system and the state.

The conceptual and methodological differences surface in the empirical evidence this study presents. This study examined NGO reports for their content. The primary evidence is significant because it provides evidence of a changing political, cultural, economic and legal landscape. These are historically important *facts* constructed in the context of intense economic, political, social and cultural transition. More importantly, this study has been interested in the secondary use of this information.

This study has examined how the contents of NGO reports can put pressure on a sovereign-state. Since international lending institutions adopted the NIE logic, there has been a global shift in thinking about institutions and organisations and how these can assist in the development project (see Cameron 2000, Potter et al 1999). NGOs have become an important conduit of information. NGO reports were analysed as evidence of their presence in a location. In this study, specific NGOs are not the specific object of analysis. Rather, the focus is upon the ideas and information that flow through them. In other words, this study is evaluating their presence in Zimbabwe, which is allowing a conduit of information to flow from the South to the North. The primary information that has been evaluated is based on the question - what makes the international community respond to the Head of State's abuses of power?

This study has focused on several themes found in NGO reports: the politico-legal superstructure of the state, the political practices and patterns of lawmaking, violence, torture, the anticorruption movements, economic crisis, international law, domestic law, quasi-emergency laws, challenges between the Supreme Court and the Head of State and struggles of ideas about justice among members of the legal and justice system and the sovereign-state and others. The purpose of reviewing the breadth of topics was to understand from a contemporary case study – what makes the international community respond to NGOs information? This study has discovered that it is not the number of people who die, the number of people who are tortured, or threatened, or the number of

times women, men and children attempt to peacefully demonstrate. Rather, the international community seems to be shaken by the judgement of the United Nations Special Rapporteur on the Independence of Judges and Lawyers(see UN- COHR 11/02/02 for full discussion connecting Special Rapporteur with governments, NGOs, the judiciary, human rights activists, etc).

This study has traced how specific texts are constructed during a political and economic crisis, and how these are used by the international community to put pressure on a sovereign-state. This study suggests that the critical texts that the international community focuses on are: the political practices and patterns of lawmaking; the anecdotes of judges (and lawyers) being threatened by the state; and a judge who offers a comment about an international law that the state has ratified but has not made accessible to local judges. The international legal community interprets these stories as if they are complex struggles between the state and the legal and justice system. These are the stories that initiate a response from the international community.

Because the analytical framework has offered a different interpretation of how externally driven legal-institution-strengthening initiatives, transnational legal activist and the legal and justice system take legal power from the state, this study is interested in seeing how this analytical framework can offer a new interpretation of what are the political implications of this activism.

7.2.6 Summation: Global Processes – Local Responses

This section has highlighted and summarised the conceptual, methodological and empirical points presented in previous chapters. This section suggests that the postcold war legal order politics and processes affect nations around the world, yet local responses are connected to the unique characteristics of a country's legal history and legal culture.

This section will conclude by presenting some very general conclusions of the dissertation at this point. One, this research initiates a fascinating area of investigation. This study developed the Transnational Legal Activists Network (TLAN) approach. It

incorporated sensitive methodological tools such as textual analysis – to evaluate the political implications of the transnational legal activists advocating for economic and political reform, and to better understand changing local values in and among legal communities, nation states protecting sovereign-state interests and global legal activism. This approach has investigated how transnational legal activists work toward changing the day-to-day minutiae of legal ideas - changing legal texts, words, phrases, and the occasional clause of legal text. This is the process by which rule of law views are made into legal power. This study establishes that there is a wealth of new empirical evidence being generated by NGOs. This study also suggests that there is an urgent need to examine the political implications of this activism, particularly as this study suggests that these ideas can restructure societies around the world. This assertion has been grounded in a case study. It has investigated how legal-institution-strengthening initiatives, transnational legal activists and the legal and justice system take legal power from the state.

The second general conclusion is that transnational legal activists take legal power away from the State by documenting the political practices and patterns of lawmaking and struggles of ideas about justice among members of the legal and justice system and the sovereign-state and others. The processes through which local and transnational legal activists, international organisations of nation-states and international lending agencies attack state sovereignty seems to be relatively the same across the globe. Third transnational legal activists appear to be becoming increasingly important in global governance, as suggested by Chapter Six. Because they can rely on being harboured by global and local legal architecture, and they know that the characteristics of the legal and justice system that make it distinct from the sovereign-state, transnational legal activists can collaborate with externally driven legal-institution-strengthening initiatives in a unique political space. However, most transnational legal activists do not seem to consider how collaborating with externally driven legal-institution-strengthening initiatives might make the powerless even more vulnerable to the state.

The next section will explore what the Zimbabwe case study can tell us about the unexpected consequences of legal-institution-strengthening initiatives can have upon legal and justice systems. Based on the Head of State's response to transnational legal activists (judges, lawyers, NGOs and the media) and the international community advocating for legal and economic reform in Zimbabwe, the next section will provide evidence that suggests that transnational legal activists advancing NIE/LDM logic have had a tremendous impact on local legal and justice systems, and that the practices, tactics, strategies and the theoretical underpinnings of international development have changed in the postcold war period.

7.3 A Global Shift in Thinking About Development

This study confirms the concern of the critical legal institution development literature. In addition this study also suggests that the threat of the New Institutional Economics /Law and Development Movement (NIE/LDM) legal-institution-strengthening initiative is much deeper and more pervasive than the critical legal institution development literature acknowledges.

The current critical legal institution development literature refers to the scholarly debate that declared that the 1960s' Law and Development Movement (LDM) was a failure. Much of the literature will compare and contrast the 1960s development initiatives, declared a failure, and the 1990s rejuvenation of the LDM. Much of the literature cites the Seidman (1978) and Burg (1977) responses to Trubek and Galanter (1974) (see Appendix 1.1). Some of the current literature argues that the current LDM is different. For instance, Rose (1998) suggests that the work of feminist legal theory, critical race studies and legal and economic theory are bringing more cultural sensitivity and awareness to the conflicting agendas within the law and development movement. Although the World Bank website acknowledges that the 1960s law and development was flawed methodologically and conceptually (also see Hendley 1997), James Wolfensohn's (the World Bank keynote speech at the *Second Global Conference on Law and Justice in Russia* (July 9 2001) continues to propound the need to strengthen legal and justice systems around the globe (Z-Insider 31/07/01-O).

This literature and these current events establish three points that are directly relevant to understanding the political implications of transnational legal activists' activism and the effect they have had upon the Zimbabwean legal and justice system which has exacerbated Zimbabwe's political and economic crisis. The lessons we can take from this example are applicable to other nations around the world. The first point is that the scholarly community is engaged with understanding the key lessons learnt in the 1970s. Scholars are seeking a way to embrace the unique historical legal culture and context when trying to apply western models of democracy and law to developing countries (Appendix 1.1). Second, even the World Bank acknowledges that this development initiative holds the potential to exacerbate the political, economic and social disparities in a society. Third, the theoretical debate and development practices are ongoing. Yet, a critical silence is found in this literature and policy documents. This literature is not discussing changes to legal space, or the importance of spatial relationships in and among the state, civil society, the legal and justice system, global bars, and international lending agencies, or the socio-spatial effects this development initiative has had upon specific locations.

All three of these points are directly applicable to this investigation, which has examined some of the political implications of transnational legal activists advocating for economic and legal reform. The next three sections will review the activism of the World Bank, the Judiciary and NGOs from 1997 to 2002. Each section will illustrate changing interactions between the Head of State and different social movements. The purpose of this analysis is to suggest that symbolically, the Head of State responds to different coalitions of externally driven legal-institution-strengthening initiatives and local legal activists, seeking to write new laws that incrementally encroach on sovereign-state power. Lessons will be drawn from each example, which are meant to highlight the lessons this study has offered to the current debate.

To set the backdrop, several themes from previous chapters will be re-introduced. The themes are the postcolonial legal personality of Mugabe and the leadership style of Mugabe.

7.3.1. The Zimbabwean Head of State

Chapter Four presented information that suggested that Mugabe has a complex postcolonial legal personality. Mugabe obtained a B.Sc., an LLB, BA (Admin) and B.Ed. through correspondence. As leader for the National Democratic Party (NDP), Mugabe mobilized and led a nationwide movement protesting the passage of the 1961 constitution (Sayce 1987). As a legal activist seeking to re-write the constitution, as a law student, and a guerrilla fighter, Mugabe is distinguishable from many other Zimbabweans. As Head of State he has the ability to mimic Western vision of western legal ideals, follow good governance agendas and develop a pro-democracy position (Sayce 1987, Z-NCA Sithole 2000, SA- SA 25/07/01, AI 25/06/02: 23-26, N- 20/03/02- NEOM). All of these elements make Mugabe an interesting Head of State to evaluate as he responds to externally driven legal-institution-strengthening initiatives. Mugabe offers a unique and legally savvy response, as suggested in Chapter Six. His desire to preserve state sovereignty appears to originate from his postcolonial legal identity (Odinkalu 1998, 2001). Moreover, all these elements suggest that Mugabe as Head of State complicates a simplistic analysis of the political implications of transnational/local legal activism.

The second theme is Mugabe's style of leadership. Chapter Five and Chapter Six offered details of how Mugabe has used the Law and Order Maintenance Act (1960), which became the Public Order and Security Act (2002) to legally silence, suppress and deny individuals their political voice (ICG 13/07/01:12, ZHR-NGO-SR-01/01, LCHR 19/12/01-POSB-HR). Mugabe has also used these instruments against two formal political opponents. In 1997, Mugabe used LOMA against Reverend Ndabaningi Sithole, an opposition M.P. and long-time rival of President Mugabe. Mugabe first charged MDC President Morgan Tsvangirai under LOMA, and once it was re-written, Mugabe charged Tsvangirai under POSA. In March 2003, Tsvangirai was still in trial. He faces the death penalty if convicted (USA-Z-HRR 1997/1998, Sayce 1987, ICG 10/03/03: 12-13,

Hatchard 1993: 163, Dubow 1989, Mamdani 1996, Palley 1966: 320 ff, 321, Mathews 1986: 139-178).

Mugabe has used violence since 1983 to suppress and silence opposition. His political party is associated with the “psychological threat of physical violence” (SA-HSF-Focus 18, 06/00). For instance, the phrase *Gukurahundi* reminds women and men of how the sovereign state violated civilian rights in Matabeleland and parts of the Midlands and rural Matabeleland (SA-HSF-Focus 18, 06/00, ZHR-NGO 1999b, Z-Today-CCJP 1997). As noted in Chapter Six, Mugabe has used the legal power of the sovereign state to suppress women and men’s political voice with violence, the law and *defacto* impunity. The Mugabe Administration chose to retain the settler-era legislation and to retain a state of emergency, allowing Mugabe to make extra-judicial decisions. While NGOs, such as *Amani Trust*, *Amnesty International*, *Lawyers Committee For Human Rights*, and the *International Crisis Group* and many others are breaking the silence about the relationship among the judiciary and parliament and Mugabe, for many years the silence, violence and laws have empowered Mugabe while the most vulnerable in society have remained disenfranchised, and even their public protests made illegal (D-PHR 21/05/02-PPE, D-PHR 24/01/02, Z-AT-20/05/02-PE 2002, LCHR 19/12/01-POSB-HR, ICG 26/02/02).

The third theme is Mugabe’s historical relationship with the World Bank. In 1991, the World Bank used the language of *good governance*, and offered loans to the Mugabe Administration (1991-1999). At the same time, the World Bank did not acknowledge the changes in the Zimbabwean national politico-legal structure: the violence of Matabeleland; the Mugabe Administrations’ use of quasi-emergency security laws such as the Official Secrets Act and the Law and Order Maintenance Act (LOMA) - two laws dating from the British colonial era (1890-1979); the use of security laws to control state institutions; and the ZANU (PF) domination of both parliamentary and presidential elections since 1980 through the threat of violence.

This thematic review of Mugabe's postcolonial legal personality and leadership style sets the backdrop with which to understand how Mugabe as Head of State responded to the NIE/LDM legal-institution-strengthening initiative. These global-local patterns that surface from the Zimbabwe-World Bank relations suggest the sorts of patterns we can expect to see when a Head of State is given the choice, as well as the power, to interpret the role that the legal and justice system could and should play in constructing economic development.

7.3.1.1 The Zimbabwean Head of State and Lending Institutions

Robert Mugabe's interaction with the World Bank from 1980 to 2002 suggests a process of economic and legal reforms. This section will highlight some of the contradictions of the World Bank funding Zimbabwe in the 1990s by focusing on Mugabe's interactions with the World Bank in 2001. The empirical evidence presented in this section challenges much of the critical legal institution development literature, which suggests that the threat of the NIE/LDM logic is location specific, and illustrates that the Zimbabwe case study can offer empirical as well as theoretical lessons.

The World Bank approached Zimbabwe in the 1980s. Major structural changes were ongoing within the World Bank in the 1980s. The review of how North's (1990) New Institutional Economics theory threatened to discredit the World Bank traditional neoliberal ideology presented in Chapter One and Appendix 1.1 will not be repeated here. Nor will the history of the World Bank with Zimbabwe, presented in Chapter Four be repeated. Yet, the World Bank's *good governance* agenda - born in the late 1980s - materialised in the 1992 World Development Report entitled *From Crisis to Sustainable Growth* and has had a definite impact on postcolonial Zimbabwe (Tshuma 1999). The key point is that the World Bank adopted the *good governance* agenda very close to the time that it began to loan funds to Zimbabwe in 1991 (see Chapter Four and Appendix 1.1 for full discussion). The irony of the World Bank lending funds to Zimbabwe is highlighted because the Mugabe Administration had initiated major structural changes to the national politico-legal system in 1987. Major material changes on the ground, created as a result of these changes, were hidden (Hatchard 1993, USA-Z-HRR 2000/2001): the

national politico-legal system hid the Matabeleland violence (Z- MDC-Eppel 2000). World Bank funds were injected into this landscape by the early 1990s, exacerbating the political-legal and economic disparities.

The paradigm shift within the World Bank, the World Bank's good governance agenda and the World Bank's loans to a government with a history of state condoned violence are all significant elements of the shared history connecting the World Bank to the Mugabe Administration. The critical point is that the NIE/LDM logic had constructed the policy documents Zimbabwe signed with the World Bank during the 1990s. Abrahamsen (2000) argues that the World Bank good governance agenda is part and parcel of the development intervention strategy of the World Bank in sub-Saharan African countries. Indeed, the language of *good governance* is the entry point for lending agencies to propose a series of political and economic reforms and promote the project of democracy and economic progress. Moreover, the vision that the World Bank advances is a hopeful vision of promise, it is a *modernity* myth: instill the high ideals and principles of rule of law and human rights, and reap the economic benefits. Yet the World Bank's moral principles – naïve and ethnocentric – remain on paper. In practice, the World Bank financially supported the Mugabe Administration, which had condoned many forms of covert and overt violence. More specifically, there are three contradictions to the World Bank funding Zimbabwe under its *good governance* agenda.

First, as suggested by the details offered in Chapter Four and Six, postcolonial Zimbabwean is not a democracy (Z- MDC-Eppel 2000). By this it is meant that the state is not “bound by law” (Linz in Dodson and Jackson 2001: 252). As Mamdani (1996: 32) states so well, the leadership change from Ian Smith to Robert Mugabe meant: “deracialization without democratisation”. Mugabe, although a democratically elected leader, could directly and indirectly control the members of the ruling Party, ZANU (PF) and the judiciary through the Presidential Powers (Temporary Measures) Act 1986 (see Table 4.3). This consolidation of power in the Head of State has strongly altered the legal history of lawmaking in Zimbabwe and shaped the politico-legal structure (LCHR 19/12/01-POSB, also see ICG 22/03/02:11, LCHR 19/12/01-POSB-HR).

Second, the post-Independence government has not empowered and not institutionalised the use of International Declaration of Human Rights within the Zimbabwean justice system (see Chapter Four and Six). Although there is some evidence that the judiciary did try to include the IDHR in judicial rulings, they were very aware that when the legal system sought to assert its power over the state, the legal systems and rudimentary legal institutions such as legal aid programs, investigators, public defendants, bar associations, law schools and judges came under political attack (Z-MDC - CO 2000, SA-TST 08/07/2001-Gubbay).

Third, both of these points suggest that the legal culture has never had a chance to develop a civil rights culture. Moreover, during conversations between the World Bank and local government officials, the World Bank stressed the importance of human rights and rule of law in 1991. Such conversations suggest that the World Bank seemed to be aware of historical human rights violations, while allowing the funds to flow to the Mugabe Administration, regardless of contemporary human rights violations (EIU 1991 No. 3:10).

This discussion has highlighted the historical and contradictory situation of the World Bank advocating for good governance while financially supporting Zimbabwe, Mugabe's leadership style, and the postcolonial legal personality of Mugabe wherein Mugabe has used the law as a technical tool to suppress political opposition since the 1980s. These three points establish the backdrop for the analysis of several events that happened in July 2001. This analysis will take apart the assumption that the application of NIE/LDM logic is location specific. This analysis will demonstrate that this development initiative is making changes to legal spaces, radicalising legal and justice systems around the world and that the NIE/LDM logic is having a significant socio-spatial impact even in places that international lending agencies have imposed "undeclared sanctions " upon (Z-MDC 17/09/01- IRIN). Moreover, this example offers a deeper lesson about the impact of NIE/LDM than has been yet established in the critical legal institution development literature.

7.4 Head of State, Lending Institutions and Cyberspace

This analysis begins with an examination of the political implications of Wolfensohn posting his keynote speech entitled - *Rule of Law is Central to Fighting Poverty* - at the *Second Global Conference on Law and Justice in Russia* (July 9 2001) on the Internet. This section argues that the NIE/LDM logic embodied in this text has politicised legal and justice systems around the globe. The text of this speech is available through the Internet. This is an excellent example of international lending agencies using websites to advance NIE/LDM logic, and diffuse these ideas over time and space, often with negative repercussions to the most vulnerable in local societies (see Appendix 1.1 and Chapter Two, Section 2.2.2 *The Capitalist Trajectory of Legal Activism*).

The main points to Wolfensohn's speech are as follows:

First, it is clear that the world does not offer justice for all...

Second, strengthening the rule of law and the functioning of legal and judicial systems is not merely a technical challenge, but it is also a deeply political one....

Third, legal content makes a big difference in the demands placed on legal institutions...

Fourth, the substance of the laws must be based on what people want for them - this requires a democratic process....

Fifth, we need to start with the realities that exist on the ground, not with abstract models of "best practice"....

Sixth, establishing an effective legal system is a long-term challenge: the writing of the laws, the training of judges and lawyers, the spreading of access, the education of a community in its rights, all take time....

Seventh, there must not only be a capacity within the system to reach decisions in reasonable time and at reasonable or subsidised cost, but also the ability to have decisions carried out...

Finally, any system of justice must operate alongside a system of sound regulation and government, which must have adequate capacity, organisation, and reach... (Z-Insider 31/07/01-O).

Another article can also be found on the Worldwide Web that suggests that the NIE/LDM logic is used by African Heads of State. A South African newspaper article *Mugabe shores up bureaucracy ahead of polls* (Sunday Independent (SA- SA 25/07/01)), suggests that in July 20 2001 several Zimbabwean state institutions underwent an institution

strengthening exercise- the media, army, police and judiciary – as suggested by this report:

Harare - President Robert Mugabe is tightening his grip on key state institutions ahead of presidential elections due in April next year. Mugabe has appointed officials of unquestioned loyalty in the army, the police and the judiciary in the past few months and this week to the state-run Zimbabwe Broadcasting Corporation (ZBC), which still enjoys a monopoly over broadcasting. The monopoly of radio especially, which reaches the widest audience in Zimbabwe, gives the ruling Zanu-PF party an enormous head start in elections.

The opposition's activities are rarely covered on either state radio or television. In the past few months, Mugabe has replaced five of the six editors in the state-run Zimbabwe Newspapers (Zimpapers) stable, which publishes both daily and weekly newspapers...

...Mugabe has also recently appointed seven new judges with strong links to the ruling party to Zimbabwe's high court. Mugabe is expected to confirm the appointment of Godfrey Chidyausiku as chief justice soon. Chidyausiku has been acting chief justice since the dismissal of white Chief Justice Anthony Gubbay in March...

But analysts say even these measures will not keep Mugabe in power unless he also addresses the bread-and-butter issues that are becoming critical to his country, which is facing increasing shortages of food, fuel and foreign currency (SA- SA 25/07/01)

This second example suggests that a Head of State has used the NIE/LDM ideas to affect real people's lives: changing socio-spatial patterns among the state, civil society and the legal and justice system (Z-MDC 17/09/01- IRIN).

While the political discourses within each article are different, parallel patterns of logic must be noted. Details found in the speech - *Rule of Law is Central to Fighting Poverty* - at the *Second Global Conference on Law and Justice in Russia* (July 9 2001) include the recent history of human rights laws, the increasing globalisation and telecommunication, the global shift to democracy by 14 Post soviet countries as well as African and Latin American countries, the connection between poverty, powerlessness, strengthening institutions, using formal economic exchanges and western legal norms to initiate long-term political-legal reform in local contexts. Wolfensohn stresses the equation between

Legal and justice systems [and]... powerlessness, vulnerability, and lack of opportunity...[the solution is]. The quality of the legal framework and its

institutions is thus of absolutely pervasive importance for the achievement of economic growth and poverty reduction (Z-Insider 31/07/01-O).

The text of James Wolfensohn's keynote speech - *Rule of Law is Central to Fighting Poverty* – can be viewed from several different angles. For instance, international lending agencies such as the World Bank might focus on the phrase corruption and “confronting corruption” and the “most pernicious and destructive issue of all is the question of corruption”, “the cancer of corruption” “economic power” (Z-Insider 31/07/01-O). The reason for this focus is because funding agencies fear an investment loss through cloaked, corrupt transactions. The anxieties that most funding agencies do not publicly express is that they do not fully understand the local economic fabric of the society to which they lend funds. Moreover, the Asian financial crisis (1997) suggests a certain amount of impudency by the Asian Tigers, a scenario wherein corruption and financial mismanagement threatened the World Bank's investment to the point that the IMF began to intervene in the internal affairs of Indonesia (Feldstein 1999). These anxieties can be found in Wolfensohn's speech. The language he uses is telling:

... illicit payments from elite corporate interests to public officials and politicians... There must be transparency, there must be accountability, there must be continuing review from the press and from the public...[the solution requires] strong leadership...strength of character and of influence... the poor will be supportive of such leadership (Z-Insider 31/07/01-O).

Note the juxtaposition of words: transparency/illicit, good governance/bad corruption, closed/open, strong leadership/weak leadership. The rhetoric is telling. The language suggests that corruption and mismanagement increases or creates poverty, destroys the dignity of the people and infringes on basic civil rights of people. Unfortunately, the logic embedded in the World Bank's grand statements (such as in the statement above), as Tshuma (1999) argues, should not be mistaken as the rhetoric of concern. The point being made is that this language is the World Bank's new strategy to protect its investment.

Whereas viewing this document from the perspective of a national leader one idea stands out above the language of: *corruption affecting economic development, strengthening institutions, ethical leadership traits and moral behaviour*. The idea is that a state can technically alter “the rule of law and the functioning of legal and judicial systems” ... (Z-

Insider 31/07/01-O). Moreover, reading this keynote speech alongside a South African newspaper article *Mugabe shores up bureaucracy ahead of polls* (Sunday Independent (SA- SA 25/07/01)), reveals that there are similar patterns of logic between Mugabe's institution strengthening and ideas within Wolfensohn's keynote speech. Mugabe's ability to co-opt the World Bank logic for his own political ends has been noted by Jenkins (1997) and others. However, the NIE/LDM logic seems to have deeper and far more reaching implications to the quality of life to many Zimbabweans than ESAP, as the South African newspaper article *Mugabe shores up bureaucracy ahead of polls* (Sunday Independent (SA- SA 25/07/01)) suggests.

This empirical evidence reveals that new political structures are being created as ideas being diffused through space. Global institutions using the NIE/LDM discourses/logic have affected Zimbabwe, as a political space. For example, Mugabe's use of the NIE/LDM logic to restructure the legal and political institutions suggests the breadth and depth and spatial diffusion of the NIE/LDM logic through time and space. This example suggests how the NIE/LDM discourses/logic negatively rather than positively impact local societies (see also Chapter Four, Section 4.1 *Introduction: Deepening Democracy and Development in Commonwealth Member States* and Chapter Two, Section 2.5.1 *Legal Cultures are Location Specific*).

The empirical evidence also supports a theoretical critique of the critical legal development literature's aspatial analysis. Although it is beyond the scope of this dissertation to examine the spatial diffusion of the NIE/LDM logic and better understand the connections between Mugabe's methods in restructuring the state and the World Bank rhetoric (see WB-WD 2002), such studies should be initiated. According to this newspaper article, Mugabe has co-opted the NIE/LDM logic to restructure the legal and justice system. Mugabe launched an institution-strengthening exercise in anticipation of the 2002 Presidential elections. In response to the threat posed by those who are concerned about "bread-and-butter issues... food, fuel and foreign currency" (SA- SA 25/07/01), Mugabe consolidated and strengthened formal institutions' capacity to govern the women and men who sought to resist these institutions. This reform reshaped civil

society's access to the local legal and justice system. In this situation where the state allocates justice (rather than the judiciary), protection through constitutional rights has been lost to the public. As Head of State, Mugabe now had control over the media, radio, news, judiciary, army and police force. These details suggests how an outside legal reform initiative by the lending institutions can innocently (?) be a party to the way a state violates the very principles upon which it was founded.

The main reason why future studies should focus on this topic is because the World Bank focuses on funding *democratic* nations. Yet the Zimbabwean case study illustrates a strange irony. The irony becomes clearer when the focus remains on the legal restructuring inside Zimbabwe. The Norwegian Election Observation Mission, which reports that Mugabe's orchestration of state institutions in July 2001 created the legal mechanisms to pass the election laws to create the legal scaffolding, which allowed Mugabe to win the 2002 President Elections (N - 20/03/02- NEOM). Mugabe's vision in July 2001 supported his vision for winning the 2002 Presidential Elections. Mugabe has been re-elected. And Zimbabwe continues to retain the political categorisation of being a democracy (Z-NCA Sithole 2000, N- 20/03/02- NEOM). What may be underemphasized by the World Bank and other lending agencies in the future is that Mugabe carried out his own form of legal reform to win the 2002 Presidential Elections. By placing loyal followers in key positions, Mugabe has used a legal reform in an attempt to regain a control over the silence broken in recent years. Foreign investors, should they decide to re-invest in Zimbabwe, would continue to be supporting a *democratic* nation. The deeper irony is that international funding agencies continue to emphasise that *democracy* is part of the criteria to be able to access foreign currency (Z-Insider 31/07/01-O). Mugabe may be invited to participate in the agenda of the international funding agencies in the near future.

The similar patterns of logic, both produced within weeks of one another, found in Wolfensohn's speech and Mugabe's legal reform is significant. This empirical evidence extends Taylor and Nel (2002) analysis of African leaders' use of contemporary development discourses. The empirical evidence suggests that the elite use the

NIE/LDM, including the World Bank legal-institution-strengthening initiative to change laws connected to the market economy. This example highlights that because international lending agencies have such a powerful political presence in the postcolonial world, Heads of State mimic the logic and invert the agenda in a manner way that the legal system is used to control the demands made by disabled, terminally ill, hungry, informally employed, poor and politically vulnerable women, men and children. The intention here is to illustrate the dangers of the World Bank new development discourses in specific locations.

7.4.1 Lessons from the World Bank Example

There are four lessons to take from this example. One, the global presence of the World Bank is using the Internet to reach into developing countries that wish to borrow funds in the future. Two, the main lesson we can take from Mugabe using the same logic as Wolfensohn is that this example confirms the concern of the critical legal institution development literature. The example offered above makes the suggestion, much like the rest of the dissertation, that the threat of the New Institutional Economics /Law and Development Movement (NIE/LDM) legal-institution-strengthening initiative is much deeper and more pervasive than the critical legal institution development literature acknowledges. This example suggests that the Zimbabwe case study can tell us about the spatial threat of the NIE/LDM logic that is circulating around the globe.

Moreover, this example explains why Chapter One began with the suggestion that the Zimbabwean crisis evolved from the practices and power relations of contemporary development initiatives. As was stated in Chapter One, to argue that the Zimbabwean crisis is connected to a contemporary development initiative may seem odd in light of the World Bank/International Monetary Fund beginning their “undeclared sanctions” in 1999 (Z-MDC 17/09/01- IRIN). The political and economic crisis deepened considerably since 1999. Yet since 1999, the World Bank/Commonwealth coalition has been advancing the language of international financial architecture, democracy, anticorruption and good governance throughout politico-legal landscapes around the world (CS- 4/6/99- PI). Chapters Four, Five and Six have presented evidence suggesting that different

institutions and organisations are using this language to describe the crisis in Zimbabwe. Many of these organisations and institutions have also been using the Internet. From 1999 to 2001, the Zimbabwean case study began to illustrate that the different institutions and organisations advocating for legal and economic reform were changing the local legal culture. Men, women and children were asking for the freedom of speech, and the right to choose a new leader; the Head of State responded by suppressing this activism.

One reading suggests that Zimbabwe's experience with the NIE/LDM logic - for the most part - has been an unfortunate experience. The deeper and more complex attempts to integrate civil rights into the local legal culture have been quelled by Mugabe's use of colonial laws. These laws have shadowed the postcolonial state's administrative procedures and policies. However, a more critical reading suggests that the World Bank is negating its responsibility. For instance, despite the contradictions of this postcolonial *democracy*, the World Bank continued to fund Mugabe, and Mugabe has had little incentive to integrate civil rights into the standing laws of the land.

The most important lesson to take from this example is that the concept of *development*, as articulated by the World Bank, has shifted in shape and form. Yet, even this new idea of *development* continues to empower the rich over the poor, the oppressor rather than the suppressed, with a negative impact on the most vulnerable. While the postdevelopment literature confirms that the notion of *development* must be carefully examined, as mentioned in Chapter One, the postdevelopment literature has yet to make the connection that the development discourse is no longer phrased in neoclassic economic rhetoric of cost-and-benefits discourse. Rather, as argued in this dissertation, the development discourse is the NIE/LDM discourses of *good governance, anticorruption, and strengthen-democratic-institutions (NGOs, the media and the judiciary, information management and private property rights*. This study has attempted to show precisely why post development theorists must closely examine the political implications of the World Bank's *Global Conference on Law and Justice* (July 2001) and the logic threaded through the *World Development Report 2002: Building Institutions for Markets*, and the logic that believes strengthening legal institutions will bring economic development to

post soviet and developing countries (Nederveen Pieterse 2000, 2000b, Potter et al 1999, Slater 1997,1998, Crush 1995, Ferguson 1994, WB-WD-2002).

The third lesson is a lesson about the World Bank's discomfort with acknowledging its political presence in developing countries. In the case of Zimbabwe's interactions with the World Bank, the World Bank appears to represent itself as apolitically withdrawing its previous funding commitments. Moreover, many reports offering analyses of *why* the World Bank withdrew funding tend to focus on themes such as the irrational behaviour of the government, an economic environment non-conducive to economic growth; a financial crisis; and the lack of orderly, transparent and political reforms to contain inflation and reduce state spending (IRIN 13/09/00, SA - News 24 25/09/01). The economic language threaded within the evaluation of how the World Bank funding has changed the political landscape tends to disguise rather than illuminate the politics.

At the heart of this discussion is that the World Bank has made the intensively political decision to impose "undeclared sanctions". Yet, this justification is often read through an economic rather than political lens, constructing an apolitical identity of the World Bank (Z-MDC 17/09/01- IRIN). Moreover, this *apolitical* identity seems to reach into the World Bank's acquaintances with international organization of nation-states. For instance, the Commonwealth Secretariat Press Releases provides much evidence that within the Commonwealth the language of good governance and anticorruption was circulating, a language that appears to have originated from the World Bank/Commonwealth conversations (1997-2002). While the NIE/LDM discourse started out as a language of empathy with poverty and despair, it has been transformed through the discourse of international relations into a lever for the strategic aim of the World Bank and other lending agencies to make judgements about how a government should govern its economics and maintain democratic institutions. Through the NIE/LDM discourse, the Commonwealth Heads of State have legitimised the politics of international lending agencies' economic sanctions and have so changed Zimbabwe's position in international relations. With the *anticorruption, good governance, pro-democracy* ideas circulating within the Commonwealth, this discourse, as illustrated in

Chapter Five, is shifting and changing the power relations among NGOs, the Head of State, the legal and justice system; these ideas have tremendous political implications to change local people's lives.

The World Bank's *apolitical* identity politics, the new development discourses being circulated throughout the Commonwealth and Mugabe's reaction to the World Bank in 2001 suggests that this language is understood by the political elite of the world to privilege the rich and exploit the poor (Tshuma 1999, Taylor and Nel 2002). Yet, somehow the World Bank's *apolitical* identity seems to cloak the very political choice the Commonwealth leaders have made to support the World Bank's development initiatives. For example, the July 2001 events suggest a very strategic reaction by a Commonwealth Head of State to the World Bank advocating for legal and economic reform. As a Commonwealth Head of State, Mugabe probably helped construct the Commonwealth/World Bank coalition good governance/anticorruption agenda based on NIE logic, encouraged other countries to apply these definitions to Commonwealth countries, and in general helped to construct a global framework of economic governance and financial architecture (CS- 4/6/99-PI). Mugabe probably also knows how to satisfy the Commonwealth/World Bank coalition's values of good governance by retaining his democratic standing in international relations. He probably knew the contradictory rhetoric and logic of the World Bank. NGO reports, filled with the language of *corruption, bad governance* and its underlying message: *modernisation /progress* can be achieved through "fixing" the macro and micro economic laws of the nation. The significance of this example suggests the need for deeper investigation into the tacit agreements between the World Bank and Heads of State, which reveals choices to identity politics.

Four, all three of these lessons could and should be applied to the future studies investigating how the legal community makes the sovereign-state more vulnerable to the global economy. This anecdote suggest that there will be many unexpected material outcomes which will come as a result of the Commonwealth Secretary-General Emeka Anyaoku' plan to deepen and expand collaboration with World Bank President James

Wolfensohn. In March 2002, the Commonwealth also accepted the World Bank and other international lending institutions multibillion-dollar good governance, anticorruption development initiative (CS-04/03/02-PI, CS-04/06/99-PI, CS-28/04/99-PI, CS-09/06/99-PI, CS-4/28/99-PI).

The Commonwealth's new Pan-African Fund, partially funded by the World Bank (CS-04/03/02-PI) may have a number of unexpected consequences, and even the Commonwealth Secretariat's "dialogue between the Bretton Woods institutions and Commonwealth developing countries" must be closely examined for its political implications, particularly as it is quite likely that the international financial architecture and global economic governance is likely to work in the World Bank's favour, not that of the poor, vulnerable or weak in Commonwealth countries (CS- 4/6/99-PI, CS-7/18/2001-PI).

7.5 The Civil Rights Movement: The Judiciary in a (Normal ?) Democracy

The High and Supreme Court Judges Activism from 1997 to 2002 offers a contemporary example of local legal activism. This study also confirms the work of Spohn (2002), Boon (2001), Tolley (1994) and others. The Zimbabwean Judges' activism includes the following characteristics:

- a choice to struggle against undemocratic institutions
- working in their professional capacity to represent a contentious issue
- focusing on citizen empowerment and organizing the community
- playing a part in changing the legal system and quietly challenging the authority of the state in their daily workday
- representing an invisible extension in the human rights movement
- politicising legislation passed by the state and abuses of sovereign-state power

This section will review some of this activism to suggest that NGOs documenting these overt forms of activism within the judiciary may be neglecting the more subtle forms of judicial activism. The intention of this review is to highlight the lessons that this local trajectory of legal activism which is driving the international law/state transformation/human rights/democracy legal-institution-strengthening initiatives can tell us about how the legal community intervenes in the sovereign-state affairs, including an

analysis of NGOs' focus on the overt forms of judicial activism which may have negative repercussions for post conflict Zimbabwe.

The Zimbabwean judges' activism must be seen in the politico-legal context. The activism of the High and Supreme Court Judges has been shadowed by the fact that Zimbabwe has never been a *normal* democracy. Zimbabwe's postcolonial reality has been created through a skewed politico-legal superstructure, which privileged Robert Mugabe above the majority. Without re-iterating how the post-1987 period changed politics in and among male and female parliamentarians, the executive government, the judiciary and the security forces, the history of violence during elections, Mugabe's interpretation of the legal minutia of quasi-emergency laws and other standing laws of the state, as presented in Chapters Four and Six, the details suggest that the civil rights movement was caught in a politico-legal gridlock. Civil society and the legal and justice system could only slowly move the civil rights movement forward, because Mugabe had retained the emergency legislation, and could actively exercise his legal right to use the Constitutional Prerogative of Mercy, the Presidential Powers (Temporary Measures) Act (1986) and 1987 "Unity Agreement" when so choosing (Z-MDC - CO 2000, SA-TST 08/07/2001-Gubbay (see Chapter Four)).

Part of the difficulty facing the civil rights movement was that the settlers' internal security laws were still active. The Constitution of Zimbabwe came into force on April 18, 1980, the day Zimbabwe attained independence. The Constitution had

... a justifiable Declaration of Rights. Its provisions are largely derived from the Universal Declaration of Human Rights and the European Convention (SA-TST 08/07/2001-Gubbay).

But the Declaration of Rights only came into force in 1985. It had been suspended between 1980-1985. The reason for this was that Zimbabwe's new Parliament needed the time to re-write statutes and repeal laws, which breached the Constitution (ZHR-NGO 30/09/01: 9-10). By 1986, the constitution had been amended. Mugabe had the power of the Presidential Powers (Temporary Measures) Act 1986. Since 1986, Mugabe's powerful political presence has been felt by the judiciary, which has changed how the

judges would use the international treaties or include the Declaration of Rights in many of the postcolonial legal cases (see Table 4.3). In short, the judiciary had only a one-year period in which they had the political space to call upon the Declaration of Rights (1985) before Mugabe shadowed their space.

This backdrop is critical for understanding why the NIE/LDM logic radicalised the local legal and justice system before, during and after the World Bank withdrew its funding in 1999. The NIE/LDM discourses continued to circulate affecting the politics inside and outside the local legal and justice system (Z-MDC 17/09/01- IRIN, Z-Insider 31/07/01-O, SA- SA 25/07/01). In fact, the Zimbabwean case study suggests that the World Bank had never intended to financially support the civil rights movement, a point also stressed by Tshuma (1999). For example, *after* the World Bank decided to withdraw its funds, the Supreme Court became extremely active in advancing the interests of the civil rights movement. As early as 1997, the Legal Resources Foundation (LRF) and the Catholic Commission for Justice and Peace (CCJP) took a bold step forward when they published a report entitled: *Breaking the Silence, Building True Peace: A report on the disturbances in Matabeleland and the Midlands 1980 – 1989* (SA-HSF-Focus 18, 06/00, ZHR-NGO 1999b, Z-Today-CCJP 1997). Made bold by the activism of the NGOs, judges began to become more publicly active in 1999 (ZHR-NGO 30/09/01, Widner 2001).

The point being made is that the High and Supreme Court Judges had always subtly exercised their activism. This argument is based on Williams (2001) who outlines general forms of judicial activism. As we saw with High Court Judge Gillispie, local judges were very aware of the contradictory situation wherein the Mugabe Administration was signing treaties such as Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), but resisted efforts made within the judiciary to advance international humanitarian laws into domestic law. According to Gubbay (SA-TST 08/07/2001-Gubbay), the Supreme Court used the technique of borrowing legal decisions from other countries, especially jurisdictions known for advancing human rights – such as the European Court of human rights – for the Zimbabwean courts.

NGOs support this assertion. The NGO reports notes that in 2001, LOMA, amnesties and other legal breaches of human rights were present in the current legislation. However, the

Supreme Court began overturning – section-by-section – provisions of LOMA. As complainants started coming before the courts, the public began to understand how some of the statutes were unconstitutional, as they were tested before the courts (ZHR-NGO 30/09/01: 9-10).

Several Supreme Court judges were slowly breaking the gridlock between the judiciary and the Mugabe Administration. In addition, the Supreme Court judges had the support of the local and global legal community. For example, when the Mugabe Administration began to harass Supreme and High Court Judges, the response of the legal community was immediate. By March 2001, the Commonwealth Lawyers Association publicly criticized the government. The Law Society of Zimbabwe and the Zimbabwe Lawyers for Human Rights and 34 leading Zimbabwean lawyers felt that their profession was threatened. In April 23 2001, the International Bar Association offered a public criticism of the government. As public spokespersons for the Zimbabwean legal community, the Commonwealth Lawyers Association could call upon

Commonwealth political values as enunciated by the heads of government in their successive meetings starting with Singapore in 1971, Harare in 1991, Millbrook in 1995 and Durban in 1999 (ICG 07/01:12)

suggesting that the Zimbabwean legal system should be in a legal zone that exempted them from the regular political struggles of political parties. Moreover, ZANU (PF) supporters had inappropriately involved the legal and justice system in the ZANU (PF) supporters' politico struggles. In many cases, legal activists from the Commonwealth Lawyers Association, the Law Society of Zimbabwe and the Zimbabwe Lawyers for Human Rights, and the International Bar Association offered a public criticism of the government. The significance of this activism is that it had no financial support from the World Bank which continued to publicly support the Law and Development Movement.

As the Head of State responded to the state transformation/human rights/democracy legal-institution-strengthening initiatives, the political profile of the legal and justice system continued to increase. The High Courts became involved in judging whether or

not Parliamentary elections in specific constituencies were legitimate or not. Many relied on NGO reports, deepening the connection between the human rights advocacy networks. Many judges used NGO reports to justify their decisions to overturn some of the Parliamentary elections and civil society (see Chapter Six, Section 6.3.2 *Amani Trust*). The judges also relied on NGO reports to publicise the current court cases to global bars to ensure the acting judge's safety. For example, the Zimbabwe Human Rights NGO Forum Report: *Human Rights and Zimbabwe's June 2000 Election* (ZHR-NGO-SR-01/01) provides extensive details of how the Electoral Act was manipulated through altering the Electoral Acts institutional function, which affected voter regional constituencies and how the election was monitored. The NGO argues that not only were political rights affected before, during and after the election, but that ZANU (PF) position was that violence could be, and was, used as a political tool. This NGO also cites *Amani Trust* and Zimbabwe Election Support Network's detailed statistics of the election results in relation to political violence: provincial summaries and constituency details. Because the judges drew from these reports to justify overturning the parliamentary elections, the statistics of torture and violence also have a deeper meaning. The quantitative data legitimises the local judge's activism to human rights activists inside and outside national borders, it justifies why new legal scaffolding was created and suggests that the collaboration between the judges and NGOs allowed the civil rights movement to move forward in the courts.

During this small time period 1999-2001, we can start to see civil society's idea of justice become legal power for the first time in the history of Southern Rhodesia/Zimbabwe (Palley 1966, Hatchard 1993, Gubbay 1997, SA-TST 08/07/2001-Gubbay). By 2000, the judiciary's activism had begun to surface, and materialise in several laws. Many of these cases began in the High Court. And when the Mugabe Administration disagreed with the interpretation, the case went to the Supreme Court. Details of the court cases that passed from the High Court to the Supreme Court can be found in various Human Rights Reports (see USA-Z-HRR 1999/2000, 2000/2001, 2001/2002, SA-TST 08/07/2001-Gubbay (see Chapter Six)). The publicity connected to these court cases is significant. When the Mugabe Administration began to put pressure on the High Court judges, NGOs

would cite legal cases to emphasise the differences of perspective of the interpretation of the law.

This pattern of protest substantially changed after 2001. The period since 2001 is characterised by Mugabe dominating Chief Justice Supreme Court Judge Chidyausiku's political space, which has created a change in the culture of the Supreme Court (Z-K 19/04/02-PLS). Chapters Four, Five and Six have also established that NGOs report that Mugabe has interfered with the *normal* administration of justice with several strategies: his dominance over Godfrey Chidyausiku and the use of the Presidential Powers Act and other legal mechanisms to suppress the civil rights movement (ZHR-NGO SR 09/01).

To summarise, this review of the High and Supreme Court Judges activism reveals a daring and brave social movement of men willing to play a part in changing the legal system and challenging the authority of the Mugabe Administration in their daily workday (there were no female judges before 2001 (ZHR-NGO 30/09/01)). Many details have been offered in Chapter Six, which captures some of the struggles between Robert Mugabe and the legal, and justice system. Yet there are other lessons to take from this example. Many of these lessons are grounded in the points made in Chapter Two. Chapter Two established a number of similarities and differences between the social movement driving the New Institutional Economics /Law and Development Movement (NIE/LDM) legal-institution-strengthening initiative and the social movement driving the international law/state transformation/human rights/democracy legal-institution-strengthening initiative. Against this literature review, this study suggests that the overt activism of the local judiciary could be harmful for post conflict Zimbabwe and other postcolonial, post-soviet, post-conflict and newly independent countries that may be pinpointed by the capitalist trajectory of legal activism as nations in need of an externally driven legal-institution-strengthening initiative.

7.5.1 Lessons from the Activism of the Judiciary

7.5.1.1 The Political Implications of NGOs Activism

The first lesson is NGOs' documentation of the overt activism within the judiciary may be harmful for post conflict Zimbabwe. The points about NGOs' role in re-enforcing the democratic processes with their reports of the legal and justice system will not be repeated (Sarat and Scheingold 2001, Cain and Harrington 1994). Yet, the details offered above shows that the period 1999 to 2001 is an exciting historical period for the legal and justice system because of the collaboration between democratic institutions such as NGOs, the media and the legal and justice system. Judicial activism has occurred in a period of rapid economic, political, and social and culture change.

Four reasons account for this concern over NGOs representing the judiciary's activism during this time, First, NGOs play a major role in bilateral monitoring: producing information and exerting pressure, and establishing links with "dissidents still inside" the country (Kent 2001: 591). NGOs are representing a dissident culture. The dissidents in this case are the judges and lawyers attempting to build the legal framework for new social movements to gain more legal power. These are the judges and lawyers who have participated as an invisible extension in the human rights movement for many years, whose support of the civil right movement began to be asserted with some boldness from 1999 to 2001. This boldness is costly to individual's careers. Many do so at the risk of losing their career and potentially their personal security. The significance of the media and NGO reports publicising the high profile cases is that this publicity draws the attention of the Head of State, the international community – sometimes at an inopportune time. For example, during a high profile case, the judge needs to carefully weigh the evidence provided by NGOs, key witnesses and experts and carefully evaluate how constitutional law, legislative law and quasi-emergency laws and many other laws are woven into the political landscape of a country, before interpreting the law. Many judges will try to ensure that justice being drawn into the legal and justice system is just (Weinrib 1987, Russell 2001a, 2001b). While the NGOs and media seek to gain support from the outside community, the Zimbabwean High and Supreme Court judges were

faced with the political context of her/his daily workday, which changed because of NGOs' publicity tactics. These individuals had successfully negotiated with Robert Mugabe's rule of law view, which has traditionally penetrated but did not entirely dominate, the local legal and justice system until 2001. But this political space began to narrow alongside NGOs advocacy tactics. The pivotal point being made is that the Zimbabwean judges had to consider the larger politico-legal-economic backdrop in which a judge must make his/her ruling. The intention of this discussion is to stress the point that this is an African country with limited economic resources, not an affluent European or North American country.

The critical tension is this. Human rights NGOs empower the trajectories of legal activism and the state transformation/human rights/democracy legal-institution-strengthening initiatives as they publicise the court cases, document the violence and transcribe the stories. NGOs can draw the public attention to the bold positions of the Zimbabwean High and Supreme Court judges. While the empirical evidence collected by NGOs supports the state transformation/human rights/democracy legal-institution-strengthening initiatives, the international attention is on the local legal and justice system. This public attention has had negative implications. The local and international attention has put the career of the acting judge at risk. Many of the activist judges sacrificed their professional careers during this period (ZHR-NGO-SR-09/01: 42-43 (see Chapter Six)).

A second reason why this study expresses some concern with the NGOs representing the judiciary's activism during this time is that NGOs may have been neglecting to focus on the more subtle forms of activism. Chapter Four offered some evidence of the High Court judges' subtle forms of activism. The example offered was a High Court Judge offering counsel to the local women's movement seeking the right to own private property (ZHR-NGO-SR-03/01:6). Many of these subtle forms of activism are not being documented by NGOs. Thus, this lesson has two facets. The subtle forms of activism matter and they need to be documented. However, most NGOs tend to highlight the bold displays of activism. In addition, the activism within the judiciary may be very subtle. In practice, the

judges may be circulating new ideas of justice and changing the local legal culture. Yet, if NGOs reports consistently, and somewhat simplistically, argue that Mugabe is dominating the post-2001-Chidyausiku-led legal and justice system, and that most cases will not even be brought to court, NGOs could be neglecting the very activism that may see Zimbabwe through this period wherein Chidyausiku is leading the legal and justice system (Z-K 19/04/02-PLS).

A third reason is that NGOs which collect information on the judges and provide details about the legal and justice system are generally funded under the rubric of human rights development initiatives (Tolley 1994, UN- COHR 11/02/02, EIU CP 2001: 10). When representing the judges' activism, many NGOs will use the current development buzzwords such as *democracy, human rights, good governance, civil service strategy and management, political will, constituency building, and public support, engaging civil society in reform efforts, investigative capacity of the police and other law enforcement institution international and bilateral donors to foster civil justice system reform.*

Unfortunately writing such texts against the global power relations of international lending institutions and international organisations of nation-state such as the World Bank/Commonwealth coalition that has adopted the NIE logic, NGOs method of representation silences rather than illuminates the local societies' practices, concepts and ideas that are struggling to be heard. Moreover these discourses have the power to restructure the capitalist agenda that focuses five thematic lines of thinking - good governance, anticorruption, and strengthen-democratic-institutions (NGOs, the media and the judiciary) information management and private property rights (Keefer and Knack 1997, Feldstein 1999, Chhibber 1998, Harrison 1999, Webb 1999, Cameron 2000, WB-WD-2002, CS-04/03/02-PI, CS-04/06/99-PI, CS-28/04/99-PI, CS-09/06/99-PI, CS-19/03/02-PI).

The significance of NGOs using this language and the logic adopted by the World Bank/Commonwealth is that many of these institutions will take the details compiled by the NGOs on the activism of the judiciary and use these details to justify the need to rewrite laws and reform the legal institutions. Legal reform is meant to create stability

and predictability in market relations, which, in turn, reallocates resources to enterprises and industries. However, the World Bank/Commonwealth' discourse of rule of law, law and social justice which will be offered in the post conflict era will not repair the damage done during the Chidyausiku-led legal and justice system period. The pro-ZANU (PF) and other judges are rewriting many of the laws and overseeing several important court cases. The treason trial of MDC President Morgan Tsvangirai in February 2003 is just one example of many (ICG 10/03/03). For example, some of these judges are overseeing cases wherein individuals have been charged with the Broadcasting Services Bill (2001), which affects press freedom, and the POSA - affects civil rights freedom - was used against civil society in 2002. The POSA has been used against demonstrators, and journalists and MDC opposition activists (UK-TST 18/02/01, Z-K 19/04/02-PLS, Z-AT-20/05/02-PE 2002, SA-BD 21/05/02; Z-CIZC-19/06/02: 31). The role of NGOs in shifting the power relations running in and through the legal and justice system is that the public attention has negatively affected the civil rights movement *within* the legal and justice system. Even the subtle and small incursions the local judiciary made upon the sovereign-state political space, which allowed the judiciary to develop a new political presence in international relations, has changed. The activist judges have been forced to retire or resign and the subtle changes they had made to some of the law have been rewritten in the Chidyausiku-led legal and justice system period.

The fourth reason is that NGO reports are taking a political position. Many – perhaps unknowingly – support the complex situation wherein the World Bank and other international lending agencies participate in radicalising legal and justice systems around the globe for the benefit of a capitalist, rather than social justice, agenda. In July 2001, approximately at the same time that Mugabe had “.....appointed seven new judges with strong links to the ruling party to Zimbabwe's high court [and was to] confirm the appointment of Godfrey Chidyausiku as chief justice” (SA- SA 25/07/01) Wolfensohn posted his keynote speech entitled - *Rule of Law is Central to Fighting Poverty* - on the Internet. As noted, the text of James Wolfensohn's keynote speech - *Rule of Law is Central to Fighting Poverty* – can be viewed from several different angles. Moreover, it must be understood through different world views if one wants to understand how the

World Bank/Commonwealth (NIE/LDM) driven legal-institution-strengthening initiative uses the momentum of the civil rights movement, the struggle between the Head of State and the legal and justice system and the synergy of the state transformation/human rights/democracy legal-institution-strengthening initiatives to justify a World Bank good governance development initiative in the post conflict era.

The political implications of Wolfensohn's speech needs to be understood at three different stages to understand why NGOs representation of the judiciary's activism supports the lending institutions rather than the civil rights movement. First, the global presence of this text. A human rights activist might focus on the phrases in Wolfensohn's speech that reflect Euro-American ideals of civil liberties, freedom of speech and economic justice, the Montesquieu view of Rule of Law (Shklar 1987, Mutua 2001). For instance the following phrases can be found in this speech:

...freedom, on rights, on equity, and on social justice...law and justice can be put at the service of all people - not just the powerful - to enhance freedom and to ensure equality of opportunity and the protection of rights
...an honourable and fair system of justice for people, and voice for every citizen, is ultimately in the interest of all (Z-Insider 31/07/01-O).

The vision is powerful. The significance of Wolfensohn's speech to civil rights groups and NGOs is that in outward appearances the World Bank appears to be supporting civil right movements. The contradictions begin here, and are best illustrated with the Zimbabwean case study. The World Bank had used this visionary language of human rights very close to a time when the civil rights movement inside the legal and justice system began to challenge the Mugabe Administrations' *Rechtsstaat* view of Rule of Law (a view which assumes that the highest power is the state, and there are no laws from a source outside of the state (Berman 1992, Mathews 1986)). As the geopolitical discourse gained political stature, the outside communities' commitment to legal activists advocating for the Montesquieu view of Rule of Law became a form of intervention in the international affairs of the state.

The point being made is that institutions which had propounded that the Montesquieu view of Rule of Law would lead to economic growth and stability could have used these

funds as leverage with the Mugabe Administration during the time when the Zimbabwean civil rights movement was really active (Z-MDC 17/09/01- IRIN). However, because the World Bank does not fund civil rights movements, it did not take a wide look at the cultural politics inside and outside the legal and justice system and envision how the space of judicial independence was seeking to incorporate the ideas being supported by the World Bank, or how the space of judicial independence might be affected by economic sanctions (Tshuma 1999).

The second stage is the impact of the World Bank rhetoric, which is politicising legal and justice systems around the globe and increasing momentum of the local civil rights movement. The NIE logic holds an attractive vision for the future: install democratic systems with voting rights and lobbying rights, develop intellectual freedom, and establish independent institutions such as independence of the central bank, a professional civil service, a free and independent press, a professional army; strengthen legal infrastructure to attract foreign and domestic investment to facilitate faster economic growth and institutional capability (Chhibber 1998, Mbaku 1999). This vision is extended to those who are willing to take the risk. We have much evidence that the Zimbabwean High and Supreme Court Judges and women, men and children were willing to take the risk and challenge the state from 1999 to 2001. As this social movement mobilised, its activism has dismantled local political and social structures, created disputes over legal practices, procedures, social norms, interpretation of legal texts, created contested territories of state/judicial dynamics, created friction, tensions and chaos and changed the civil rights culture and manipulated politics, social and economic spaces. The Chidyausiku-led legal and justice system period forces the question whether or not the newly appointed High Court judges with “strong links to the ruling party” are being used to legally suppress the civil rights movement (SA- SA 25/07/01, ZHR-NGO 19/02/02, ZHR-NGO 2001-05 see also Z-I 18/05/01, LCHR 19/12/01-POSB, LCHR 19/12/01-POSB-HR).

The third stage is the post conflict solution offered by the World Bank. The World Bank is willing to lend funds to carry out legal and justice reform under the framework of the

Governance and Public Sector Reform development initiative - the Legal/Judicial Reform Projects (<http://www1.worldbank.org/publicsector/legal/legalprojects.htm>).

Moreover, the World Bank is perhaps the largest and most influential lending agency among multilateral international aid institutions. While struggles among the Head of State and the legal and justice system and the synergy of the state transformation/human rights/democracy legal-institution-strengthening initiatives and the civil rights movement was at its height, the World Bank has stepped away. And now that the Chidyausiku-led legal and justice system is in place and the activists High and Supreme Court judges have been replaced with “seven new judges with strong links to the ruling party to Zimbabwe's high court...” (SA- SA 25/07/01), the World Bank is ready to lend funds for World Bank good governance development initiative in the post conflict era.

The point being made is that there is a need to carefully examine the deeper dangers of extending this *modernity/Enlightenment era/Eurocentric* vision. This view, as argued by many postdevelopment theorists, seems to be inherently attractive to societies around the world (Crush 1995). This vision has the power to make individuals mobilise.

Unfortunately, as the Zimbabwean case study suggests, this local mobilisation may be fed into the political practices and economic policies of the global capitalist system. More specifically, by holding out a dream and a promise of an equitable world, the World Bank and other international lending institutions can use the energy and commitment of human rights NGOs to perpetuate the political and economic power of the North over the South in a very innovative, and dangerous way. This strategy is innovative. The general pattern described above is summarised here (a pattern more fully theorised in Paasi's (1991) treatise on institutions). The lending agencies use these visions to incite the judiciary, civil society, NGOs and the state. The judiciary believe that they are advancing the civil rights movement. NGOs that report on the judiciary's activism believe that they are doing so for the civil rights movement. However, this strategy is dangerous because the Head of State tends to react quite negatively to the local judges' activism and the groundswell of activism in pockets of civil society: the greater the perception that there is a loss of sovereignty, the stronger the forms of backlash made by the state in reaction. In this case, the civil rights movement *within* the legal and justice system has been silenced by the

state. The civil rights movement *outside* the legal and justice system has been silenced with laws, the militia and an economic crisis.

The important lesson we can take from the NGO reports on the activism within the legal and justice system is that international lending agencies are given the empirical evidence, which suggests that – on the surface - these democratic institutions support their ideas. While democratic institutions such as the media, judiciary and NGOs appear to be supporting these ideas, these institutions need financial backing to be financially independent from the state. By imposing economic sanctions upon a nation whose civil rights movement is establishing an identity and a political presence, international lending agencies have silenced the voices of the terminally ill, informally employed, poor and politically vulnerable women, men and children. Unfortunately this example offers some insights into international lending agencies' commitment to human initiatives, civil right movements and legal activists crossing borders and boundaries.

These four reasons suggest that the Zimbabwe-Commonwealth-World Bank case study offers an important lesson about the negative implications of NGOs representing the judiciary's activism. This lesson suggests that this form of representation may be harmful for post conflict Zimbabwe. This study has suggested that NGOs reports allow Zimbabwe to be pinpointed by the World Bank/Commonwealth good governance agenda as nation in need of externally driven legal-institution-strengthening initiatives.

7.5.1.2 Conceptualising the Space and Cultural Politics of Judicial Independence

The second lesson the case study of judicial activism has to offer is that it has traced a period of time in which invisible struggles between the High and Supreme Court Judges and the Mugabe Administration began to surface after 1999. Once these were visible, the United Nations Special Rapporteur on the Independence of Judges and Lawyers was given the opportunity to publicly critique the Mugabe Administration (AI 25/06/02: 26-27). Thus, the struggles over legal space had become public. With the increasing publicity, different stakeholders took their positions.

The analysis draws from the literature of the political practices of legal activists, presented in Chapter Three (Sarat and Scheingold 2001, Cain and Harrington 1994). The point is to suggest that the Zimbabwean case study appears to tell us something about the way that legal space and legal activism is conceptualised. This study acknowledges that the judges' activism has had far reaching effects. This activism has worked in two directions. Within national borders, the civil society watched Mugabe respond to the High and Supreme Court challenges. Mugabe responded by putting in place the Chidyausiku-led judiciary. The legal community within Zimbabwe continue to sensationalise the political struggles between the original Judiciary and the Mugabe Administration. They took the politics outside the national borders. For instance, we have evidence of the United Nations Special Rapporteur on the Independence of Judges and Lawyers admonishing the Mugabe Administration in 2002 and 2003 (ICG 10/03/03: 12-13, Williams 2001, ZW-News 24/04/01, ZW-News 15/02/01, SA-TS 08/01/01, Sayce 1987: 136, Palley 1966).

The significance of the High and Supreme Court Judges' activism is that this activism offers an important lesson about the shifting and changing power relations running in and through the legal and justice system as the state transformation/human rights/democracy legal-institution-strengthening initiative and the World Bank/Commonwealth New Institutional Economics /Law and Development Movement (NIE/LDM) driven legal-institution-strengthening initiative radicalises the local legal culture. Chapters Four, Five and Six offer much evidence that suggests that the local legal culture was changing. NGO offer evidence that civil society was demanding a more interactive process between the legal system, public opinion and public behaviour. The momentum of this local social movement could be used by the judges to advance the civil rights movement: some made bold political statements as they made rulings that displeased the Mugabe Administration. From the United Nations Special Rapporteur on the Independence of Judges and Lawyers to the High and Supreme Court Judges to civil society, as individuals sought to have their views made legitimate in the law; these are all struggles over the use of legal space (ICG 10/03/03: 12-13, ZHR-NGO-SR 30/09/01). Because these struggles over this space have had a deep and lasting impact on the lives of local women, men and children, local judges

were willing to draw social power from the global-local power relations running through the legal and justice system, and make this social power, legal power. For example, Chapter Six highlighted a number of cases wherein the Supreme Court Judges drew social power from the local civil rights movement and the global legal community. The specific cases can be found in several reports (SA-TST 08/07/2001-Gubbay, also see USA-Z-HRR 1999/2000, 2000/2001, 2001/2002).

The significance of this example is that it illustrates that the local civil rights movement began to take on a form, shape and presence, which was supported by complex networks and alliances throughout the world. The point being made is that this example illustrates a conceptual limitation in the current critical legal institution development literature. The critical legal institution development literature has the ability to theorise the impact of applying western models of democracy and law to developing countries. Yet, this literature does not seem to have the ability to focus on the importance of spatial relationships in and among the state, civil society, the legal and justice system, global bars, and international lending agencies. Nor does the literature analyse the socio-spatial effects this development initiative has upon specific locations (Appendix 1.1).

As this study has suggested, cyberspace seems to be directly relevant to an investigation into how transnational/local legal activists document and disseminate information about the Head of State's response to state transformation/human rights/democracy legal-institution-strengthening initiatives, which seek to institutionalise local civil rights law. Much of the legal activists' activism appears to have been done through cyberspace. For example, the International Bar Association, the Commonwealth Lawyers Association, the Law Society of Zimbabwe, the Zimbabwe Lawyers for Human Rights and others quickly responded when the Head of State transgressed into the space of judicial independence (ICG 13/07/01:12). Widner (2001) acknowledges that the legal community is using faxes; and Chapter Six acknowledges that judges are using the Internet. Thus, space and spatial relationships also seems to be a critical element to understanding how transnational legal activists and the international community advocates for legal and economic reform can change practices, concepts and ideas in local legal cultures particularly as they challenge the leadership style of Mugabe. The intention of highlighting the current limitations in the

way that legal space and legal activism is conceptualised is to suggest further examination into the far-reaching effects of judicial activism.

7.6 The Process of Nongovernmental Organisations De-legitimising Robert Mugabe Locally and Internationally

The focus of this section is to make the political practices of human rights advocates explicit, which will allow us to better see the positive and negative impact human rights activists have had upon local societies. This section will offer a multiscalar and multi-institutional analysis of the state-international community-NGOs-legal and justice system-civil society interaction. As mentioned in Chapter One, this study has categorised a wide array of diverse voices as *nongovernmental organisations (NGOs)* (see the patterns of information moving from the South to the North) to evaluate the political implications of this information and to express the presence of multiscalar and multi-institutional political voice. This is intensely spatial. Moreover, this study envisions that the information generated by this coalition of multiscalar and multinational voices during the Zimbabwean political and economic crisis is tremendously significant. This information holds the key to understanding Zimbabwe's present and future presence in international relations. This section will reveal a very different vision of a state being encouraged to "cede some sovereignty" by the international community based on the information NGOs have collated between 1997 and 2002.

The analysis of the information that NGOs created during a period of rapid change suggests that the media and NGOs have posted many articles, and reports, and created many websites over the past few years. As there has been much information available on the Internet (as suggested by the rich empirical evidence provided in Chapters Four and Six) there also is a need to offer some explanation. This study suggests that three factors account for why there was so much information available on the Internet during this period.

One, more information became available because different countries withdrew funding from the state and began to fund NGOs to collect information (EIU CP-2001, ICG

14/06/02). Two, NGOs who were working with the grassroots social movement needed a way to protect themselves from the state. Local legal activists, such as the High Court Judges, responded to their activism. At the same time, the reaction by the Head of State suggests that for every success these activists have had, there has been a backlash from the State. The shapes and forms vary. The backlash is found in the “shadow militia”, to police officers not able to take action, to Mugabe using the Presidential Powers Act (1986) to amend the electoral laws – such as the Electoral (Amendment) Regulations, 2002 (No. 15) (S.I. 42A of 2002) - just before the 2002 Presidential Elections (Z-CIZC-19/06/02: 28 ft, AI 25/06/02: 16).

In some ways the presence of NGOs and the information that they collected cannot be separated from the politico-legal and economic landscape of Zimbabwe. Neither can this information be separated from the legislation passed by the Mugabe Administration, such as the Broadcasting Services Bill (2001), which affects press freedom, and the POSA - affects civil rights freedom and was used against civil society, demonstrators, and journalists and MDC opposition activists in 2002 (UK-TST 18/02/01, Z-K 19/04/02-PLS, Z-AT-20/05/02-PE 2002, SA-BD 21/05/02; Z-CIZC-19/06/02: 31). But in another way, a complex pattern of politics was beginning to take shape. The more information NGOs posted on the web, the more the Mugabe began to lash out at the human rights activists in the public forum of changed legislation. These changes in legislation have given the human rights advocates more empirical evidence of the state’s abuse of power. With more empirical evidence, the more the international community would justify its withdrawal of funds from the state. In addition, the international community argued that the human rights advocates were offering the *truth* from the grassroots perspective, and in need of funding. Thus, with more funding, more NGOs posted their research on human rights abuses on the World Wide Web.

The pragmatic element to all of this is that NGOs need to get information to the outside community to gain international power, which would be directed back at the state. NGOs became bolder as the international community and grassroots activists offered support. For example, Chapters Five and Six used the activism of several NGOs, including the

National Constitutional Assembly (NCA), to illustrate how human rights/legal activists' work. For instance, the NCA focused on the legal motif - the Constitution – to politicise the post-Independence politico-legal system, and Amani Trust collated empirical evidence of violence to criticise the *defacto* use of impunity. Civil society has responded positively to these NGOs. These NGOs attract social power. With this social power, NGOs were willing to risk more conflict with the Mugabe Administration as they tried to gain more legal power from the international community to direct it upon the state. Both NGOs have their own websites to highlight their local influence to the international community.

The international community has been a receptive audience, and used this information. A multitude of different voices, activists and agendas agitating inside and outside national borders have been able to use their local-global connections to attack the state and create change. The information provided by NGOs on the legal and justice system provides essential historical information that has been used by the Committee of Commonwealth Foreign Ministers, the European Union (EU) and the United States (U.S.), the key G-8 countries and the African countries putting forward the New Program for Africa's Development (NEPAD) initiative, the United Nations Special Rapporteur on the Independence of Judges and Lawyers, as well as INGOs, such as Amnesty International and Physicians for Human Rights (ICG 10/03/03: 12-13, AI 25/06/02: 26-27).

Each of these points suggests that much of the information being generated by NGOs was being funded by Euro-American nations. Moreover, the information collected by NGOs appears to have had an impact upon many organisations, institutions and individuals who were territorially distributed in geographic locations around the world and throughout Zimbabwe. Lastly, the information NGOs collect has had the ability to attack the politico-legal-economic structures of the state.

7.6.1 Information Politics

This section will provide an illustration of the sorts of details that NGOs collated over the years to support the argument that the legal culture was rapidly changing. This section

offers the spectrum of topics that NGOs have collected from 1997 to 2002. In 1997, NGOs were documenting demonstrations and subtle forms of activism. By 2002, they had evidence of the ever-present threat of violence currently condoned by the justice system and the state, militia bases (Z-TC 8/12/97-1, Z-AT-20/05/02-PE 2002: 9-10).

More specifically, the spectrum includes:

- Information about civil society's demonstrations and activism
- the Head of State's response to transnational legal activists
- details about legal mechanisms/ emergency legislation
- lack of separation between the elected government and the judicial system
- tacit understanding among civil society and law enforcers being broken
- the ever-present threat of violence currently condoned by the justice system and the state, militia bases.

A review of the most credible voices during this period –*Amani Trust*, *the National Constitutional Assembly*, *Zimbabwe Human Rights NGO Forum (ZHR-NGO)* *Amnesty International*, *Lawyers Committee For Human Rights*, *the International Crisis Group* reveals that a central concern is the Head of State's abuse of power (D-PHR 21/05/02-PPE, D-PHR 24/01/02, Z-AT-20/05/02-PE 2002, LCHR 19/12/01-POSB-HR, ICG 26/02/02, ZHR-NGO 9/10/01 AT-SNS-Sept). Many NGO reports stress the presence of quasi-emergency security laws, changed legislation, and state condoned violence in daily life. Yet to the extent that any of these NGOs have considered the political implications of their advocacy work is debatable. Some NGOs, namely *The International Crisis Group* (ICG) have collated a wide array of primary evidence and offered an excellent analysis, such as,

...President Robert Mugabe is efficiently putting in place a broad edifice of legislation that creates a *de facto* state of emergency. The objective is to crush all forms of opposition or criticism. The latest legislative and executive actions are remarkably similar to the measures used by Ian Smith's white minority Rhodesian regime to repress ZANU-PF and other freedom fighters in the 1970s (ICG 25/01/02: 2)

Yet, at the same time, because the ICG has used phrases such as "Mugabe's... bellicose words...", this study has felt the need to develop an analytical framework to evaluate the contents of NGOs reports, to better understand the political implications of this information being generated and disseminated through electronic advocacy networks during a time of political and economic crisis (ICG 25/01/02: 5).

This section has two objectives. One, to present a summation of the empirical evidence that NGOs present and to highlight some of the general themes in these reports. Two, to better understand the political implications of this information, and to evaluate why this information is believed to deepen power inequalities “among and within cultures, national economies, genders, religions, races and ethnic groups and other societal cleavages” (Mutua 2001: 207). The purpose of examining the sort of information that NGOs collect is to identify the effects of this information upon the power of the state, the Head of State’s position in international relations and the transformation of Zimbabwe’s interactions with the international community from 1997 to 2002. In the main part, material available from the World Wide Web will be the source material for identifying how NGOs social construction of the state affects the standing of the Head of State in international relations, which in turn affects local communities.

The information used to write the section below relies on a multitude of sources. From local newspapers, to South African newspapers to international organisations such as the International Crisis group to local NGOs such as the Zimbabwe Human Rights NGO Forum. The variety of sources of information is significant for two reasons. One, all these individuals were willing to post this information to the Internet and publicly shame the state for its abuses of power. Two, many of these voices participated in constructing the Zimbabwean politico-legal and economic crisis in the legal and justice system, which gained the attention of the international community.

7.6.2 Documenting Local Struggles

Many NGO reports reveal an important theme: the Zimbabwean civil rights movement was gaining momentum in a number of ways. A few examples presented in earlier chapters will be highlighted here:

1) People wanted the right to demonstrate. The women and men I spoke to in 1997/98 did not want these demonstrations labelled as riots. They were extremely angry that Police Commissioner Augustine Chihuri had crushed the December 1997 National Day of

Protest based on the presumption the ZCTU were allied with industrial employers and white farmers (Z-TC 8/12/97-1).

2) Women and men chose to participate in anticorruption campaigns at the risk of being oppressed by the state. Parliament passed the War Veterans Bill and gave the war veterans \$Z2.6 billion from the Consolidated Revenue Fund (Z-TH 12/12/97: 1), while ignoring the thousands who were working fulltime and could not " ...afford what they want"(Simbarashi male: SLK98 01).

3) On February 12 to 13, 2000, Zimbabweans voted on revised constitutional proposals. They had been empowered by the National Constitutional Assembly's strategy of educating the masses. Women and men had learnt that President Mugabe had amended the Lancaster House Constitution to grant himself security of tenure. The *no* vote represents people's resistance to the Mugabe Administration as a space, the places touched by the civic education on political participation and participants articulating that they wanted the right to chose a new national leader and create a new post colonial future (Z-FG-24/02/00-PE, Z-FG 17/02/00-PE, Z-FG 24/02/00-PE-PE, Z-MDC-ICG-A 2000).

These three examples highlight that since 1997, NGOs have been documenting the activities of the civil rights movement – albeit in different shapes and forms and in different locations, and documenting the process wherein disenfranchised women and men began to move toward organisations and collectively to articulate their visions for the future. For instance, civil society was aware that the human rights NGOs protested against the Mugabe Administration's treatment of demonstrators during the December 1997 National Day of Protest. Since December 1997, there has been a rise of NGOs (see Chapters One and Six). NGOs ability to formally protest became increasingly important to civil society from 1997 to 2002. NGOs gained political power from civil society.

7.6.2.1 Struggles of Ideas about Justice

Many NGOs seek evidence that reveals political biases in the legal and justice system. For example one NGO, the *Crisis in Zimbabwe Coalition*, argues that the Supreme and High Court Judges appointed in 2001 "have shown themselves to be staunch supporters of the government" (Z-CIZC-19/06/02: 28).

Other examples are as follows. NGOs publicise the subtle cases such as documenting civil societies' response to the publication of *Breaking the Silence, Building True Peace: A report on the disturbances in Matabeleland and the Midlands 1980 – 1989*. When this report was released to the public in 1997, the silence had been broken and many began to speak of the state condoned *Gukurahundi* era violence. NGOs also prepared reports, documenting the violence and the Head of State's abuses of power. Many have one aim: *to create more pressure on the sovereign-state*. NGOs provide evidence of the most blatant cases such as the Judiciary's political struggles with the Head of State over three laws: the Presidential Powers Act (1986) and Law and Order Maintenance Act, which became the Public Order and Security Act in January 2002, and the Constitutional Prerogative of Mercy. NGOs use the language of specific legal cases to capture the attention of the International Bar Association and the Commonwealth Lawyers Association and many others. These larger organisations have the political power to protest against the State's use of these laws to legally silence, suppress and deny individuals their political voice. Moreover, as these international organisations' protest, local legal organisations such as the Law Society of Zimbabwe, the Zimbabwe Lawyers for Human Rights can use this social power and draw it into the legal and justice system for their own activism (ICG 12/07/02:12, ZHR-NGO-SR-01/01, LCHR 19/12/01-POSB-HR).

NGOs also document the politics of lawmaking behind the legal cases of *Minister of Lands, Agriculture and Rural Resettlement & Ors v Commercial Farmers Union S-111-2001* and *Tsvangirai v Registrar-General of Elections & Ors S-20-2002*. We have documentation of unofficial dissent of Ebrahim, a member of the original Supreme Court Bench against the Chief Justice Chidyausiku's judgment in the case of *Minister of Lands, Agriculture and Rural Resettlement & Ors v Commercial Farmers Union S-111-2001*. As well, we are offered the unofficial dissent by another member of the original Supreme Court bench, Sandura, when the Court would not consider the application by Morgan Tsvangirai, the MDC opposition candidate in the Presidential election. Tsvangirai claimed that amendments to the electoral laws – such as the Electoral (Amendment)

Regulations, 2002 (No. 15) (S.I. 42A of 2002) - are unconstitutional (Z-CIZC-19/06/02: 28 ff). The specific amendment Tsvangirai was trying to contest was the Electoral Act passed by Presidential Decree (Section 158) on March 5 2002. The changes prohibit NGOs from providing voter information, and restricted the postal voting option to diplomats, military and police. These changes gave the Registrar General extensive powers and took the opposition parties power before the 2002 Presidential election (N-20/03/02- NEOM). This information was used by the human rights activists to gain the attention of the specific countries and international organisations of nation states to place economic and political sanctions against some the members in the Mugabe Administration.

The point being made is that NGOs' collection of facts and laws is a very specific message to a very specific audience: *the legal order* that has the power to direct international power upon the state in a unique manner. This empirical evidence suggests the real evidence of strategies and tactics used by human rights activists to change the complex power relationships between the state and legal and justice system. These NGO reports are evidence of a trajectory of legal activism, seeking to protect human rights, circling the globe, keeping the postcolonial or post soviet state (bound to a location) under surveillance through a Euro-American world view. However, these are not just abstract ideas. We have evidence of the impact of these struggles upon the grassroots, where local socio-spatial political relationships were also changing. With NGOs circling the state, the Mugabe Administration has placed militia bases in primary schools, and the threat of state condoned violence continually intersects with people's daily lives (ZHR-NGO 19/02/02). This information too is being collected by NGOs who tend to position Mugabe against the legal and justice system, as the examples below suggest.

7.6.2.2 Old Laws/New Laws

NGO reports reveal other themes such as details about: legal mechanisms/ emergency legislation; the lack of separation between the elected government and the judicial system; the tacit understanding among civil society and law enforcers being broken; the

ever-present threat of violence currently condoned by the justice system and the state, and militia bases are found in many reports.

For instance, many NGOs identify that President Robert Mugabe used the tight weave of legal mechanisms/ emergency legislation created by the settler government since Independence (1980) to keep the silence intact. The silence also protected the Mugabe Administration in a multitude of ways. The relatively new layers Mugabe has added - the 1987 “Unity Agreement”, the Presidential Powers (Temporary Measures) Act 1986 – have also been quite effective in maintaining Mugabe’s power.

NGOs also offer material evidence of the legal abstraction - *what happens when the sovereign-state transgresses into the space of the legal and justice system*. To illustrate this transgression, NGOs offer empirical evidence suggesting that the Mugabe Administration used the legal and justice system to create a five-pronged attack on civil society. The Mugabe Administration has used quasi-emergency security laws, current laws and created new law; it has gained full control over state institutions, made significant changes within the legal system which in turn has changed how the laws are administered in daily life and condoned violence in daily life. The detail is significant, and some details will be presented here, because these details illustrate how NGOs delegitimise a sovereign-state which is perceived to be authoritarian, rogue, and an abuser of human rights.

Using these silences and forms of legal power, Mugabe has also sought to control all state institutions – the legal, political and regulatory framework. He has used legal mechanisms such as the Presidential Power of Power and Clemency (1953), the Emergency Powers (Maintenance of Law and Order) Regulations (1965), the Emergency Powers (Censorship Publications) Order (1965), the Presidential Powers (Temporary Measures) Act (1986), the quasi State of Emergency laws that have been a daily part of Zimbabweans lives since the 1960s. For instance the Law and Order (Maintenance) Act (1965) implemented in 1965 that was rewritten as POSA. Public Order and Security Act, and passed by Parliament January 10 2002 (LCHR 19/12/01-POSB-HR). Mugabe

continues to use a number of laws to legally silence, suppress and deny civil liberties such as mobility, public voice, written texts and airwaves, freedom to demonstrate and freedom of speech. For example, the Emergency Powers (Censorship Publications) Order 1965 established the censorship of written information. However, the post-Independence government adapted to technological advances in the Western world and broadened the settlers' internal security laws with the Entertainment Control Amendment Act (1983), which widened the scope of the original Emergency Powers (Censorship Publications) Order 1965 to cover video material (Sayce 1987). The significance of Mugabe Administration creating many new legal instruments in the hope to quell the rising social movements, and even going so far as to charge journalists and the opposition under POSA, is that it feels threatened by the transnational legal activists mobilizing the local-global social justice movement, funded by state transformation/human rights/democracy legal-institution-strengthening initiatives (Z-CIZC-19/06/02).

7.6.2.3 Changing the Legal and Justice System

Many NGOs focus on the theme: judicial independence. For example, NGOs represent Godfrey Chidyausiku as closely allied to Robert Mugabe. To briefly highlight a few points made in Chapters Four, Five and Six, examples have been offered in previous chapters - Godfrey Chidyausiku leading the *Chidyausiku* Commission investigating the War Veterans' Compensation Fund; Godfrey Chidyausiku not acting in a manner befitting a judge (see Dodson and Jackson 2001); Godfrey Chidyausiku creating change in the legal culture of the Supreme Court, and raising the concern of the Law Society after Chidyausiku was appointed as Chief Justice Supreme Court Judge (Z-K 19/04/02-PLS). These details highlight the *perception* that Chidyausiku was politically affiliated with the Mugabe Administration (ZHR-NGO SR 09/01). The *perception* of the legal communities and civil society that Chidyausiku was no longer impartial to justice being drawn into the legal system signals a much deeper emotions - a tacit mistrust of his judgement. Legal activists made it clear that they no longer believed that Chidyausiku could fulfil either of his two general functions: administer justice; and safeguard the system of governance. The evidence presented in Chapters Four, Five and Six NGOs provided much detail to suggest political favouritism, and the lack of separation between

the elected government and the judicial system. The empirical evidence provided by NGOs suggests that there is no local legal space that could ensure that citizen's rights remain protected. The Chief Justice Supreme Court Judge Chidyausiku has followed Mugabe's political agenda, this perceived following has been produced and reproduced throughout the country. Many feel that the justice and legal system has been delegitimised locally. Moreover, the Mugabe Administration interpretation of the law seems to administer as the justice of this society, rather than lawyers or judges.

7.6.2.4 Changes to Legal System/Changes in how the Law is administered

NGOs focus on themes such as the lack of separation of powers between legislature, judiciary and executive. This information, interpreted by the legal community, is understood to mean that there is a widespread feeling in civil society that civil society can no longer trust law enforcers such as the police and the army. Rather than making reports to the police, victims of political violence now express fear of the Zimbabwe Republic Police and armed forces. The police, the army and the judges, such as Chidyausiku - appointed as Chief Justice Supreme Court Judge- are perceived to be under the direction and control of the Mugabe Administration. Moreover, civil society generally assumes that the ZRP ignore court orders from magistrates and some members of the High Court, while they intervene on behalf of war veterans. The law appears to legitimise violence in the day-to-day lives of Zimbabweans. The police and army do not appear to be accountable for political violence used to intimidate public opponents of the government. Moreover, civil society tacitly understands that the uniformed forces will not be brought to court (AI 25/06/02: 16, ZHR-NGO 2001-05 see also Z-I 18/05/01).

7.6.2.5 Violence in Daily Life

NGOs also focus on the theme, *violence*. In doing so, many NGOs capture evidence of civil society's resistance to the state. For instance, many NGOs provide much evidence of the Mugabe Administration's use of the legal system and security forces to impose violence upon women, men and children. Since February 2000, the army and police had been inflicting terror upon civilians. Much of the state condoned political violence started just before the Constitutional Referendum in February 2000 and continued for months

after the June 2000 elections (ZHR-NGO-SR-01/01) The ever-present threat of violence currently condoned by the justice system and the state is manifest in militia bases scattered around the country, established at schools and growth points and in their intersection with people's daily lives (ZHR-NGO 19/02/02).

The struggles between transnational legal activists and Mugabe have created a volatile situation in which the common woman, man and child are the most vulnerable. With Mugabe using the Constitutional Prerogative of Mercy to grant amnesty to political allies, *dissidents* are constantly being threatened with state condoned violence, as the following quotation suggests (AI 25/06/02, Z-MDC-Eppel 2000, Hatchard 1993):

Men...[and] women experienced physical torture. Women and children were more likely to have experienced psychological torture...these were virtually all victims of Zanu(PF) violence or intimidation.

The perpetrators were...[the] so-called *war veteran* militia, the youth militia, Zanu(PF) Youth, Zanu(PF) supporters, the ZRP, the CIO...[granted] impunity, both through legal amnesty and partisan policing...[This] leads to a belief that people can be above the law.... (Z-AT-20/05/02-PE 2002: 9-10)

The theme, violence/resistance to the state has been expressed in many ways. For instance, Chapter Five suggested that many are socially conditioned to remain silent. A social norm in this landscape is silence and fear. The women and men we interviewed suggested that many may have wanted changes in the legal system, yet few are willing to risk the threat of physical violence (Z-NCA - Kagoro 2001). We identified that women and men expressed reservations about answering questions about law and authority "they don't want to talk about police...they did not want questions involving the police" ("Tariro" female (SLI98-01-Jan 14/1998). "Most of the people feared the mention of police" ("Nyaradzo" female (SLI98-02-Jan 13/1998). This study also identified subtle forms of resistance to the state. For instance, when *Amai Tsitsi* broke her silence about the oppressive Law and Order Maintenance Act, she had a militant expression on her face. These nuanced descriptions of the local legal culture highlight the day-to-day hardships and struggles that these women, men and children live with, and how they have adapted to the presence of the Mugabe Administration with distinct patterns of silence, muffled protest, anger and frustration.

The international community has been particularly attentive to the thematic representation of violence. For example, as the political landscape became increasingly violent, foreign governments such as the Commonwealth Ministerial Action Group (CMAG), Canada, Australia, the United Kingdom and others began to fund NGOs rather than the state (ZHR-NGO 28/09/01-Crisis). This is another layer of events (EIU CP 2001: 11, 18). NGOs collected the information that was presented to the Committee of Commonwealth Foreign Ministers, the European Union (EU) and the United States (U.S.), the key G-8 countries and the African countries putting forward the New Program for Africa's Development (NEPAD) initiative (ICG 14/06/02: 2-3).

With NGOs collecting information, advocating for legal and economic reforms to representatives from the EU, the US, NEPAD and the Commonwealth Committee, a series of reactions were created at the international level. In October 2001, the Commonwealth was reprimanding a member for corrupt practices and for not following the so-called good governance agenda. They advocated for human rights, development and rule of law (legal and economic reform). By March 2002, the Commonwealth Committee imposed economic and political sanctions upon Zimbabwe changing approximately 14 million Zimbabweans' day-to-day lives (UK- TG 29/10/01, IRIN 19/11/02, CS-19/03/02-PI, C- 19/03/02-PI- 02/26). The significance of this study is that it examines the theme that NGOs highlight in a time of rapid change. Many researchers, scholars and development practitioners have come to rely on this source of information. Moreover, as this study will assert too few make the connection that the thematic representation of law, violence, fear, demonstrations, riots and abuses of human rights is meant to speak to a specific audience: the legal community and legal activists.

The significant point to take from these details is that the collection of information is a process developed by NGOs through time and space. NGOs gradually gain legitimacy in the international community as they advocate for civil rights. Nonetheless, the deeper and much more critical lesson to take from this example is that this has been a study of NGOs research to illustrate the complex political and legal geographies as NGOs respond

inward and outward to current events. Inside Zimbabwe, NGOs offer local people an opportunity to tell their story. Outside Zimbabwe, NGOs offer their information to foreign governments and international organisations of nation-states such as the Commonwealth. They are changing political space locally and internationally.

7.6.3 Lessons from the NGOs Activism

To summarise, this review of NGOs activism during the time period 1997-2002 suggests that NGOs documenting of fact and law is important to the international community. This example is significant because it tells us what sort of information NGOs are collecting. This case study also confirms Tolley's (1994) argument that NGOs that report on the politics inside and outside the legal and justice system are in a powerful position in international relations because they are allied with judges and lawyers. More specifically, this study suggests that NGOs collection of evidence pertaining to the politics of lawmaking related to the legal and justice system makes a powerful statement in the international community about the quality of justice being administered by the legal and justice system.

This study will suggest that the information NGOs collect has the ability to attack the politico-legal-economic structures of the state, because it speaks to a specific audience. This information allows NGOs to gain more power over the state and begin to change the global-local legal order. This case study suggests that NGOs have been advocating for economic and legal reform since the mid 1990s. Because NGOs have been willing to risk collecting this information, they have changed the political and economic status of the elite in Zimbabwe. For example, the Mugabe Administration began to feel the effects of NGOs' information collection and dissemination in 1999 when the World Bank imposed "undeclared sanctions" on Zimbabwe (Z-MDC 17/09/01- IRIN). In March 2002, the European Union and the United States of America placed a targeted sanctions regime on the Mugabe Administration. On February 2003, the EU "...renewed the sanctions against 79 members of the ZANU-PF leadership". In March 2002, the Commonwealth suspended Zimbabwe from the Councils of the Commonwealth. They still have not decided whether or not to lift the suspension (ICG 10/03/03: 1-2, 15). The history of the

sanctions suggests NGOs' ability to provide information that makes the international community respond. This study has documented what sort of information makes the international community respond. There are five lessons to take from this example.

One, this example suggests how NGOs gain legitimacy locally and internationally. By documenting demonstrations and activism, the Head of State's response to the interpretation of laws and the legal and justice system, legal mechanisms/ emergency legislation, the breaking of tacit understanding among legal system, public opinion and public behaviour, and the ever-present threat of violence currently condoned by the justice system and the state, and militia bases, NGOs have participated in the process of agitating with the international community to take legal power away from the state.

Two, NGOs received cooperation from civil society. Moreover there appears that there were some legal mechanisms protecting NGOs so they could remain in a country hostile to the very work they did from 1997 to 2002.

Three, this case study offers a lesson about the sort of information NGOs collect to attack the politico-legal-economic structures of the state. This study also illustrates how NGOs use this information to move through the changing power struggles among civil society, the state and the legal and justice system. This study has followed the shifting power relations, and traced the sort of information being collected by NGOs, which has been used by the international community to direct diplomatic power upon the Mugabe Administration. NGOs documentation of legal cases is possible because of their alliances with the local judiciary and the outside community. Locally, NGOs work with civil society and offered a political space for individuals to publicise a story about state condoned violence. Once this information had been collated, judges could use this information and refer to specific cases, citing qualitative and quantitative evidence of state condoned violence. Many details have been offered in Chapter Six and will not be repeated here. However, Amani Trust's reports were used in a number of legal cases to admonish the Mugabe Administration for state condoned violence in the forum of the international community.

Given the long history of subtle activism within the judiciary who daily navigated around Robert Mugabe's rule of law view, as established above, the judiciary seemed to expect some form of backlash from the Mugabe Administration when bold decisions were made. NGOs were also there to collect this information. Because the tension was directly connected to the space of judicial independence, NGOs fed this information to the legal community. International organisations and institutions such as the United Nations Special Rapporteur on the Independence of Judges and Lawyers, and Amnesty International and Physicians for Human Rights could use the local NGOs reports (ICG 10/03/03: 12-13, AI 25/06/02: 26-27). Once the grassroots level information was in the hands of the international community, diplomatic power was directed at the Mugabe Administration in a multi-pronged manner.

The NGOs' information was used by different interest groups. For instance, INGOs, such as Amnesty International and Physicians for Human Rights focused on the violence, and used the NGOs' collation of stories of violence. NGOs had collated this evidence to provide evidence of abuses of state power, highlighting the laws condoned by the state to legitimise its actions, to create daily terror, repressive actions and economic deprivation. The underlying purpose is a de-legitimisation of the electoral process. They acknowledge that technically, Mugabe won the election. But even before the election, the will of the people was silenced. Their voices could not be heard through the legal clauses and technical loopholes such as the Electoral (Amendment) Regulations, 2002 (No. 15) (S.I. 42A of 2002). The Mugabe Administration had played a role in shifting the courts' decisions, which legally allowed Mugabe to constrain these voices (N- 20/03/02- NEOM, Z-CIZC-19/06/02). However, the INGOs focused on the social injustice of the violence.

The United Nations Special Rapporteur on the Independence of Judges and Lawyers could also trace the political practices connecting the NGOs to the local legal community. As established in Chapter Three, the local judiciary tend to remain silent and politically invisible as they take legal power away from the state. Many rely on the intricate political

networks at different geographic scales. In an unusual act of public activism, shortly after Chief Justice of Zimbabwe Gubbay *resigned*, he posted his article on a South African newspaper website for other legal activists (Williams 2001, ZW-News 24/04/01, ZW-News 15/02/01, SA-TS 08/01/01, Sayce 1987: 136, Palley 1966). The key point is that activism is very unusual. But it is significant because Gubbay used the same strategy that NGOs were using to shame the Mugabe Administration. It appears that the Judiciary can exercise their own activism in the shadow of NGOs' activism.

As NGOs gained more political power in the local and international forum with their *facts* of civil rights abuses and the law, some of this power was transferred to the local legal and justice system. Empirical evidence of this shift in power is revealed in the High Court rulings. For instance, when the new opposition party, the Movement for Democratic Change (MDC) took the Mugabe Administration to court for beating and torturing MDC supporters during the election period, local judges had to make a decision (see Chapter Six, Table 6.3). High Court Judge's rulings, in this case, were an act of activism. Many chose to consider the Amani Trust reports in their evaluation of the justice being drawn into the standing laws of the court (see Chapter Three, Section 3.2.1.4 *Doctrines of Justice: Visions of the Role the Legal and Justice System has in Society* and Section 3.3 *Political Practices in the Legal and Justice System*). The Amani Trust reports connect politically motivated violence and intimidation with trauma, torture and violence. Different High Court Judges evaluated the qualitative and quantitative evidence of violence – physical torture, psychological torture, etc. This evidence was used in the case against some of the *elected* ZANU (PF) representatives. This evidence became the deciding factor to annul some of the ZANU (PF) elections, even at the risk of drawing Mugabe's anger (see Chapter Six, Section 6.3.2 *Amani Trust*).

The significance of NGOs collating information on the politics connected to the legal and justice system is that it opened up a window for the United Nations Special Rapporteur on the Independence of Judges and Lawyers to evaluate the Mugabe Administration's treatment of judges in the legal and justice system. NGOs brought evidence of the

activism of the High and Supreme Court Judges, which was connected to International Bar Association and the Commonwealth Lawyers Association and United Nations Special Rapporteur on the Independence of Judges and Lawyers; the Commonwealth Ministerial Action Group (CMAG), Canada, Australia, the United Kingdom and others who chose to fund NGOs rather than the state (ICG 10/03/03: 12-13, EIU CP 2001: 11, 18).

Yet, this third lesson is significant because it offers a re-reading of the NGOs' ability to draw international attention onto a *norm violating state*. NGOs had to deepen and broaden their reach locally and globally so that they could break the gridlock between the judiciary and the state. They daily challenged the Mugabe Administration, strategically collecting information on the politics of lawmaking in the past and present. NGOs tenacity began to shift the Mugabe Administration's domination over the landscape. NGOs have revealed how Mugabe's control silenced many issues that the public deserve to know. NGOs have also emphasised to the Mugabe Administration, that the government could not control the movement and flow of ideas and images of victims and stories of suppressed demonstrations. This daily challenging by NGOs has shifted legal, political, economic and social patterns in the past few years.

Read at a national-international level, this case study suggests that all this activism has the effect of shifting the diplomatic discussion of Zimbabwe's crisis into abstract space. However, at the grassroots we see the real implications of this transnational legal activism. Judges have sacrificed their professional careers. Women, men and children are being threatened, tortured and raped. These individuals try to continue their day-to-day lives against the constant threat of violence. These are the ones been intimately connected to the human rights movement, shaping new legal institutions and reshaping state-society relationships. As individuals on the front line of this activism, so many individuals' personal and professional lives have been affected. Participation in broader struggle, wherein legal activists seek to have wider visions of justice to be included in

the standing laws of the state is, as stated by Sarat and Scheingold (2001b: 12) particularly “controversial” (see also Dodson and Jackson 2001, Cain and Harrington 1994).

These three lessons highlight the positive lessons that we can take from the example of the NGOs activism during the time period 1997-2002 when NGOs documented fact and law and became increasingly important to the international community. However, there are a number of deeper and more important lessons to take from this example.

7.6.4 Critical Lessons

The fourth lesson is a lesson about a global shift in thinking in the North inspired by the NIE logic and a consideration of the political implications of this shift in thinking.

Theoretically, many scholars suggest that nongovernmental organisations (NGOs) are the institutions used to collect and disseminate information and to advocate for legal and economic reform (Cameron 2000).

Conceptually, very few studies are making the local-national-global connections. The Transnational Advocacy Network framework ((TAN framework) discussed in Chapter Two is unique because it traces how NGOs collect information from the individual and draw this information up to the international community, which in turn directs this information back to the nation-state in the form of diplomatic power. The empirical evidence presented in this study seems to confirm the conceptualisation of the TAN framework. For instance, NGOs have become the popular forum of human rights advocacy. A diverse group of organisations and institutions that range from multilateral development banks, international and regional organisations of nation-states, NGOs, educational institutions, and research organisations have adopted NIE logic. Many hire NGOs to collect information about the politics inside and outside the legal and justice system. Moreover, the method of information dissemination that the TAN framework outlines has also been used by different organisations and institutions studied in this dissertation. For example, the World Bank, the Commonwealth, Chief Justice of Zimbabwe Gubbay and NGOs such as the National Constitutional Assembly (NCA), Amani Trust and many others have used the internet (SA-TS 08/01/01, see Table 1.3).

This study has benefited from their willingness to share their research. As noted in the separate bibliography, most of the empirical evidence has been collected through the World Wide Web. However, very few NGOs (if any) acknowledge the need for methodological sensitivity.

This leads us to perhaps the most important point about the global shift in thinking that supports NGOs as part and parcel of the development process. Methodologically, we need to be asking a number of deeper questions about human rights advocates using the Internet. Many new questions need to be asked and answered. This study has only begun to probe into some of the deeper questions. For instance, are NGOs acknowledging their responsibility to represent their “subjects” appropriately, particularly when using electronic advocacy networks to fragment state sovereignty?

The point being made is that the information that NGOs collect seems to be making an important difference in how the international community responds to Zimbabwe’s crisis. The information covers a wide array of themes such as - struggles of ideas about justice among members of the legal and justice system and the sovereign-state, the political practices and patterns of lawmaking, violence, torture, economic crisis, international law, domestic law, quasi-emergency laws to the international community through the cooperation of civil society and many others. Yet how is this information being interpreted and by whom? Does who-ever is interpreting this information know about the Rhodesian/Zimbabwean legal history which have affected cultural politics, the legal personality and positionality of women and men and their patterns of resistance to authority and even leadership patterns in the post-Independence era?

Several important criticisms of human rights NGOs collection of information can be found in the contemporary literature. For instance, Mutua (2001) raises a number of new questions when he suggests that many of these reports have the metaphors of victim (the abused), savage (the state) and saviour (human rights advocates). He suggests that we need to more deeply examine NGO reports for their political ambitions and political implications and ask who is benefiting from these images? Mutua’s (2001) argument is

significant, particularly as Euro-American countries are now hiring African NGOs to collect this information. The critical lesson we can take from NGOs' information collection and dissemination is that scholars need to ask a number of deeper questions such as whether or not human rights NGOs are supporting the international global economy or if NGOs allow the Euro-American nations to unify their capitalist agenda and erode the economic protectionism of individual nations, and to gain more access to the markets and resources of economies in transition based on the information collected by NGOs.

7.6.5 Conceptual Lessons

The fifth lesson is a conceptual lesson. The Zimbabwe-Commonwealth-World Bank case study read through the Transnational Advocacy Network framework ((TAN framework) Risse and Sikkink 1999) fits almost too neatly into this analytical framework.

Thematically, this case study has all the right elements: repression of local citizen's rights, information flows, local civil rights activists' demands blocked by an authoritarian regime, the collection of information, local and international organisations trying to force the state to incorporate international human rights norms into their daily practice, international outcry about the arbitrary uses of power, international organizations and norm abiding states creating more pressure on the norm violating state and the international community threatening the state with sanctions and international ostracism. The TAN framework seems to provide a satisfying end to the violence, chaos, terror, fear, breakdown of local communities and informal economies. The TAN framework suggests that political power flows from the citizen through to the international community to bring political pressure on the sovereign state, and that at some point, despite the changes to the politico-legal landscape, the state leader will fully support legislation that supports international norms and administers the law to respect human rights.

The significance of this multiscale analysis is that the TAN framework appears to be able to interpret the empirical evidence, as it has been presented above. The TAN framework also seems to be able to explain why various state

transformation/democracy/human rights NGOs illustrate that Mugabe knows the limits of international law and that Mugabe continues to abuse civil liberties, even though he has ratified many International Instruments - the International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights and the African Charter on Human and Peoples' Rights and many others (HRW-Z 8/03/02-Land, AI 03/01- Z).

The details presented in this chapter and the past three chapters acknowledge that Mugabe violates basic civil rights of the people such as freedom of speech, freedom of association, freedom of movement and many others. The troublesome element of the TAN framework is that it seems to glide over the hard and harsh facts of torture, violence, disrupted social structures and the psychosocial fear of violence that real people experience when a Head of State transgresses into the space of judicial independence. The details provided in the NGO activist/legal activist example, offered above, were included specifically to illustrate the irony of scholars who tend to describe this process as a *transformation of state power*. Many scholars who publish under the rubric of the state transformation literature present this process as a positive outcome of international relations (see Risse and Sikkink 1999; Sarat and Scheingold 2001). Indeed, for Kent (2001: 623), this is an era in which the world attempts to encourage all states to become *normal* and internalise human rights norms through accession to “numerous human rights instruments”. However, while some celebrate NGO agitation within the local legal culture, building alliances with the judiciary and the international legal community, the Head of State responds to the shifting relationships in and among civil society, and democratic-institutions/transnational legal activists (judges, lawyers, NGOs and the media), this study takes a somewhat different position, which is the topic of the concluding section.

7.7 Conclusion

This chapter has offered a comprehensive analysis of the dissertation, and highlighted how the TLAN framework offers a number of new insights into the political spaces occupied by transnational legal activists. This analysis is important for a number of

reasons. To begin with, a wide range of lessons about the political implications of the different coalitions seeking to change laws in a place have been identified and discussed. These range from the World Bank using the Internet to reach into developing countries that wish to borrow funds in the future, to the process of how NGOs gain legitimacy locally and internationally, to a sovereign-state feeling threatened by all this activism and silencing the civil rights movement with laws and removing the few protective legal mechanisms that exist for civilians to protect their civil rights. The significance of identifying all the lessons is that it provides a careful analysis of the potential political implications of legal activism. This empirical evidence lays the groundwork for a theoretical critique of the TAN framework. These points would not surface if this dissertation had used only the TAN framework as its intellectual point of departure. Moreover, many of these points reveal the sorts of future studies that could be initiated, a point discussed in the next two chapters.

The Zimbabwe-Commonwealth-World Bank case study raises four specific points of contention with the TAN framework. First and foremost, this sort of representation of real women, men and children's fear of state condoned violence is irresponsible. Theoretical models such as the TAN framework are precisely why NGOs collect qualitative and quantitative facts of state condoned violence. Moreover, these facts are interpreted by Euro-American scholars as a *normal* process of international relations. The harder questions of *who does this information serve* or *why are these reports which are supposed to empower local people, fed into the political practices of the global capitalist system* but do not often surface in the mainstream literature (see Mutua 2001, Sarat and Scheingold 2001). Nor will these difficult questions be asked if the empirical evidence is simply interpreted through the TAN analytical framework.

Second, the celebratory note found in the TAN framework also allows for the TAN framework to allow scholars to gloss over the more disturbing questions. Precisely because the TAN framework does not carry these ideas quite far enough, most scholars do not have the analytical tools needed to understand how the flow of power from human rights legal-institution-strengthening initiatives is easily co-opted into the NIE inspired

legal-institution-strengthening initiatives. The argument being made is that the World Bank/Commonwealth good governance agenda thrives on the details of violence, corruption, deaths and injustice such as the ones provided in this, and previous, chapters. Moreover, the Commonwealth - World Bank (1997-2002) good governance agenda re-interprets these details to support its own NIE/LDM inspired development initiatives. In short, the TAN framework, as a conceptual framework used by scholars, legitimises the World Bank's NIE/LDM reasoning. However, because this dissertation has focused on transnational legal activists, rather than simply on the human rights movement, the analysis offered suggests some of the complex outcomes that will occur as a result of NGOs advocating for legal and economic reform. The analysis pivoted around the fact that the state resents being made vulnerable to the international community through the different forms of intervention reaching into its legal and justice system.

Third, and related, the TAN framework must be understood in the context of the global political economy in order to appreciate the political implications of using this analytical framework. To begin with, the global political economy is supporting the sorts of social movements that erode sovereign-state protectionism through state institutions. As argued throughout this dissertation, transnational legal activists/NGOs who advocate for legal and economic reform have the power to make the sovereign-state vulnerable to the international community, unlike any other social movement. The point being made is about having the adequate information to make an informed choice about using a theoretical framework to support one's political position. The choice to use the TAN analytical framework needs to be made based on an awareness of how one's research, scholarship or activism supports or challenges this type of intervention in the affairs of the state, as well as the possible implications to the most vulnerable when this research is published. For a scholar who is initiating his/her research from a postcolonial political position, this point is even more relevant. Yet, too few scholars tie the TAN framework to shifts and changes in the global political economy or highlight the negative political implications of using this analytical framework.

More concretely, one thread binds together scholars who use the TAN framework to justify their interpretation of progress in the human rights movement, human rights advocates who work with grassroots organisation, and local communities that are learning about how the legal and justice system could be used to protect their rights. All use legal discourse to define their agenda. If a text is written, the legal phrases contained within still need to be interpreted. For this reason, Dezalay and Garth (2001: 354-55) rightly identify that the TAN framework provides a "...particular reading of...the law". The law read through NIE/LDM reasoning will be interpreted in a manner that suggests that economic progress will bring back human rights, the sort of logic that legitimises a state's suppression of labour union strikes and political demonstrations (Tshuma 1999).

As has been argued throughout the length of this dissertation, international lending agencies and international organisations of nation-states such as the World Bank/Commonwealth coalition appear to be using the NGOs' human rights advocacy information to propose a post conflict development initiative. On the one hand, the positive outcome of the presence of the NIE/LDM logic is that the global community has mobilised to protect the individual from the state. Moreover, many Euro-American nations are financially supporting NGOs to further this agenda. Many Euro-American nations rely on NGOs to collect information and advocate for human rights. Global institutions such as the United Nations, the World Bank, Amnesty International, etc, support NGOs because they can tap into the voices of the people (Tolley 1994). Moreover, in the case of Zimbabwe, international organisations of nation-states, regional organisations of nation-states, and individual states such as the EU, the US, NEPAD and the Commonwealth Committee have used the NGO reports to construct their policy documents.

However, on the other hand, because the NIE/LDM logic is the theoretical basis used to hire NGOs, the negative factors tend to outweigh the positive (Cameron 2000). Regional organisations of nation-states, and individual states such as the EU, the US, NEPAD and the Commonwealth Committee using the NIE/LDM reasoning are hiring NGOs to report on human rights. This means that NGOs now use the legal discourse rather than

indigenous language of human rights. For instance, the larger indigenous NGOs, such as the National Constitutional Assembly, funded by Euro-American agencies have focused on the legal motif -the Constitution – to politicise the post-Independence politico-legal system local society. The motif – the Constitution - is important. This is the language of the NIE/LDM logic. The NIE logic suggests that if one limits the government constitutionally to reduce the opportunities by political elites, and limit state power, the business sector can strengthen market institutions that in turn will strengthen politico-legal institutions thus improving the economy (Keefer and Knack 1997, Ayittey 1999, Harrison 1999, SA-TST 08/07/2001-Gubbay, also see ZHR-NGO 1999a). Other NGOs provide much evidence of the NIE/LDM rhetoric. For instance, the NGO, *Crisis in Zimbabwe Coalition*, argues that the “...conduct of Zimbabwe’s government over the past two years is antithetical to every ideal of good governance that is expressed in the NEPAD document” (Z-CIZC-19/06/02: 41). The representation of human rights abuses is just one negative outcome. The pivotal and critical point being made is that legal discourse is a geopolitical discourse, interpreted by nation-state leaders, international funding agencies, etc. These individuals interpret NGO reports to develop foreign policy documents or think through post conflict development policy documents. Many think through their analysis with NIE/LDM reasoning. As will be subsequently discussed, the geopolitical implications of this reasoning must be carefully examined in future studies. While we might applaud the rapidly moving picture of activists creating political and social change, we must also raise the deeper questions such as – *who will be served by this local activism?*

Fourth, thinking through the celebratory scholarly tone discussing *state transformation* in the broader context of international relations opens up the broader question about whether or not NGOs represent grassroots issues (see Mohan and Stokke 2000). At a more specific level, this line of questioning suggests that we need to question the tendency to celebrate NGOs’ new and important role as a geopolitical voice (Price 1999). This study does not seek to contest NGO activism or commitment to social justice and political empowerment. Rather, this study seeks to highlight the contradictions in NGOs advocating for legal and economic reform, as well as question how NGO activism might

be affected in the long-term. Scholars need to think through how the broader global political economy as a backdrop which currently supports NGOs advocating for legal and economic reform, as well as critically evaluate why NGOs documenting civil societies' demand for more interaction with the legal and justice system supports the NIE/LDM logic in a manner that attacks the politico-legal structures of the state, yet does not empower the local civil rights movement. This is just one contradiction that has surfaced from the Zimbabwean case study. Many others are evident. The intention is to lay the groundwork to prevent international lending agencies from financially benefiting from the shifting power relationships among civil society, the legal and justice system and the state. These shifts and changes often meant more conflict for civil society. As mentioned above, civil society's activism is useful to international lending agencies because such activism legitimises their legal development initiative in the post conflict era.

Perhaps before celebrating the presence of NGOs that educate local people about their political rights; that work with smaller indigenous NGOs; that use a variety of strategies and tactics to de-legitimise the Head of State; and that participate in geopolitical discussions with the Commonwealth Ministerial Action Group (CMAG) and SADC leaders (ZHR-NGO 28/09/01-Crisis, ZHR-NGO 28/09/01-CAA, CS-9/06/01-01/55) there is a need for some critical reflection. How will the overt human rights activism affect other less political human rights NGOs such as Save the Children UK which implements a food relief program for children and the indigenous Zimbabwe Church Related Hospitals (ZACH) which helps with agricultural development, savings clubs, and self-help projects for youth and women? We need to be asking how these NGOs will be affected (Z-K-Rogers 24/10/02, ICG 2002: 4). This is the topic of the next chapter.

Chapter Eight: The Law and the *Postdevelopment* Movement

8.1 Introduction

This dissertation has identified three ways in which the critical legal institution literature can be pushed forward. The first accepts the original contribution of Trubek (1972, 2000) who argues that the Law and Development Movement is a development scheme based on *modernisation* theory, a complex form of social and economic intervention because it pinpoints the legal and justice system as the site for development. A geographic line of questioning was developed to focus on the spatial relationships of international institutions such as international lending agencies, international organisations of nation-states and international peacekeeping organisations (World Bank, the Commonwealth, and the United Nations' Special Rapporteur on the Independence of the Judiciary and Lawyers) whose international reach into individual nation-states continues to deepen and broaden in this era of globalisation. Much of the literature that discusses transnational legal activists is crowded with visions of space, place and legal structures in abstract space. Yet, this dissertation has argued that very few studies offer a conceptualisation of the political space occupied by transnational legal activists.

With some boldness, this dissertation developed an analytical framework, the Transnational Legal Activists Network Analytical Framework (TLAN) to analyse how trajectories of legal activism change a legal culture. Broad-brush strokes were used to sketch the connections among sovereign-states, the United Nations Charter, the surveillance of democratic institutions such as NGOs, the United Nations' Special Rapporteur on the Independence of the Judiciary, trajectories of legal activism, and economic development. Three different geographies have been identified: the ideas about justice; the sovereign state and the legal and justice system have similar, but different, set of identity politics; and legal activists are harboured by the legal architecture. Moreover, this dissertation has deconstructed transnational legal activists reports – reading for the presence of the NIE/LDM logic. In addition, it has reconstructed a new geography sketching a territorial presence of the NIE/LDM logic at local, national and global scales. Empirical evidence provided in the last four chapters established that the

acknowledgement of the differences between the legal and justice system and the state reveals the presence of a social movement challenging the state from inside and outside state institutions. Thus far, a relatively strong argument has been offered, suggesting that the analytical framework is conceptually solid.

The second focuses on the legal and justice system as an object of inquiry. To extend the current analysis, a line of thinking was developed to think about the means by which international organisations and institutions cite the human rights rhetoric, encourage individual judges and lawyers to enter the political arena, then in the course of the events of a civil rights movement being advanced by the courts in the streets, these very institutions interpret the activism inside and outside the courts through a NIE/LDM lens.

The Zimbabwean case study confirms the (generally unelaborated) point that many institutions using legal discourse interpret social interactions through a NIE/LDM logic, and suggest that demonstrations, riots, protests, informal economies and other forms of *illegal* action simply provide evidence that society is in need of stronger institutions, including laws that will provide stability and order. Activism within the legal community seems to be more of a product of the NIE/LDM discourses than as a response to the new opportunities this Rapporteur on the Independence of the Judiciary and Lawyers offers to them to become more active.

The third has focused on how local societies respond to these changes being driven by local and global forces. To extend the critical legal institution development literature, analysis of the response of local communities was completed with an eye to the postcolonial/postdevelopment literature (Watts 2000b). By establishing the similarities and differences between different trajectories of legal activism, this dissertation has suggested some of the North-South relations affecting postcolonial people's legal reality have changed as a result of the NIE/LDM logic. Details about how the day-to-day lives of Zimbabwean women, men and children have been changed were included precisely to challenge Western cultural hegemonic politics and practices as well as stereotypical forms of representation.

The significance of pushing forward some of the thinking about the impact of the NIE/LDM logic is to fill a gap in the literature. This chapter extends the point made earlier, that the critical legal institution development literature generally fails to engage with the more troublesome questions of who is socially constructing the notion of development, what sorts of methodologies shall we use, and is our choice of theory potentially harmful to our subject peoples. In the same breath, the argument will be made that the political project of legal institutional development has remained relatively unnoticed by the leading development and post development theorists (Bates 1995). The key lesson that can be learnt from identifying this gap in the literature is that the two literatures share many themes.

This chapter will not offer a review of the literature. Previous chapters have done so. Rather, the purpose of this chapter is to explore the possibilities this dissertation may offer to future studies. Moreover, an example will be given which suggests that these are not abstract claims. Rather, they suggest a pressing need for these types of empirical studies, and new analytical frameworks.

The analysis offered in this chapter is important for three reasons. First, this chapter, as does much of the dissertation, confirms the basic argument made in this dissertation: the territorial shape of legal activism and its political implications are being ignored in the geographic literature. This implies that the broader material and political processes of transnational legal activism have been analytically marginalized in the geographic literature, including legal activists propounding the NIE/LDM logic.

Second, this analysis begins to hint towards some of the really interesting future studies that could be initiated. This dissertation has challenged the vision that the "...strictures on non-intervention in internal affairs [are] embedded in the Charters of the United Nations" (Olonisakin 2000:41). The argument made is that this constructs the assumption that other nation states cannot interfere with the internal affairs of a state. What the Zimbabwean case study suggests is the conceptual limitations of many legal scholars

because they do not take space and spatial relationships seriously. In one way, this discussion confirms the point made by Blomley (2001) that there is a serious gap between legal and geographic thought. In another, this discussion suggests the need to keep pushing the boundaries of the geographic discipline. The tension that will be identified is that Robert Mugabe tolerated the multiple attacks made by human rights NGOs for five years, because he signed numerous international agreements. The interesting tension revealed is that the symbolic power of humanitarian international law held open a space that made the state vulnerable for five years. After five years of being attacked, more oppressive laws are being shaped within the national borders to quell the presence of these quasi-legal mechanisms. This example suggests why future postdevelopment studies – which often have very little to say about legal discourses – must begin to carefully examine the various tensions, complexities and points of intersections between domestic and international laws.

Third, the line of questioning initiated through the TLAN analytical framework creates an important position for future geographic studies of law, economics, space and society. The analytical lens focuses on separate identity politics of the state and the legal and justice system. Recognition of this divide creates an important analytical tool for future geographic investigation. Moreover, the groundwork for future dialogue between the postdevelopment theorists, legal analysts and political scientists under the rubric of a geographic interpretation of the law and development movement has been initiated. The intent is to continue contesting assumptions about legal space. These points and others will be discussed in this chapter and the next.

8.2 The Law and Development Movement as a Development Scheme

To begin with, the LDM as a development scheme is extremely complex. What the critical legal institution development literature has shown is the complex forms of interaction of the law, economics, rules, social norms, patterns of obligation, informal institutions, etc. Law, in this sense is a form of sociability: reactions by individuals to changes in the social, economic, and political and legal landscapes. More importantly, the critical legal institutional development literature gives reason to question the

profoundly individual response to new laws constructed and the definition of law and development.

Acknowledgement of the different forms of oppression, be they patriarchy, racism, capitalism, etc, is a key thread in this literature. Yet, more precisely to the argument being made is the point that the critical legal institution development literature fails to give weight to the choice of the individual faced with opportunities, which may allow her to have more political, economic, cultural or legal rights, or the threats that may take these away. In contrast the postdevelopment literature acknowledges that North/South, urban/rural, male/female, etc. dualisms tend to marginalize the voice and representation of the individuals. These differences suggest that the two literatures have much to offer, if and when, bridged in contemporary and future studies.

8.3 Passing the *Post* in Postdevelopment

The redefinition of development as well as the shift away from neoclassical economic discourses to the politico-legal/economic discourses of *good governance*, *rule of law*, *human rights*, *judicial independence*, *private property rights*, etc. has thrown into question the postdevelopment-accepted neoclassical economic analysis of the tactics, practices and policies of development and the legal geographic analysis of socio-spatial relations of location-specific cultures of legal and justice systems. While the postdevelopment literature has become known in the poststructural/postcolonial/postdevelopment literature for its use of discourse analysis, it appears that postdevelopment theorists have been hesitant to perform discourse analysis of legal discourse, and reconceptualise the political implications of the legal discourse circulating in popular culture (Nederveen Pieterse 2000: 180, Peet 1996). Yet, there are many such case studies waiting to be initiated, as the example below suggests. This example highlights why we need a deeper understanding of the political implications of legal discourse.

8.3.1 Post 2002 Structural Changes Affecting Zimbabwe's Legal Culture

This dissertation has analysed the transformation of the legal culture, and the political structure of a legal and justice system from August 1997 to June 2002. Since October 2002, a number of changes have occurred in the transnational legal activists community within Zimbabwe.

NGOs may collect information to put pressure on a sovereign-state, but they do so at the cost of their own security. One effect of the shifting power relations in the legal and justice system is that the legal architecture protecting legal activists within Zimbabwe is quickly being re-written. In September 2002, the Ministry of the Public Service, Labour and Social Welfare issued a public notice in *The Herald*. The public notice highlighted the Private Voluntary Organisations (PVO) Act, Chapter 17:05, Section 6. The notice was that NGOs register with the state. NGOs, that do not, are warned that they risk prosecution. The PVO Act allows the Minister of Social Welfare, Labour, and Public Service to suspend an organisation's executive body or members of the executive committee and appoint persons to manage the affairs of the organization. The Mugabe's Administrations' interpretation of the PVO Act also allows the state to shut down organizations, and to silence independent media which investigate and publicize human rights violations in Zimbabwe (AI-Z-16/11/02, Z-K-AT 15/11/02).

This is the second occasion that the Mugabe Administration has used legislation to silence NGOs. Initially, the Mugabe Administration retained the security legislation created by the Rhodesian government which passed the Private Voluntary Organizations Act (1967). The purpose of this was ensure that private voluntary organizations would register with the state so that the state could collect information on, control, and monitor registered private voluntary organizations. Human rights NGOs have always been aware of the threat posed by this legislation. So, too, has the local legal community. In 1995, the Supreme Court ruled that the Private Voluntary Organizations Act (PVOA) was unconstitutional (USA-Z-HRR 2000/2001, USA-Z-HRR 1998/1999, Z- NANGO 2002, Z-K-NANGO 2002, Z-K-PVO Act 01/09/02). In 1997, the PVOA was enacted. But it

was not until the Godfrey Chidyausiku became the Chief Justice Supreme Court Judge - changing the culture of the Supreme Court - that we saw these sorts of deeper changes in the formal legal culture. Now that the Supreme Court is unable to formally challenge Mugabe, NGOs appear to have very little political space to speak for the oppressed (Z-K 19/04/02-PLS).

The power relations between Mugabe, NGOs and the legal and justice system have changed from 1995 to 2001, which has had a direct impact on NGOs. When Godfrey Chidyausiku became the Chief Justice Supreme Court Judge, Mugabe was able to reach into the space of judicial independence with relatively little opposition. Before 2001, NGOs felt that they could rely on the legal and justice system to protect their activism. They felt that the 1995 Supreme Court ruling protected NGOs. For instance, partially because of the 1995 ruling, over 200 NGOs came together. In 2001, a number of visible, vocal and politically active NGOs joined to represent the views of Zimbabweans who were protesting the extreme hardship, poverty, violence, political intolerance, climate of fear, disorder, instability, rapid economic decline which had brought enormous suffering to Zimbabweans and the government's lack of respect for the law. Local indigenous NGOs made connections with international organisations. For instance, a forum of Zimbabwean, Harare-based NGOs – the Zimbabwe Human Rights NGO – which has monitored the violence (1998 to 2002) made connections with the international organisations such as the Physicians for Human Rights, Denmark (PHR-DK). In turn, the Physicians for Human Rights published three reports on torture and human rights abuses. These reports were distributed locally and globally. The Physicians for Human Rights, Denmark (PHR-DK) also networks with the International Crisis Group, Lawyers Committee for Human Rights, New York, Rehabilitation and Research Centre for Torture Victims (Denmark) which specializes in treating torture survivors, the International Rehabilitation Council for Torture Survivors (IRCT) an independent, international health professional organization, which works for the prevention of torture worldwide and supports the rehabilitation of torture victims and Amnesty International which regularly report on human rights abuses and the repression of civil society and human rights activists. The coalition of NGOs called upon the United Nations, foreign

governments, the Commonwealth, the European Union, SADC and the African Union to use their influence to restore peace, political stability and lawfulness within Zimbabwe and compliance with the Harare Declaration, the African Charter on Human and People's Rights and the United Nations human rights instruments (Z-K-Crisis-NANGO 04/08/02).

This postscript is an acknowledgment of two facts. First, many NGOs are driven by passionate and committed individuals advocating for legal reform. Many individuals are deeply concerned about human rights abuse, social injustice and abuse of power through the law. The empirical evidence presented in the past four chapters attests to the commitment of individuals working with NGOs. NGOs tenaciously collect information during times of intense economic, political, social and cultural transition. Second, the way that this dissertation has been written suggests that NGOs are empowered by externally driven legal-institution-strengthening initiatives. Yet, reality is somewhat different.

NGO investigation of alleged human rights is always under threat from a sovereign-state. NGOs are allowed to remain because Mugabe signed international treaties such as the International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights, African Charter on Human and Peoples' Rights and others (HRW-Z 8/03/02-Land, AI 03/01- Z). As noted in Chapter Six, NGOs such as the Zimbabwe Human Rights NGO Forum have taken a dominant position during the Zimbabwe political and economic crisis. But as emphasised in this chapter and others, Mugabe knows the limits of international law and Mugabe continues to abuse civil liberties. The events in October 2002 suggest that Mugabe is fully aware of his legal powers, reminding NGOs that he can threaten them with the PVOA. The critical lesson is that NGOs are very vulnerable to the legal landscape that they navigate within. The Mugabe Administration's threat to use the PVO Act to suspend or shutdown NGOs or infiltrate an NGO by inserting an individual to manage the organization will have far reaching effects locally and globally (AI-Z-16/11/02, Z-K-AT 15/11/02). The significance of this empirical evidence is that it challenges the TLAN as a conceptual

framework and suggests the need to revisit some of the assumptions made about the vision that the legal architecture offers a protective veil of laws for legal activists.

Under the PVO Act, NGOs such as Amani Trust will be deeply affected by the Mugabe Administration's threat to use the PVO Act. By threatening Amani Trust locally, the Mugabe Administration has been able to control the ability of this NGO to investigate, disseminate or advocate for the local civil rights movement. But more important, the specific NGO which has been threatened by the state through this notice are Amani Trust, as suggested by the quotation below:

On 13 November [2002], the government published a list *of NGOs, which allegedly threaten national peace and security*. On the same day, Patrick Chinamasa, the Minister of Justice, Legal and Parliamentary Affairs made statements in parliament accusing Amani Trust, a leading Zimbabwean human rights and service organization which appears on the list, as well as other organizations, of destabilizing the country. The Minister of Public Service, Labour and Social Welfare, July Moyo reportedly told parliament that organizations such as Amani Trust which are not registered under the Private Voluntary Organizations (PVO) Act would be forced to close their offices or face arrests (AI-Z-16/11/02 (emphasis added)).

The broader and deeper effect of the PVO Act is that it silences many NGOs. Amani Trust will no longer be on the landscape monitoring the violence. More importantly, the ripple effect of silencing Amani Trust is that smaller NGOs and human rights advocates have lost one of their strongest allies which has effectively connected local voices to international organisations (D-PHR 21/05/02-PPE (see Chapter Six)).

The TLAN analytical framework is useful because it acknowledges that the ideas about *justice* hold the power to restructure societies. The significance of this broad understanding that ideas filter through societies also acknowledges that when NGOs challenge the Mugabe Administration, they signal the broad *injustice* of the PVO Act to the broader community.

Based on Paasi's (1991) treatise on *institutionalism* this is the process through which postcolonial peoples become increasingly connected to the legal and justice systems. In Oct 2002, NGOs questioned the legality/constitutionality of the Minister's notice to

NGOs - a public announcement that all NGOs must register with the state or stop all activities. The main question was whether or not “the Notice really is gratuitous legal advice by the Ministry” or a legal order (Z-K-PN 08/10/02). Moreover, the Legal Resources Foundation is an NGO which has challenged the Ministry of the Public Service, Labour and Social Welfare’s Notice:

...the LRF therefore calls upon the Minister to desist and abstain from his threat to arrest or close down any so-called illegal NGOs, as such action is a clear violation of the freedom of association (Z-K-LRF 18/11/02).

However, those who would challenge the Mugabe Administration through the courts are well aware of the pro-ZANU (PF) judges rewriting many of the laws and overseeing the court cases. Those who seek to publicise the contradictions of this legal threat to NGOs are all too aware of the possibility political implications to their own legal security. The Broadcasting Services Bill (2001) and the POSA are an ever-present threat. These legal instruments and others have been used to suppress citizens’ voices, journalists, MDC opposition activists, civil society and demonstrators and others (Z-AT-20/05/02-PE 2002, UK-TST 18/02/01; Z-K 19/04/02-PLS, SA-BD 21/05/02; Z-CIZC-19/06/02: 31). The geography of the idea that this law is *unjust* resonates within the legal community, as well as those whose careers, daily lives, public voice, private conversations will be affected by this law and others. Because this idea resonates with those who understand how oppressive the state using the law can be, individuals may have become increasingly receptive to human rights NGOs, the legal and justice system and in turn offer symbolic support for the United Nations’ Special Rapporteur on the Independence of the Judiciary and Lawyers who seeks to ensure that the state and the law remain somewhat separate, and thus establishing international and local mechanisms to disempower the state. This is how local societies adopt the vision that international laws and institutions have the power to protect their rights. In short, the TLAN analytical framework reveals the process of the *institutionalisation of the rule of law*.

8.3.2 Several Anticipated Effects

The TLAN framework has separated the sovereign state from the legal and justice system to evaluate how different elements of the legal architecture are being invoked by the state to suppress the civil rights movement. This step is useful insofar that the attempts of the

sovereign-state to suppress activism within the legal community have been better revealed. Moreover, this step allows us to anticipate several effects of the impact of the PVOA and what this can mean for most Zimbabweans while Zimbabwe is relatively isolated from the international community (which has chosen to impose more sanctions in 2003 (ICG 10/03/03)). Because the TLAN framework traced the oscillation of power flowing from the local to the international, which is directed to the state, three possible effects have been identified. One, there will be a change in discourse representing Zimbabwe. NGOs that are currently using the social justice rule of law discourses such as *civil rights, human rights, food rights, social movements, empowerment, popular participation* will change their language. This discourse will become the economic rule of law discourse, which uses the language of *good governance, institutions, efficiency, law and order, foreign policy, development programs*, etc. The significance of the Mugabe Administration's threat to use the PVO Act needs to be understood in the historical context in which this threat has been constructed.

NGOs have taken a very definite position from 1997 to 2002. For instance, this study has carefully read many NGO reports to trace the language, the ideas and the focal points in many NGOs reports and their use of discourse as they seek to de-legitimize Mugabe. This study has identified the overall tendency to characterise Mugabe as a *bad leader*. Moreover, as Australia, the United Kingdom and others began to fund NGOs rather than the state (ZHR-NGO 28/09/01-Crisis, EIU CP 2001: 11, 18), NGOs have become the main conduit of information. They are the ones who have collected the information that was presented to the international community (ICG 14/06/02: 2-3). The cumulative effect of NGOs, using the IDHR, has been to draw the international power back onto the state.

This strategy has been effective. The Abuja Agreement and the international sanctions attest to how effective this strategy has been. However, the deeper question is to ask if these global-local NGOs, judges, lawyers, and civil rights activists have made civil society even more vulnerable. Mugabe has broken the terms of the Abuja Agreement; he is flouting the international sanctions. Moreover, he is pinpointing human rights advocates: NGOs have become the enemy. NGOs will be forced to change their

language. NGOs will be the ones who begin to self-censor. In all likelihood the most acceptable language will become the apolitical language of economics.

Two, the shifting power relations may be felt by the most vulnerable. Although the Mugabe Administration's threat to use the PVO Act seems to be directed towards human rights NGOs, NGOs, which have been developed from grassroots initiatives that may rely on foreign funds, will likely be affected by this announcement. In Sept 2002, the Mugabe Administration announced that all NGOs which had not registered with the state were committing a criminal offence. This broad definition of NGOs will have a deep effect on many NGOs throughout the country. The point being made is that NGOs play an active role in redefining socio-economic and political development to local women, men and children.

The Mugabe Administration's threat to use the PVO Act will affect all types of NGOs. In a developing country such as Zimbabwe, NGOs have worked on local projects such as agricultural development for youth and women. For instance, during the colonial era, various churches founded schools and hospitals countrywide for the local people. Many of these continue to operate. These hospitals provide the major part of medical services in the rural areas under Zimbabwe Church Related Hospitals (ZACH). NGOs are formed through grassroots initiatives, often at a rapid pace to deal with current crises (Z-NANGO 2002, Z-K-NANGO 2002, Z-K-PVO Act 01/09/02): for instance, "one hundred...have sprung up in the last seven years to help in the situation of HIV/AIDS" (Z-K-Rogers 24/10/02).

The critical difference between these different NGOs suggests that the most vulnerable will be affected by Mugabe invoking the PVO Act to silence human rights advocates. The vulnerable rely on NGOs that are not overtly political. These NGOs, which may rely on external fund, generally use these funds to provide food, healthcare and micro-scale economic development. They tapped into grassroots movements of individuals trying to survive in a developing country. It is they who will not be able to feed the sick, tend to the hungry when the human rights NGOs have left Zimbabwe (Z-K-Rogers 24/10/02).

Three, the Head of State is legitimising state condoned violence and oppression through the legal and justice system. Mugabe's reaction to NGO advocacy illustrates the extent to which he resents legal activists encroaching on his sovereign territory. Empirical evidence presented in Chapters Four through to Seven provides a moving picture of human rights advocates drawing international attention to the rapid changes in the Zimbabwean politico-legal and economic landscape. This empirical evidence was offered as a way to suggest that the Mugabe Administration has been under attack since 1997. The oscillation of power among the legal and justice system, the international community and Mugabe really came to the surface during the Abuja Agreement and just before the 2002 Presidential Election. Yet, by October 2002, we see that the shifting power relations are beginning to change. The Mugabe Administration has been eliminating its opponents and legitimising this process of elimination through the legal and justice system. For instance, the Mugabe Administration has scanned international and domestic legal documents, found the technical loophole needed to build a new legal space for this administration to be empowered by state institutions, such as the legal system. The Mugabe Administration continues to challenge society's vision of justice with a complex array of legal mechanisms to suppress the civil rights movement. In November 2002, the Mugabe Administration used the phrase "*NGOs allegedly threaten national peace and security*" (AI-Z-16/11/02) and cited the PVO Act. The coupling of the logic and legal justification for suppression of NGOs is telling. This politico-legal strategy reflects the global political economy. Mugabe seems to be fully aware that institutions and organisations that advocate for good governance, rule of law and human rights, surround national borders. This politico-legal strategy also reflects the political economy of a common-law African country: very few have access to the national legal system. The key point is that the Mugabe Administration has cited the PVO Act to legitimise its suppression of NGOs. In this attempt to formalise and legitimise its suppression of NGOs to the international community, the Mugabe Administration reveals its belief that the international community will support the state's right to have the legitimate use of violence and law to sustain "national peace and security".

This case study reveals why the TLAN analytical framework has been effective. In many ways the case study confirms why many international legal specialists argue that the international community, and even the local legal community, is relatively powerless in this sort of situation, and why international law tends to be represented as an inability of international organisations and institutions to interfere because of the "...strictures on non-intervention in internal affairs embedded in the Charters of the United Nations" (Olonisakin 2000:41, see Hatchard 1993, 2000, Odinkalu 1998, 2001). Read through traditional interpretations of the power of international law and institutions, we understand that the most aggressive/non-violent action a nation-state can take is to impose more sanctions. Whereas the TLAN analytical framework focuses on the themes: ideas about justice, differences in the identity politics of the sovereign state, and legal activists and the legal and justice system and a vision of the legal architecture to reveal a more complex process of change. Many changes in the legal culture have been identified, changes also seen in Eastern European, Asian, Latin American, and Middle Eastern and African countries where NIE/LDM logic has been through time and space changing the politics, legal ideas, legal philosophy and practices within the legal community, which in turn creates symbolic and cultural changes on the ground (Mathews 1986, Tate 1997, Doe 1997, Katouzian 1998, Ayittey 1999, Hendley 2001). For this reason, suggesting policy formulations may be a way to alert other researchers of the possible implications of their research, policy and practices.

8.4 New Questions

Practical problems require practical solutions as well as deeper questions about the theory and practice of development. The case study will be analysed at two levels: 1) How the case study can help us formulate better policy documents. 2) What can the case study tell us about the ability of the postdevelopment literature to see the possibilities and complexities of the NIE/LDM?

The first line of analysis confirms that this dissertation has exposed some of the assumptions made about *who* transnational legal activists are empowering. Indeed, from a practical point of view, transnational legal activism seems to be empowering the civil

rights movements and allowing alternate voices a point of entry into the debate. At face value, transnational legal activism seems to support the postdevelopment/poststructuralist/postcolonial agenda, which celebrates alternative methodologies. However, the flaws become apparent when transnational legal activists' reports are examined through the eyes of the state that is trying to manage these multiple layers of attack by different organizations, institutions and individuals. This dissertation has offered an illustration of how a sovereign-state manages these multiple attacks. Moreover, it has argued that the key to understanding why transnational legal activists threaten a sovereign-state's legal power comes from a close examination of the relationship between the legal community and activists within the media and NGO community. This opens up the broader questions about how social movements within state institutions are being managed by international lending agencies and other international economic and political forces, as well as narrower questions about what sorts of policy recommendations this study can offer.

8.4.1 Future Policies and Practices

This study suggests the need for two areas of policy formulation and administration. The first area of policy formulation and administration is in anticipation of the unexpected consequences that the Commonwealth/World Bank alliance and the new Pan-African Fund may have on developing countries. In light of Zimbabwe's experience with the World Bank/Commonwealth, this study suggests that there is a need for the Commonwealth/World Bank alliance to be accountable to African countries that wish to borrow funds from the new Pan-African Fund. Research projects should be completed prior to African countries being allowed to borrow funds. These research projects will establish the structure of the politico-legal system of the African countries before a major influx of foreign aid alters and changes the legal and justice system's relations with the state. These research projects should include:

1. Systematic evaluation of how legislation is constructed and the politics involved through time and space, and how choices are made about which legislation needs to be challenged.

2. Systematic evaluation of politics between judges, the head of state, elected parliamentarians, lawyers, civil society and NGOs when constitutional law, legislative law or quasi-emergency laws are being debated.
3. Systematic evaluation of how legislation is interpreted – by different actors at different scales.
4. Systematic evaluation of resistance to some legislation, and the spatial organization of social groups resisting this legislation.

The second area of policy formulation and administration focuses on NGOs' ability to change global and local information politics. This study has identified that NGOs are re-writing many countries' legal and economic history. This study has also identified that many NGOs risk being misinterpreted by the NIE/LDM legal-institution-strengthening initiative. Moreover, NGOs' methodological flaws may negatively impact civil society, as misrepresentation may lead to greater divisions and disparities among the rich/poor, women/men, able/disabled, urban/rural, etc. For this reason these flaws are highlighted in Chapter Four which offered a practical critique of NGOs methodology and analysed *how* NGOs' information can be used in international relations and fed into lending institutions' political practices. To further argue this point, Chapter Five also provides a practical critique of Transparency International's (TI) methodology and agenda.

Steps that NGOs could take to be more comprehensive:

- Work with a wide array of economic and political classes.
- Evaluate how the methodology may maintain existing power relations at the top strata of African elites, rather than restructure power relations from below.
- Acknowledge the positive changes in local legal culture.
- Be aware of the dangers of misrepresenting a highly political issue that may create more friction for grassroots civil rights movements.
- Identify how global-local institutions and organisations - as well as the Head of the State and local institutions - create these problems.
- When posting reports on the Internet, acknowledge the dangers of representing "voices" in cyberspace.
- Acknowledge that legal discourses, such as corruption, good governance, democracy, etc. are intensely political in the post-cold-war era.
- Acknowledge that micro foundations of the rule of law have the power to change macroeconomic structures.

Perhaps the most important step NGOs could take is - to *not oversimplify the problem and solution*. For instance, when suggesting that a legal-institution-strengthening initiative is an appropriate step to take, it is important that human rights advocates be

aware of the tendency to perpetuate a vision that the *problem = the state* and the *solution = the legal and justice system*. Many offer the vision that legal and justice system is powerful, impartial, apolitical, sensitive to the marginalized and the oppressed, and citizen's rights oriented, and the state is identified with violence (see Mutua 2001). This oversimplified characterisation of the legal and justice system allows many NGO reports to support an initiative that seeks to strengthen legal mechanisms. In the future, many of these legal mechanisms will act to protect the material rights of the market economy rather than strengthen politico-legal structures to help institutionalise local civil rights. For example, this study has been very careful about the way it has represented legal issues (see Chapter Four and Six, Z-MDC - CO 2000, SA-TST 08/07/2001-Gubbay). Rather than using the language of democracy, this study has asked a question to address the core democracy question: *to what extent does the government empower and institutionalise the use of the International Declaration of Human Rights by the justice system?* Such care in representation of the local politico-legal structure should be developed within NGOs reports.

8.4.2 Analysis of Conceptual Frameworks

These suggestions for policy formation and recommendations highlight how this dissertation has made an important contribution to the postdevelopment literature. These suggestions are significant to the postdevelopment literature for five reasons. First, this is the first postdevelopment/postcolonial/poststructuralist study to make the following suggestions for policy documents:

- The political discourse of corruption creates friction for the civil rights movement
- The politics surrounding the use of legal discourse in a location
- Evaluation of the politics within the legal and justice system is necessary if one wants to understand how *development* programs work in practice.
- Framing the solution in legal discourse misrepresents the issue and is likely to be used by international development agencies to legitimise another development project.

The key point to note is that these policy suggestions focus on legal discourse, legal cultures, the legal and justice system, a focus which the postdevelopment literature has tended to avoid (see Watts 2000b).

Second and related, a conclusion that could be taken from this analysis is that many postdevelopment theorists are locked into critiquing neoclassical economic forms of exploitation, and the processes connected to the institutions, using neoclassical economic logic. Moreover, as suggested in Chapter One, the postdevelopment theorists' focus on discourse analysis suggests that such analysis can hamper deeper understanding of how the global capitalist system uses the legal and justice system to further entrench its wants, needs and desires. This is meant to be a cautionary tale.

Third, this dissertation has opened up the broader questions of whether or not the postdevelopment literature is aware of this major shift in development theory and practice?

Fourth, taking these points a few steps further, we need to ask are postdevelopment theorists asking the bigger questions such as:

1. Do the postdevelopment theorists and Euro-American development economists share a belief that humanitarian laws and human rights activists will allow the politically, economically, and socially marginalized in local societies some social or economic justice?
2. Underlying these beliefs, visions and hopes, are there similar conceptualisations of a better world?
3. Is this conceptualisation based in the political economy of Euro-American funding patterns, the use of NGOs and legal activists to create a mesh of legal strategies to protect their activism, and challenge the sovereign-state's legal and justice system to integrate their specific agenda based on a modernity/Enlightenment era/Eurocentric vision, which perpetuates the political and economic power of the North over the South?
4. Do both follow a vision that the state should be controlled with a fine mesh of laws created at the national and international level?

Rarely are the political agendas of the postdevelopment theorists and the economic development theorists put side by side. But perhaps we need to be asking these more difficult questions because the two sets of literature are producing, albeit with different agendas, legal discourse. This dissertation has examined the manifestations of this move in five key political arenas: an international organization of nation-states (the Commonwealth), an international lending agency (the World Bank), and the informal food distribution networks, a legal and justice system and a state in a Commonwealth

country (Zimbabwe). The conclusion, thus far, is that this discourse is dangerous for local societies.

Fifth, this dissertation argues that it is important that the postdevelopment theorists' imaginary of the contemporary *development/modernisation* projects shift to the case study of the Zimbabwean human rights NGOs to realize that this discourse (in the long run) holds the potential to be more harmful than emancipatory to the most vulnerable. This point also suggests that postdevelopment theorists move through the visions of empowering the marginalized, the vulnerable, and the exploited, to rethink some of the bigger questions about *who is speaking when the language of human rights is spoken in a public forum?*

8.5 Summation and Conclusion

By being curious about the absence of the geographic presence in the *Workshop on the Changing Role of Law in Emerging Markets and New Democracies*, at the University of Wisconsin-Madison (2000) this dissertation began with the firm belief that geographic analysis was important to the future of the critical legal institution development literature. At the same time, bridging different literatures and disciplines suggests that the critical legal institution development literature has a lot to offer the geographic postdevelopment literature.

An important lesson has been offered to the postdevelopment literature. Perhaps reconsideration of previous analyses of how global power relations are working in practice is in order. The critical legal institution development literature is raising new questions that the postdevelopment literature could be well positioned to contribute to. If the two literatures were more firmly bridged, postdevelopment theorists could contribute to an interesting future research agenda that examines the impact of the new development discourses, social movements and activists upon the legal architecture. As well the postdevelopment literature could encourage the critical legal institution development literature to be sensitive to different legal realities such as *Amai Tsitsi*, whose social

reality has been shaped and affected by race-specific, gender-specific and location-specific laws (see Chapter Five)

This dissertation argues that much of the political analysis of the local-national-international processes of the global political economy tends to underplay the significance of the political structure of the legal and justice system being affected by transnational economic and political forces. Moreover, following from this discussion, the position being taken is that postdevelopment theorists must put stronger emphasis on making the structure of the legal and justice system the centre of analysis. This is the topic of the next chapter.

Chapter Nine: Conclusion

9.1 Introduction

The thread that has been followed throughout this dissertation is that the NIE/LDM logic affects different spaces and different places, an argument marked by economists (Keefer and Knack 1997), humanitarian law specialists (Kent 2001), international relations commentators (see contributors to Risse et al 1999), and political scientists (Weaver 2000), and very rarely geographers. While the array of literatures drawn from to establish the spatial presence of this trajectory of legal activism may seem eclectic, the sole purpose has been to ensure that the NIE/LDM as a political identity is mapped into encounters on the ground. These newly emerging legal cultures are defined in legal systems through global economic and political processes, as well as through the response of sovereign-states.

Three continuities can be traced in this dissertation. These are: law as a political discourse, law and place, and the legal and justice system as an object of analysis. In tracing these continuities, as stated in Chapter One, this dissertation has identified several major gaps in the literature. Three are directly relevant to future studies that wish to follow a similar line of investigation. One, political science/international relations scholars engaged with human rights issues tend to neglect referring to the critical geopolitical, and more generally the geographic literature, for analytical tools (Dodds 2001, Dalby 1990, Falk 2000, Risse et al 1999, Chandler 2001, Kent 2001). Two, human geographers tend to sidestep engaging with legal philosophical issues and the political relationships between the state and the legal and justice system (Delaney 1998, Blomley 1994, 2001). Three, postdevelopment theorists show some reluctance to engage with the critical legal development literature (Nederveen Pieterse 2000, Watts 2000b, McIlwaine 1998, 1999)

These continuities are significant because they suggest that this dissertation has extended the analysis of the legal, political, economic and geographic knowledge. The argument has been made that geographers have neglected the analytical category – transnational legal activists – and the political economy and space this social group occupies. Despite

this gap in the geographic literature, legal activists' presence has been demonstrated by drawing on a wide array of literature and revealing their presence in the contemporary case study of Zimbabwe. The presence of this community has been found in a wide array of different literatures, as noted below:

- International and comparative law, such as humanitarian law (Odinkalu 1998, 2000, Charlesworth and Chinkin 2000),
- Law and policy in international business (Salbu 1999)
- Post conflict reconstruction of legal systems (Olonisakin 2000, Widner 2001)
- Constitutional law (Palley 1966, Hatchard 1993, 2000).
- Critical legal theory (Prihan 1997, Sarat and Kearns 1992, 1996)
- The rule of law in ideological formation (Shivji 1995, Shklar 1987, Weinrib 1987)
- Legal activism and the practice of calling upon radical laws in court (Sarat and Scheingold 2001a, Scheingold 1994)

Traditionally, legal activists have been defined as activists calling upon radical legal theory to interpret international humanitarian law (Scheingold 1994, Phillips 1997, Goldberg-Hiller 1998). Recently, Sarat and Scheingold (2001a) have redefined the term legal activists to acknowledge activists calling upon economic law. The presence of legal activists can be also found in the institutional and theoretical economics literature (North 1995, 1990, 1986; Schneider, 1999, Bates 1995, Mbuku 1999, Meili 2001). The task has been to suggest that they exist on the political landscape.

The significance of using this eclectic array of literature to support the analysis of the Zimbabwe-Commonwealth-World Bank case study suggests the possibility of publishing in legal journals such as *Law and Society*, *Social and Legal Studies*, critical economic theory journals such as *Feminist Economics*, development journals such as *Third World Quarterly* as well as a number of geographic journals. The purpose of focusing on possible publication outlets is to suggest that geographers must situate themselves more clearly on the interdisciplinary boundary and contribute to the current debate. They must make other disciplines aware that taking space seriously can offer some interesting insights.

The purpose of this chapter is not to review all the points made in Chapter Seven of why the critique of the TAN framework contributes to a theoretical understanding of the

geopolitics of theory, information and ideas. Nor will the points made in the conclusion of Chapter Eight about how this dissertation contributed to the postdevelopment literature be re-iterated. Rather the purpose of this chapter is focus on these three continuities and highlight how the analysis points us toward a future research agenda.

9.2 Law as a Political Discourse

The first continuity is law as a political discourse. Critical geopolitical theorists such as Dalby (1990) and others, conceptualised “geopolitics as a form of political discourse” (Dodds 2001: 469). Postdevelopment theorists also interrogate the relationship between discourses, political practices and economic spaces (albeit usually at a smaller scale of analysis).

Beginning with a global vision, this dissertation has focused on the legal discourses often cited by human rights activists, often interpreted through the NIE/LDM reasoning and evaluated how legal discourses, and different interpretations have the power to affect real people. This analytical move paved the way for this dissertation to investigate the politics of international organisations of nation-states, such as the Commonwealth, using the NIE/LDM discourses to create the changing politico-legal geography of Zimbabwe. If the NIE/LDM reasoning (as well as the representation of the NIE/LDM logic of good governance, anticorruption) can be mapped as geopolitical shapes, with unique forms in which these politics and practices are taking, this dissertation has attempted to do so by identifying that the NIE/LDM logic can be found in a trajectory of legal activism.

While this may seem ambitious to many geographers, this dissertation has drawn from the TAN framework to map the tentative shape of global-national-local interactions of legal discourses. The geographies and spatialities sketched in the TAN framework suggest great progress in political science and international relations theorists, creating a new theoretical model to envision how legal discourse is the domestic political discourse in many countries (see Risse et al 1999). This analytical framework has been embraced by many international relations specialists, human rights theorists, and political scientists to suggest that the human rights movements’ law, practices and politics to illustrate a

form of *progress* in this era of globalisation (Sarat and Scheingold 2001a). Unfortunately, many investigators collect empirical evidence rather than investigate the political implications of this discourse and/or this analytical framework. The important lesson here is that Sikkink has sketched the spatial shape of *why* scholars need to be aware of the symbolic power of legal discourse in the 21st century (see Falk 2000). This theoretical framework can tell us a great deal about the symbolic power of legal discourses in the 21st century. But more importantly, it can tell us the sorts of direction future studies in international relations and political science should take, if they wish to understand how international law creates more inclusive laws on the ground (Charlesworth and Chinkin 2000, see Meili 2001). International relations and political scientists desire to focus on the theoretical model rather than the use of law as a political discourse is telling. This trend highlights the need for an analytical shift within political science/international relations to ensure that there is a deeper understanding of how legal discourse in international relations can threaten a sovereign-state (Mutua 2001, UN- COHR 11/02/02). More importantly, this line of investigation highlights a key gap in the literature: political science/international relations scholars engaged with human rights issues tend to neglect referring to the critical geopolitical, and more generally the geographic literature, for analytical tools (Dodds 2001). This point confirms the argument that Dalby (1999a) and others have also established.

As argued by Paasi (1991: 240 – quoting Sayer 1985), “Space makes a difference”. Blomley (2001) suggests that individuals inside or outside legal institutions have the power to change socio-spatial relationships of society and law. Geographies of law have been mapped by tracing law as a political discourse. The analysis in this dissertation has pivoted around questions concerning legal space and how law as a political discourse changes space and spatial relationships. This dissertation has carefully evaluated the political spaces privileged or silenced through the analysis shaped by this analytical framework. This analytical turn has revealed a number of insights, many deeply critical of TAN framework as an analytical framework for social scientists, specifically geographers interested in questions concerning social justice, law, and human rights. At the same time, the purpose of this critique is to pave the way for future stories.

The similarities between the state transformation/human rights/democracy legal-institution-strengthening initiatives and the NIE/LDM legal-institution-strengthening initiative are tremendously significant. Within these similarities lies the key to understanding why the geographies and spatialities of the human rights movement intersect and entwine with the global capitalist system. Future studies must begin with this point in mind, and must make this point transparent, or else such human rights activism will continue to be fed into the global capitalist system.

To summarise, despite acknowledging that the sensitive treatment of legal space that the TAN framework etches, and the potential of the TAN framework to make scholars aware that legal discourse is the language of power in the 21st century, this dissertation offers a very critical reading of the TAN framework. Moreover, this critique is made alongside the fact that the TAN framework inspired the idea of downloading NGO reports while NGOs constructed Zimbabwe's politico-legal and economic crisis (Keck and Sikkink 1998a, 1998b, Risse and Sikkink 1999). Using the TAN framework allowed this study to suggest that NGO reports suggest a sphere of influence of the NIE/LDM logic within a Commonwealth country. Moreover, the TAN framework suggests that NGOs provide a vivid illustration of geographic processes: the spatial diffusion of legal discourse and the movement of information through cyberspace and networks and nodes in the social movement, which attack the sovereign-state. Given the geographic nature of the research question, this method of collecting empirical evidence seemed to be the most logical. This method has proved to be very effective. For example, this study has been able to reconstruct the legal history, and contemporary politico-legal issues by downloading NGO reports from the Internet. This in itself is an important accomplishment as this information is usually not accessible: previous fieldwork experiences in 1994 and 1997/1998 support this assertion, (for instance, even while I was inside Zimbabwe, I had difficulty accessing information). This study has demonstrated that NGOs using electronic advocacy networks are an important conduit of information, even though this information should be used with caution. This study has read NGO reports at two levels – as producing historically important *facts*, as well evaluating the way in which this

information might be used. Moreover, this dissertation would urge other geographers interested in transnational legal activists' activism might do the same.

Yet, three points have been identified that suggest that scholars who have embraced the TAN framework and who continue to collect and analyse empirical evidence of human rights abuses through this analytical framework may be inadvertently supporting the political economy of the global capitalist system.

First, the TAN framework has become part of the geopolitical discourse of human rights activists, cited as the theoretical framework supportive of their activism. Second, while many human rights activists seek empirical evidence to establish that individuals are demanding these institutions and use the TAN framework as a refined theoretical model, such participation in the global social movement may be strengthening legal institutions that facilitate market transactions and allow the economic elite to be active participants in the global economy. This dissertation, alongside the critical legal development literature, suggests that the human rights movement plays an important role in contributing to the process of economic *progress*.

Third and most importantly, the focal point of this critique is not on the analytical framework itself. The argument being made is that many of these processes are extended through space and time, because very few scholars are examining the geographies and/or the political implications of the *human rights, social justice, judicial independence* discourses. As argued throughout the length of this dissertation, if geographic regions, such as the Commonwealth continues to accept the World Bank NIE/LDM agenda for development, rule of law, and governance, the vision advanced within African Commonwealth countries is for a restricted market economy agenda, not one aimed at transforming social justice issues. African Commonwealth Heads of State continue to make changes in the legal system that liberate economic transitions and support the global economy when the global economy is "...creating ever greater pressure for standardisation (or at least harmonisation) among nations with regard to laws governing commercial transactions" (Hendley 1997: 230). New economic laws support the legal

infrastructure needed for the market economy, which allow the economic and political elite to develop new tactics and strategies to maintain class domination in supranational economic and political forums such as the Commonwealth.

Because this study has argued that the intersection between law and space must be taken seriously, this study has been able to highlight these points. Moreover, each of these points suggest that for participants at the *Workshop on the Changing Role of Law in Emerging Markets and New Democracies* (March 2000) to refer to the TAN framework is full of contradictions, particularly if the critical legal institution development literature wishes to remain rigorous. The analysis presented in this chapter and the last two is valuable to a wide range of literatures. The spectrum ranges from the legal activists' literature (Scheingold 1994, Dodson and Jackson 2001, Dezalay and Garth 2001), to the legal geographic literature (Delaney 1998, Blomley 1994, 2001), to the postdevelopment literature (Nederveen Pieterse 2000, Watts 2000b, also see McIllwaine 1998, 1999) and the critical legal institution development literature (Weaver 2000, Hendley 1997, 2001, Bates 1995). It offers new theoretical insights into some of the global processes protecting, affecting and threatening the political space of legal and justice systems.

In short, those participating in social movements - stridently making the argument that local civil rights movements must be connected to legal mechanisms and legal structures – might want to deeply question the political and economic implications of this activism (Eide 1995a, 1995b, see Watts 2000a). Informal social structures have been created through time. Social networks which use illegitimate means of social control, such as threats of witchcraft, to control social behaviour in local neighbourhood and a rumour mill to organise a nation-wide *illegal* demonstrations to signal hostility against the current political and economic conditions have created a justice system that works in the current location. Rather than trying to institutionalise these social strategies within the legal system (simply because Euro-American nations have increased their funding to human rights NGOs over the past decade), we need to question *who* will benefit in the short term or long term because of this activism.

To conclude, an important contribution to the literature has been made, whether this dissertation be situated in the international relations, political science, human rights, economic or geographic literatures because it has taken the issue of human rights, economics and the globalisation of legal institutional development very seriously and asked a number of difficult questions. Taken together, the points made in the last two chapters reveal that the TAN framework has the capacity to silence the very voices that need to be heard and empowered. But more importantly, this analysis has made an important contribution to legal geography. Three important conclusions have been made. Different stakeholders who create new legal geographies use first, legal discourse. Second, legal discourses - when used by some of the most powerful voices in the world such as the United Nations' Special Rapporteur on the Independence of the Judiciary and Lawyers - have the power to shift and change a sovereign-state's position in international relations. Third, international law is not a binary of international/domestic law (i.e.. when judges call upon IDHR to protect the rights of a citizen when making a ruling), moreover, the discourse of international law binds together the past, present and future, as well as domestic legal space and international legal space.

9.3 Law and Place

Law and place in an era of globalisation is the second continuity. The vision that a location can be touched or left untouched by a global social movement, suggests the possible reconfiguration of a legal culture when it is affected by the political and economic agenda of Euro-American nations. The sense of the spatial limits and temporal terms in which a place is affected by a law has been established by constructing the abstraction *a trajectory of legal activism* and evaluating how *trajectories of legal activism* affects a place, rather than a place shaping the socio-spatial relations between the individual and the law.

A fresh geographic perspective of how global institutions seek to change a law, or legal culture, in a location has been offered. This dissertation is aware of Blomley's (2001:9) argument that law has traditionally been disconnected from place, and that critical legal geographers should weave together space, law and place. Nonetheless, a portion of this

dissertation has focused on developing a vision that the law is disconnected from place. Justification for doing so is because discussion of law, legal space and socio-spatial interactions under the rubric of human geography neglects to open up the fundamental question of how the political structure of the legal and justice system responds to the broader context of global processes and local social movements.

Through Paasi's (1986, 1991, 1996) treatise on *institutionalism*, this dissertation is given the analytical framework to evaluate how a rule of law view is woven into a legal culture within the Commonwealth region, changing the territorial shape of the influence of the courts. The World Bank/Commonwealth conversations (1997-2002) are changing common-law African countries' legal culture. Zimbabwe provides a case in point. More specifically, this study has identified that there is a need in the literature to show these sorts of linkages among activists working inside and outside legal institution and to establish the political presence of this complex mesh of activism. We can understand the overlapping and intersecting socio-political cultural spaces being changed by the human rights movement as well as the global capitalist system through Paasi's (1991) analytical viewpoint.

Bridging the TAN framework with Paasi's (1986, 1991, and 1996) treatise on *institutionalism* has helped this dissertation develop the Transnational Legal Activists Network (TLAN) approach which provides an innovative conceptualisation of the United Nations' Special Rapporteur on the Independence of the Judiciary and Lawyers, as a symbolic institution to the international community and legal community, protecting judicial independence in a place.

Combining these two perspectives is significant for three reasons. First, the TAN framework allows geographers to initially envision the connections between the United Nations' Special Rapporteur on the Independence of the Judiciary and Lawyers, visions of justice in local societies and the intersection between international and domestic laws within the legal institutions. Whereas, Paasi's (1991) treatise on *institutionalism* lays the groundwork for understanding that postcolonial peoples become increasingly connected

to the legal and justice systems through spatial relationships and interactions with legal space. Using this combination of perspectives allows for more complete analysis of the relations between sovereign-states and the legal and justice system in several ways.

Paasi (1991) identifies that institutions are connected to locations *because* of societies. The institution is the legal institution with all its covert politics, authority figures and identity politics. For society to accept the legal institution and weave its presence into the day-to-day geographies, people must support the vision of justice being advanced by this institution. At the same time, based on the interpretation of the law, civil society may dispute the authority of the legal institution, thus the authority of the law.

The analysis has come to pivot around the point made by Paasi (1991): societies accept or reject institutions, holding the power to embed or sever the institution's relationship to a location. While Sikkink and contributors have described the geographic phenomenon of the transfer of power between the international community and human rights organisations, they neglect to acknowledge the *symbolic* presence of the United Nations' Special Rapporteur on the Independence of the Judiciary and Lawyers. As argued in this dissertation, this Rapporteur may have had an important role to play in the creation of many new humanitarian laws and the ability of legal activists to call upon this international instruments within the space of the courtroom. Paasi's (1986, 1991) treatise on *institutionalism* was applied to the geographic region, the Commonwealth, more specially the Commonwealth Lawyers Association, the Law Society of Zimbabwe and the Zimbabwe Lawyers for Human Rights, and the International Bar Association conversations about Zimbabwe (Z-CIZC-19/06/02, AI 25/06/02: 26-27), thereby allowing linkages to be made between this Rapporteur, current conversations which may become political strategic interpretations of international and domestic laws within the space of the courtroom.

Paasi's (1991) analysis can be used to develop geographic understanding of how legal institutions work in practice. The critical legal institution development literature confirms this point, suggesting that despite the global political economy affecting the national legal

system as well as the local legal culture, local social norms are the defining point of how legal institutions work in practice (Hendley 1997, 2001, Widner 2001). This analysis could, and should, be extended by other scholars engaged with questions of globalisation to avoid a rigid interpretation of the political structures created by the human rights movement.

In sum, understanding of how rule of law is made into *legal power* including a conceptualisation of legal space linking local-national-international institutions at different geographic scales. This conceptualisation of legal space challenges most of the international law literature. Within this analysis, the focus has been upon the *essence* of international economic laws and international humanitarian laws as a meaningful political presence affecting a place. The intention has been to suggest that the spatial limits of an international law are broader and deeper than has been previously been imagined by geographers. Paasi (1991), rather than the TAN framework, has been of assistance in this analysis.

9.4 The Legal and Justice System as an Object of Analysis

The third continuity is politics, practices and philosophy within the legal and justice system can be an object of analysis. Chapters Four, Six and Seven illustrated that if the identity politics of the legal and justice system and the state were separated, an interesting undercurrent of activism was available for analysis. In addition, the many bold and subtle forms of activism were identified which ranged from the Supreme Court Chief Justice Gubbay to Judge Gillespie citing the Convention on the Elimination of All Forms of Discrimination against Women to Godfrey Chidyausiku leading the *Chidyausika* Commission. This is the first geographic study providing a rich and sensitive interpretation of the positive and negative political implications of Zimbabwean judicial activism (Chapters Four through to Seven).

Each of these continuities suggests the direction of future research. Each of these continuities suggests why this dissertation makes an important contribution to a wide array of different disciplines.

9.5 Contribution to the Geographic Literature.

Future geographic studies focusing on transnational legal activists, particularly those working from a critical geographic position will need to take into account some of the conceptual difficulties this dissertation has encountered. Each of these difficulties will be included to support future geographic investigation.

First, very few (if any) studies have used geographic analytical tools to investigate the connections among a paradigm shift in economic theory, the legal community producing and reproducing the political space of the United Nations' Special Rapporteur on the Independence of the Judiciary and Lawyers, the World Bank/Commonwealth 1997-2002 conversations, and the Zimbabwean politico-legal and economic crisis. The main reason for this is because few studies engage with such a wide range of literatures.

Second, as the first geographic study to make the legal and justice system the central category of analysis, tentative connections between law, economics, politics, space and society have been difficult to establish because this study was asking a new question. It began with the vision that it was important to liberate geographic analysis from a place, and to analyse the identity politics within local-global legal institutions, which in turn would affect a specific location.

Third, a geographer, reading the international legal literature offered several insights about why tradition legal analysis tends to cloak the political structure of the legal and justice system. Future geographic investigation will want to take into account three important discoveries made during the research and writing process. The first discovery is that there is a need to challenge mainstream understandings and assumptions that there is a *normal* separation of power between the elected government and the legal and justice system (see Smith 1993: 1-23). Second, the assumption that these two institutions have the same identity politics also tends to cloak the point that the core question of many theoretical and empirical studies being completed on human rights, social and economic justice, state-civil society relationships, civil and criminal law, international law and

state-condoned violence are about power relations connected to, woven within and flowing from the abstract space - *judicial independence*. The third is that the identity politics of the legal and justice system make it distinct from the sovereign-state. These characteristics include the historical circumstances which have functioned to separate the state from the law, the space where judges and lawyers use the language of justice, rule of law and law to debate the *justice* being drawn into the legal system, the global politico-legal economy of transnational legal activist; changing spatial patterns that constantly renew the cultural politics within the legal system among civil society, the state and the local legal and justice systems, institutions and organisations and many others.

Future geographic studies will need to carefully evaluate how the space of judicial independence affects the symbolic and material realities of a society, as well as the specific characteristics of a legal and justice system. Such studies should be completed with an awareness of the global capitalist system and contemporary political events at the international level.

This dissertation also reveals a certain naïveté in many geographers' recent interest in law, social justice and human rights. To be absolutely clear, this critique does not pivot around specific geographer's analysis. The legal/social justice/human rights geographic investigation initially inspired this research. Although this dissertation has left the commentary of legal geography's origins, methodological concerns and empirical themes to several leading geographers, such as Blomley (1994, 2000), Blomley et al (2001), Herbert (2002) and others, this study has been inspired by many geographers, including legal geographers (even though many legal geographers tend to complete spatial analysis in European or North American urban contexts (Harvey 1992; Blomley 1994, 1998; Blomley et al 2001, Fyfe 1995, Kobayashi 1995; Herbert 1997, 1999, 2002; Mitchell 1996, 1997, Martin 1999, Williams 1999)). Delaney et al 2001(xvii) argue that the legal geographic research is drawing attention to the idea that law is spatial, and challenges assumptions about the essential differences of power, place, identity and discourse and how these can be articulated with understandings of legal space. Moreover, Delaney et al (2001) set out an ambitious agenda capable of creating many new insights about

processes inside and outside legal spaces that are connected to day-to-day life, representation, the reach of legal power through legal discourse, and the connections between the legal and the spatial. Legal geographers are opening up a dialogue with larger philosophical debates about what is law, and bringing law to the forefront of the research agenda.

The critique of the broader literature, of which legal/social justice/human rights geographic literature is just a subset, is that too few scholars are making the connection between the global capitalist system, the rise of legal discourse and the changing language in popular culture. The direction for future studies takes its point of departure from this argument. We need more studies that draw from the intellectual heritage of geographic thought as well as those which take bold steps forward. We also need more legal geographic studies that offer multiscalar analysis (see Delaney 1998). This dissertation has drawn from a wide array of literatures: the work of critical geopolitics (Paasi 1991, Dalby 1990), postdevelopment theorists (Slater 1997, 1998; Watts 2000a, 2000b) to begin to think through some of the legal geographies circling the globe. This line of questioning has opened up a wide and new research agenda.

To conclude this section, three areas for future legal geographic investigation have been identified.

- 1) This study suggests that if geographers are serious about social justice, human rights, law and development, they will put the NIE/LDM logic at the forefront of their analysis and question how this way of thinking justifies the construction of more laws with less social justice.
- 2) Geographers should go several steps beyond studying socio-spatial relationships around specific laws. While real people's lives in Zimbabwe are being affected by the state using the law to suppress their activism, legal activists working within INGOs, such as Amnesty International, seek to change such repressive laws in places around the world (see Tolley 1994). Geographers would do well to first examine which laws are being challenged by such organisations, and then focus on location-specific case studies. As

has been argued, it is not a law *per se* constructing socio-spatial relationships, but the idea of justice or injustice administered through the legal system that informs the social relations around law, and vice versa. It is the framework of *ideas* that allows social justice/injustice to be extended through legal mechanisms orchestrated by powerful groups who wish to extend their control over a space. In short, the focus on the *rule of law* in this study is significant. The analysis presented in Chapter 6 tells us about the powerful groups who wish to extend their control over a space as they use legal mechanisms to create injustice and/or justice for local communities. All the points made in the next section are also relevant to this research agenda.

3) There is an urgent need to include some of most marginalized individuals of the world: those in rural, unindustrialised locations, or urban social contexts in countries undergoing rapid economic, political, social and cultural change in legal geographic analysis. As this dissertation has suggested, legal geography is an interesting sub-discipline and its geographic reach should extend into the global and local issues around the world.

9.6 Future Research Agenda

The groundwork for a broad and varied future research agenda has been initiated. Moreover, the line of questioning initiated in the TLAN analytical framework creates an important position for future research. Given the interdisciplinary nature of the investigation within this dissertation, a critical discovery made is that much of the literature remains discipline specific. For instance, not only are there few studies connecting the post development analytical tools to the critical legal institution development theory (as noted in Chapter Eight), but also there are also few studies that take the interaction of law and space seriously.

Three issues that have not been developed in research have been identified. 1) Law as a political discourse. 2) Law and place. 3) The legal and justice system as an object of analysis.

9.6.1 Law as a Political Discourse

To take the analysis of the law as a political discourse forward, the following three suggestions are made.

One, there is a need for more studies which trace how the globalisation of legal discourses, such as *corruption* and *good governance* affect local landscapes. Chapter Five argues that local economies are being affected by the Transparency International/World Bank anti-corruption campaigns because local newspapers increase the number of reports on corruption. Transparency International/World Bank has had an impact upon local people's thinking, and in turn, actions. Despite the increased scholarly commentary on *corruption* as a social construct, this is the first study to trace the geographies of this legal discourse and how it reaches into the day-to-day lives of men, women and children. The argument that has been made is that externally driven anticorruption initiatives may not be prepared for the sort of activism they invoke and/or inadvertently support with anticorruption discourses, as such discourses radicalise the local politico-legal economy.

Two, while some scholars acknowledge that the discourse of *judicial independence* has become an important discourse in foreign policy circles (Carothers 1998), there are few studies that connect *judicial independence* as a foreign policy discourse propounded by the United States and others, to activism within the legal community, to changes inside and outside the legal and justice system, to donor country funding patterns, to changes in the local human rights movements.

Future studies need to make these sorts of connections if they wish to understand how the *judicial independence* discourse directly alters the legal and justice system relationship with the state. Future studies will also need to take into account the differences between the identity politics of the legal and justice system and the state. The Zimbabwean case study may be a compelling case study to learn from. The civil rights movement changed in response to the World Bank/Commonwealth coalitions using the *rule of law*, *human rights*, *judicial independence discourses*. Since 1997, the geographical configurations of

social relations, ideas and power have shifted greatly. By 2001, we have clear evidence of partnerships between the judiciary and NGOs agitating the local legal culture to shift local ways of thinking about law, human rights and social justice. These patterns of agitation shift social power, which in turn has the power to create the sorts of legal frameworks needed to support local social movements in the future.

The key lessons to take from this case study, which could be used in future studies, are these. To begin with some interesting connections between international institutions using this discourse - inciting the legal community - to the changes in the spatial shape of the local civil rights movement have been made (see Chapters Six, Seven and Eight). In addition, this case study documents some of the negative repercussions of this discourse. Mugabe's response to the activism of Chief Justice Anthony Gubbay and human rights NGOs provides a case in point (ZHR-NGO-SR-09/01).

Three, there is a need for studies that offer a critical, yet balanced, analysis of the impact of different legal discourses upon locations. If analysed at a global level, World Bank/Commonwealth conversations attest to the new legal geographies being constructed throughout the Commonwealth as a geographic region. Common-law Africa provides much evidence that the NIE/LDM discourses are shaping new economic and politico-legal structures. Moreover, as Kibwana et al (1996) argue, common-law Africa is a unique geographic region through which the legal discourses of *corruption*, *rule of law*, etc. has had a unique impact. At the heart of much of the critical legal institution development literature is the message that these discourses pull diverse places and cultures deeper into the global capitalist system. However, future studies might take into account the point that the case study of Zimbabwe illustrates that there are both positive and negative outcomes of NIE/LDM legal discourses restructuring spatial relations of civil society, the legal and justice system and the state at the local, national and global levels. This study presents four chapters of empirical evidence to support this argument.

The detail provided in previous chapters was in an attempt to avoid making sweeping statements that suggest that the NIE/LDM discourses destabilise communities in

developing, postcolonial, postsoviet, Commonwealth countries, and use such opportunities to embed the global capitalist system's mechanisms of exploitation within local legal systems. This line of reasoning is often adopted by the critical legal institution development literature (Hendley 1997, Trubek 2000). If carefully evaluated, the Zimbabwean crisis suggests that human rights, rule of law, etc discourses have had a positive and negative impact upon the local societies. Several points must be observed if future analyses wish to provide a balanced argument.

To begin with, legal discourses seem to have the ability to inspire the legal imagination to envision a reality in which legal mechanisms can protect the rights of the individual, and momentarily quell the oppressive state. Moreover, and very much related, many NGOs use the International Declaration of Human Rights discourse to support their advocacy work. Many argue that women, men and children need the right: to education, food and shelter; to freedom from discrimination and persecution; to information; and to the benefits of science to prevent illness and disease, not just access to medical care, and to promote health and well-being. When this language is used in a developing country such as Zimbabwe, new visions of justice evolve. These are powerful images of what the future might bring, images which are extended into political and economic interactions and transactions. Individuals' visions of justice also find a way to be articulated through legal discourse.

Future studies should be aware that there are some positive outcomes of legal discourses used by the NIE/LDM trajectory of legal activism, which also uses the IDHR discourses. These are as follows:

- Individuals demanding the right to demonstrate, the right to be heard
- Individuals demanding the right to choose a national leader and participate in the political process, such as the 2000 Zimbabwean parliamentary elections and the 2002 Presidential elections
- Individuals demanding that their individual property rights be protected from the state
- NGOs, lawyers and judges arguing that individuals should be free from the threat of fear

However, future studies should also note that a negative response to legal discourses circulating the globe might be found in the response of the state. The Mugabe Administration's reaction illustrates that legal discourses threaten a state, the state has tried to control organisations, institutions and individuals from challenging the legal power of the state, by using legal institutions to legitimise the state's use of violence, fear, terror, torture and the militia to construct a geography of fear and violence.

All these points should be considered when approaching the task of constructing and deconstructing the territorial shape of legal discourses.

9.6.2 Law and Place

Two steps to take the analysis of law and place forward are suggested.

The first research agenda should focus on comparative legal interpretation, because research on law, place, society and space has tended to focus on the differences of place. Very few studies compare the similarities of legal interpretation in different places. This gap in the literature suggests that the need to develop comparative analysis of the commonalities and specificities of the interpretation of laws in different geographic regions.

While it is relatively easy to chart specific court cases and to document the activism within each legal case, there are a number of assumptions about legal cultures in developing countries. The sorts of beginning questions to be asked are:

- Which segments of society will benefit from this law, and have they been mobilised?
- Are there class differences?
- Does the majority support these changes in the law?
- Whose voices tend to be silenced?

To avoid shaping legal cultures through a Eurocentric or imperialist viewpoint, investigation should be developed through sensitive methodologies.

In future studies, scholars must be careful to not impose their own biases and preferences within their research. One of the main critiques offered in this dissertation is that the

TAN framework advances a USA geopolitical position of how the human rights movement is progressing. At the heart of this criticism are concerns about the ethnocentric and Eurocentric biases of a Euro-American legal culture being extended through theoretical and analytical frameworks, including what is the *correct* judicial interpretation of the law. Future studies, when seeking similarities of legal interpretation in different places, should seek alternative and varied legal interpretations. Two other types of biases, if possible, should be avoided in future research.

To avoid making assumptions about a specific judge's legal interpretation, scholars should acknowledge that judicial independence, as a territorial shape of legal activists within legal institutions shifts and changes through time, reflects the capacity of the legal and justice system to implement important judicial decisions in political disputes.

In addition, scholars should consider that judicial independence is a critical element of legal institutions supporting the civil rights movement. Because many governments encourage the judiciary to retain a conservative interpretation of the law, the civil rights movement may not be legitimised in the courts. The gay rights movement in the United States, as well as Zimbabwe, illustrates how difficult it is for judges to draw the IDHR into the standing laws of land (Phillips 1997, Goldberg-Hiller 1998). Thus, the key to understanding why the legal interpretation differs in different locations comes from looking at the legal history and culture wherein segments of civil society have tended to solve their own problems outside of the courtroom, rather than rely on NGOs and judges to support their claims.

The second research agenda should focus on the financial architecture being constructed in an era of globalisation, because an important element of law and place is globalisation. Globalisation of financial markets, linked market economies and global capitalism requires that specific locations adopt international financial codes within their domestic enforcement mechanisms. The Organization for Economic Cooperation and Development (OECD) anti-bribery convention signed by 36 countries signals how local economic activities will be changed because of the globalisation of financial laws (Wang and

Rosenau 2001, Tshuma 1999, Salbu 1999). Future research will need to connect local cultural norms, to the economic history of a government and to the capital flows from the international community. Evaluation should begin at the global level and work down to the local level.

Yet, in this research agenda, researchers need to be reminded that the geohistory of place is important (a point also stressed by Blomley (2001), Paasi (1991), and other geographers). Additionally, a parallel line of research should begin with an examination of local cultural norms and work *up* through the regional, national and international scales. We need to trace the geographies of these laws and how they affect informal financial systems, which have complex social, politico-legal, and economic interactions connected to the shadow economy of bribes and corruption. We also need to establish the points of conflict: where the global capitalist system intersects, collides and clashes with local communities asserting their right to control the economic niche which has been constructed in the shadows of the state. The Zimbabwe-Commonwealth-World Bank case study offers a point of departure, suggesting the locations where different interest groups converge and/or diverge.

Future research will need to identify such contradictions, particularly as much evidence can be found within the legal and justice system, suggesting that nation-state leaders and international lending agencies are supporting civil rights organisations and as well as free trade. The critical point that researchers must be aware of is that the courtrooms are being used for different reasons. Economic and political disputes are found inside and outside the courtroom. These often evolve because the economic elites cannot reject the human rights discourse, nor can the elites be openly hostile to the civil rights organisations because many elites draw much foreign capital from the North because of their support for the human rights movement.

Thus, to avoid reproducing ethnocentric biases in future research, some of these tensions will need to be acknowledged. As argued in this dissertation – the geographies of the capitalist and human rights movements intersect. The sort of questions researchers should

be asking when collecting primary and secondary information include: is it possible to capture the contradictions of elites using the human rights discourse?

9.6.3 The Legal and Justice System as an Object of Analysis

Researchers need a coherent research agenda that connects economic theory, political action and a sense that new political spaces are being imagined and constructed through individuals' interpretation of domestic and international laws. They should start with the broad question - *what are the politics, practices and philosophy within a legal and justice system?* But there are many other preliminary questions that they could begin with.

Two general points will be made that justify why a very narrow research agenda has been offered. First, this dissertation's analysis of the power relations shaping the legal and justice system's interactions with the Mugabe Administration is instructive in clarifying a research agenda for researchers who are unfamiliar with the topic and the identity politics/position of legal activists. The following research agenda is to show that the analysis of the political presence of international law – which works outside and across sovereign-state boundaries - must be carefully connected to case studies of legal activists within the legal and justice system advancing a campaign against local elites, the global capitalist system and some social groups working in collaboration with the state. Geographers, in particular, may have difficulty bridging activism within the local legal and justice system to the changes of a nation-state's position in international relations. This issue of scale has been especially central to this dissertation, which rejects conventional understandings of local-national-international spatial relations. The key, then, is to use examples from the dissertation to suggest how other researchers can use multiple scales of analysis for imagining and creating multiscalar research agendas.

Second, rather than insist on an open research agenda and run the risk of future studies downplaying the role of the state dominating the legal and justice system, the material and political processes of transnational legal activism and the general political structure of the legal and justice system, this research agenda has been carefully constructed to reveal the tensions among the state, the legal and justice system and civil society.

Four areas for future research are suggested along with some questions which may provide a starting place for future investigation.

1) Analyse how international and domestic economic laws affect local community economic development. The critical point, which has been neglected by many, is that legal theories discussed in court can have practical implications for individuals' daily lives. Individual judges and lawyers who are interpreting economic laws in a manner that benefit the marginalized and the oppressed may be identified through studies that focus on the politics and processes within legal and justice system. Research needs to be completed that reveals how international and domestic economic legal agreements signed between Heads of State and transnational corporations affect local community economic development (Tshuma 1999 Carter and Trimble 1999: 523).

Researchers interested in this line of investigation should note that the entry point into understanding how international and domestic economic laws affect local community economic development is to focus on *individuals* within the legal and justice system. This study suggests that future research should identify and investigate *which* economic development lawyers and judges advance different justice/rule of law visions when they interpret different contracts between the state and multinational corporations, etc. We need more information about the individuals who support the NIE legal-institution-strengthening initiatives and stabilise macroeconomic institutions with the simplistic equation *law = progress*, as well as individuals, and economic development lawyers and judges who use the social/justice rule of law views to ensure a better quality of life for local women, men and children.

The following questions may provide a starting place for future investigation:

- Are new legal theories being used to interpret the current legal text and to change the current administration of the law?
- What narrow interpretations of rule of law - being used within courtrooms - sustain conservative approaches to civil liberties?
- Whose social justice ideas are being drawn into the legal system?

- What are the legal personalities, cultures and practices resisting authoritarian structures and laws and how do these patterns of resistance actively change economic and legal structures?

2) Demonstrate that judges and lawyers are benefiting from the presence of the United Nations' Special Rapporteur on the Independence of the Judiciary. To this end, future studies will need to trace historical changes in judicial activism over the past two-to-three decades. Since the United Nations' acceptance of the Basic Principles on the Independence of the Judiciary (1986) and the Basic Principles on the Role of the Lawyers (1990), legal geographies around the world have changed. We need more studies that investigate if judges and lawyers are benefiting from the presence of the United Nations' Special Rapporteur on the Independence of the Judiciary and Lawyers (see UN- COHR 11/02/02 and Tolley 1994).

We need more work that carefully traces judges' activism, particularly those who are sensitive to complex power relationships affecting racial, gendered, sexual, able/disable etc. differences. Chapters Four through Seven provide the sorts of detailed analysis of legal activists citing laws that might create political change in the future. What is interesting is that these professional coalitions are making a clear political and public stand and articulating that they have a position on the sort of interpretation of the law that they would like to see administered as the *justice* of this society. These sorts of details tell us a great deal about how a new vision of justice is circulated to civil society, changing cultural politics inside and outside the courtroom, and creating the seeds of social change. Studies that trace activism inside and outside the courtroom, with an analysis of how this activism makes a difference within local communities as well as how it changes national visions of justice are also greatly needed.

This research should be connected to broader questions about the symbolic presence of the UN in developing countries, and the issue of judicial intervention and whether or not judges and lawyers around the world are making more public statements and increasing their public presence as a result of the United Nations acceptance of the Basic Principles

on the Independence of the Judiciary (1986) and the acceptance of the Basic Principles on the Role of the Lawyers (1990)

The following questions may provide a starting place for future investigation:

- What are the historical struggles between the Supreme Court and the Head of State?
- How does a Supreme Court judge wrestle with the day-to-day reality that the elected government in power is probably not supportive of rulings. When will a Supreme Court judge risk the anger of the government to advance an idea of justice?
- Which struggles between the Supreme Court and the Head of State suggest that the Head of State is dominating? Conversely, which struggles between the Supreme Court and the Head of State suggest that the Supreme Court is dominating?
- What are the indigenous interpretations of the International Declaration of Human Rights? Are these being integrated into the legal and justice system?
- What changes are occurring in the legal and justice system i.e. are there more women in the legal system and how are gender dynamics within the legal profession translated into the legal cases?

3) The narrower research agenda focuses on how local societies respond to these changing relationships between the state and the legal system because of recent changes in the global political economy. The following questions may provide a starting place for future investigation seeking to understand local responses to the human rights movement:

- Do women and men and children avoid encounters with the police, will they speak out against oppressive laws, and is this fear and silence translated into a landscape of silence?
- Has the post-independence government re-written the colonial era legal mechanisms that oppressed the civil rights movement?
- Who is being silenced when there is a controversy about a law, or a sensitive case being handled within the legal and justice system?
- What legal mechanisms control basic freedoms, such as freedom of speech?
- How are local legal spaces entwined with multiple layers of political activism seeking to change this space?
- How does local women and men use of legal discourse, the language of freedom of speech, and demonstrations suggest that they are receptive to human rights NGOs?
- What are some of the small and subtle ways of reclaiming political space, such as maintaining the informal food distribution network?
- What is the historical development of relations between NGOs, the judiciary and the state?
- How does an NGO navigate in a landscape where local governments resent international and local NGOs investigation of alleged human rights abuses but, because of signed international treaties, allow NGOs to remain?

- Do NGOs acknowledge their political ambitions as well as responsibility to represent their “subjects” appropriately, particularly when using electronic advocacy networks to fragment state sovereignty?

Taken together, this very specific agenda connects political action, domestic and international laws and the global political economy. At the same time, the purpose is to suggest that there is a need to break out of the local analysis of law, social justice and human rights issues to understand how legal activists help shape the political infrastructure of laws, legal philosophy and legal activism. These examples and questions are meant to direct future research in the direction that connects local legal activists with recent changes in the global political economy that allow them to challenge the sovereign-state and ingrained social norms. These examples are to place clearly on the agenda of future studies an analysis of the conceptual tensions created as local forms of activism link with global forces to challenge sovereign-states. Moreover, these examples are to ensure that legal/social justice/human rights geographers focus on case studies, which may illustrate how global processes affect specific legal and justice systems.

9.7 Summations and Conclusion

Caught between global political and economic events and local social movements, many legal institutions do not appear to be administering *justice*, so why do societies continue to legitimise their presence?

This question is meant to create an important position for future conceptualisations of law, economics, society and space. To begin with, it is meant to challenge the traditional conceptualisations of the power of international law, including the clause of “non-intervention” in the United Nations Charter (Olonisakin 2000, Odinkalu 1998, 2001). Moreover, it suggests the need for more studies that offer conceptualisations of the political space occupied by transnational legal activists. The analysis in this study pivots around how a specific place is affected by societies rejecting or accepting individuals within the legal institution's vision of how the legal and justice system should work alongside the state. This analysis could, and should, be used for future studies. This focus became the critical and key point that shifted the analytical lens to global processes

altering the political space of the sovereign-state, and suggests the direction of future studies.

The Zimbabwean case study, with all its rich detail of state suppression, legal activism and changing legal geographies is significant to future studies - be they in international relations, political science, law, economics or geography- because it hints at the answer. The day-to-day reality of individuals living in an oppressive legal culture has not been flattened out. Details such as *Amai Tsitsi's* breaking her silence suggest the depth and breadth of the geography of fear constructed from state-condoned violence, a spatial presence that halts her from sharing her opinion with me (me – a symbol of the human rights movement). In short, the key to understanding why the TAN framework is methodologically flawed comes from looking at the model from a Zimbabwean's perspective.

To begin with, this local perspective is aware of the laws passed by the settler regime, the role of NGOs, the agenda of the Mugabe Administration, individuals within the legal and justice system who have a very small space to manoeuvre and the international community's readiness to impose sanctions in the 1960s as well as in the 21st century. Moreover, a Zimbabwean's perspective does not just focus upon a concern about NGOs' ability to advocate for change and navigate within the oppressive security laws as suggested by the TAN framework. Also relevant is the fact that many High and Supreme Court judges are unwilling to risk the attention of the Mugabe Administration. Also relevant is the international communities' respect for the sovereign-state's right over its jurisdiction and the United Nations clause of non-intervention (Olonisakin 2000, Odinkalu 1998, 2001).

This glimpse into the mindset of many Zimbabweans who (consciously or subconsciously) are aware of the Euro-American geopolitical neglect of African basic needs, may also help future studies explain why Trubek (2000) shapes a vision that the NIE/LDM reasoning can only create new landscapes of exploitation through capitalist oppression (Taylor and Nel 2002). Yet, this analysis misses the point: the *legal imaginary*

of the individual, the lawyer, the judge, the NGOs, the state and even the United Nations' Special Rapporteur on the Independence of the Judiciary and Lawyers has not been represented. Moreover, this analysis highlights a conceptual flaw in much of the current state transformation and critical legal institution development literature, which has continued to misrepresent the intersection of law and space. More importantly, much of the literature tends to misrepresent the legal imaginary that envisions the sort of socio-spatial relationships that may materialise because of the day-to-day presence of a law (Blomley 2001: 9).

To understand the legal imaginary, one needs to understand legal space and its territorial patterns. The territorial patterns found in legal space, as Blomley (2000) notes, are because of the constant changing of socio-spatial patterns among the state, civil society and the legal and justice system. *Legal space* is constructed through the points of intersection among the legal and justice system, civil society and the state. In short, the main power struggle among different stakeholders in the state, the legal and justice system, the international community and civil society is being misrepresented, because far too few are considering the space and spatial relationships of the legal and justice system with the state.

Moreover, as has been argued, the institutional mechanism that connects the sovereign-state to the United Nations, the legal and justice system and civil society is the United Nations Charter. The ebb and flow of political power shifting from the local to the international and back to the national level has been sketched into the TAN framework. Yet, because the geography of law is not being written into these intersections, there is a misrepresentation of many laws, including the political power of the United Nations Charter.

With the legal imaginary in mind, a very different interpretation is offered as we trace the power relations within the legal and justice system, beginning at the local level and working our way up. We start to see the potentialities, the points of intersections wherein the tensions and contradictions of drawing international law into the standing laws of the

land also hold a possibility for future change (Meili 2001, Dezalay and Garth 2001). Read through a critical legal geographer's perspective, we note that *Amai Tsitsi* broke her silence. NGOs have gained the attention and sometimes the trust of citizens (tired of the rising food prices, shortage of fuel, oppressive laws and threats of violence). The legal community connected to the Commonwealth Lawyers Association, Law Society of Zimbabwe and the Zimbabwe Lawyers for Human Rights, the International Bar Association, are discussing the fact that the local legal community made the effort to challenge Mugabe Administration's form of *legal* oppression (Z-CIZC-19/06/02, AI 25/06/02: 26-27). And scholars and practitioners are asking the bigger questions of what sort of intervention tactic – if any - should the international community use to intervene in the Zimbabwean situation (Olonisakin 2000, ICG 10/03/03)? All of this is because of the legal imaginary of each individual.

Viewed in this manner, the key element that has been missing in much of the analysis is a geographic perspective. This perspective suggests that United Nations' Special Rapporteur on the Independence of the Judiciary and Lawyers holds open political space in all legal and justice systems to allow a legal culture the space to change. Such political space is tremendously important to individuals such as *Amai Tsitsi* in developing, postsoviet, postcolonial countries. They need to hold onto the hope that the courts might some day legitimate their civil rights movement. This analysis also highlights a serious gap in human geographers understanding of social justice, law and human rights, but also suggests that a focus on legal activism may point geographers in the direction needed to better appreciate that the Zimbabwean case study provides evidence of changing spatial patterns, patterns that suggest that inclusion and exclusion in the human rights movement is a very complex process. Such struggles need to be acknowledged as well as mapped as past, present and future legal geographies.

Thus, the focus on legal activists, rather than law in a place, has established a new reference point in critical legal geography. This dissertation suggests that the power relationships between the legal and justice systems with the sovereign-state illustrate different struggles over the use of legal space. Without re-iterating the points made

during the literature review on judicial independence, rule of law, the critical legal institutional development literature and international law/state transformation/human rights/democracy literature which suggests the global context in which specific legal and justice systems have been strengthened, an important theoretical critique of the legal/social justice/human rights geographic literature has been made. *The legal and justice system is defined as a space of freedom from the state: a space in which visions of social and economic justice **may** become a material reality.* Moreover, if one carefully examines the political interactions in this space, it becomes apparent that international law and domestic law are **not** binary dualisms (Tolley 1994, Dodson and Jackson 2001).

This criticism of human geography is because of the general insistence that the legal and justice system and the state are the same. Legal geographers (and more generally human geographers) are missing an important area of inquiry and set of power relations that shape the international financial legal architecture, as well as the international humanitarian legal architecture, and force the state to remain open to the international community. Topics such as the state's vulnerability to the international community, the financial legal architecture constructed by multinational corporations, legal interpretations that flow over and through national borders and boundaries and many others need more thorough investigation.

Moreover, as was suggested in the definition of legal *space*, the complex territorial shapes of legal activists is neither local nor global, inside the state nor outside the state, representative of marginalized voices nor representative of the elites. This space of freedom from the state means that individual activists within the legal and justice system are a different sort of political reference point for a social movement than is typically considered in the geographic literature (see Miller 2000). A sustained discussion about the characteristics of the legal and justice system is beyond the scope of this conclusion, but it is worth mentioning some of the geographies and spatialities that have been identified in this dissertation. The abstraction *trajectories of legal activism*, the vision that the NIE/LDM was being spatially diffused across the globe through cyberspace, discourses, and legal activists advancing a vision that social justice could be attained with

a better standard of living were all ways of describing the diffusion and creation of new legal geographies. In short, by identifying the presence, politics and practices of transnational legal activists this dissertation has made an important contribution to the geographic literature.

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Appendix 1.1 Past Failures and Present Law and Development Initiatives

This dissertation is a geographic interpretation of the Law and Development Movement. The critical legal institution development literature will be reviewed much more thoroughly in this Appendix for those unfamiliar with the argument of the critical legal institution development literature. Three other reasons are offered to justify why the critical legal institution development literature is examined in depth. One, the critical legal institution development literature focuses on number of important issues such as the North/South and local/global politics and processes, global structural and political changes, the capitalist political economy of legal ideas, processes and policies involved in constructing laws in an era of Euro-American legal, economic and cultural domination, and the capitalist political economy of legal institutional strengthening initiatives. Moreover, this literature views the social movements of legal activists, NGOs and the global social movements as a new turn of cultural and economic and legal superiority in non-Euro-American nation-states.

While the state transformation/human rights/democracy literature adopts a celebratory tone, the critical legal institution development literature suggests that negotiations in and among state, judiciary and civil society and legal activists are complex forms of social interaction: these forms of transnational activism are far from neutral. The critical legal institution development literature observes that legal activists who step into another legal culture tend to embody the notion *modernisation/progress*, and ideas of law, economics and politics. They impose these values onto local legal cultures. These individuals are the interface between imported ideas and ideals and local legal cultures. In short, the critical legal institution development literature identifies that legal activists are a strange paradox of activist and interventionist agendas driven by the political economy of Euro-American funding patterns (Dezalay and Garth (2001)).

Two, the critical legal institution development literature makes the critical connection between economic paradigm shifts in the international lending agency community and the material/political economic implications of this paradigm shift. Tshuma (1999),

Trubek (2000), Weaver (2000) and others suggest that lending agencies such the Inter-American Development Bank, Asian Development Bank and others have adopted the New Institutional Economics (NIE) logic. The logic that is being extended through time and space is that more laws = more *modernisation/progress*. Most importantly, a particular worldview is changing the boundaries between the legal system and the state.

The law and development movement, also known as the imperial expansion of international lending agencies' rule of law revival, was sparked by end of the cold war, post-soviet countries with their economies in transition and the economic theories shift from neoclassical economics to New Institutional Economics (Trubek 1972, 2000). The critical legal institution development literature has become increasingly critical of the transference of the Euro-American legal culture to *Other* locations (Trubek forthcoming, Said 1978). Post-soviet countries provide examples which emphasise that these are locations of struggles. Some countries have tried to integrate the principles of constitutionalism, separation of powers, and the supremacy of law over rule in specific locations with less than satisfying results (Clement and Murrell 2001, Hendley 2001, 1997, 1992). In short, by adopting a liberal democratic notion of rule of law being advanced by INGOs such as the ICJ many new governments have permanently changed the political landscapes of European, Asian, Latin American, Middle Eastern and African countries (Mathews 1986, Tate 1997, Murrell 2001, Katouzian 1998, Doe 1997). A common theme found in many of these studies is that aspiring democracies have dislocated legal, political, economic, cultural and social structures shaped through space and time. Empirical evidence collected from these nation-states suggests many difficulties. Moreover, one general discovery is that legal cultures take time to change. In short, outside legal intervention schemes have caused friction and tension; and communities show evidence of social decay after they adopt western legal theories and begin integrating western notions of democracy. This literature identifies that the overarching theme of economics merges many diverse issues into one channel. The international global economy is driven by the urge to gain access to the markets and resources of economics in transition, and uses international economic law to further the global economic struggle. Thus, international economic law allows Euro-American

nations to unify their capitalist agenda and erode the economic protectionism of individual nations.

The key idea that the critical legal institution development literature makes is that that *law = modernisation/progress*. The logic of entwining law and economics is framed on one idea: the market economy can only function efficiently through the transformation of legal institutions and the enforcement of the law. When post-soviet economists asked how Western economists could stabilise macroeconomic institutions undergoing massive transition, the simplistic equation *law = progress* was offered. As stated by Clement and Murrell (2001: 2):

...the demand for the rule of law is as much an economic phenomena as a political one...when the revolutions in Eastern Europe and the Soviet Union eventually came, a central element on the agenda was fundamental change in economic laws and institutions, leading to the economic rule of law.

The key idea is economic rule of law. This idea is based on Western academic economists' logic which argues that the law can offer a technical solution for social problems. By changing local legal frameworks, altering unclear policy frameworks, empowering human rights groups to report local government's transgressions of the law, eradicating local problems of corruption and misspending, these technical solutions will create progress/modernisation for local communities (Clement and Murrell 2001).

Three, this literature also raises a number of disquieting points. It identifies the complex authoritative language that intermixes law and economics, which in turn creates a logic that is difficult to come to terms with in practical and theoretical terms. For instance, Dezalay and Garth (2001: 365) raise the troublesome question - *why has the human rights industry continued to perpetuate the inequalities of the global capitalist system?* This is an emphasis on the point that there is more to the institutionalisation of rule of law than merely human rights ideals, and zealous civil rights movements seeking to promote democratic institutions; there are also a number of political implications to this activism. This literature traces the social construction of hierarchical relations between the state and the legal and justice system. Moreover, it acknowledges that geographic presence of

INGO's vision of liberal democracy has embedded the politics that institutionalise rule of law all over the world. State/judicial relationships have begun to assume new roles and new forms of politics as legal activists re-territorialized the relationship between the state and the judiciary.

The Critical Legal Institution Development Approach

This section will highlight the key points the critical legal institution development literature makes. This literature identifies that there is a global economic initiative seeking to strengthen legal structures at both local and global scales. This literature analyses the political implications of the North transferring its legal culture to the South, and the political economy of legal ideas. It tends to argue that the institutionalisation of rule of law serves international lending agencies' agendas, not women's, children's or men's economic/political/cultural/social rights.

The Rule of Law Revival

In the late 1980s, a number of global structural and political changes occurred. The end of the Cold war created the sort of changes in the global economy that could enable and legitimate the idea that building capitalist legal institutions would foster economic development in transition economics such as post-soviet European countries. This is popularly known as the *law and development movement*, or *the rule of law revival* (Carothers 1998, Trubek 2000, Murrell 2001). The international development community has utilized this concept on two occasions in the 1960 and in the present (Trubek 2000, Murrell 2001).

Thus, the phrase *rule of law* is often used in association with discussion pertaining to democratic institutions and transitions. But rule of law discourses tends to hide much deeper problems. Empirical studies above suggest that global forces drive the notion that state/judicial boundaries need to be reconfigured. A corpus of critical legal development literature argues that the spatial transference of legal culture goes beyond a mere transfer. This transference has dismantled local political and social structures, creating disputes over legal practices, procedures, social norms, interpretation of legal texts, contested

territories of state/judicial dynamics, sense of legal personality (i.e. the civil rights culture) and manipulated politics, social and economic spaces by altering legal cultures. The literature that examines the shifting terrain between the state/judiciary relationship draws from a historical analysis of the logic which once argued *economics and law = modernisation*. Since the 1960s/1970s to the present, a variety of scholars' analysis of the shifting boundaries between the sovereign-state and the legal and justice system has demonstrated that these reconfigurations have not positively altered local economies (see Seidman 1978, Burg 1977, and Trubek and Galanter 1974, Trubek 2000, Rose 1998, Widner 2001, Trubek forthcoming).

The Modernisation Logic of Douglass North and Ronald Coatse

The present rule of law revival is based on the theoretical work of the Nobel Prize winning economists - Douglass North and Ronald Coatse. The NIE has quickly become established in the discipline of economics and in the practice of development (Bates 1995, Weaver 2000, forthcoming). As Hendley (1997) argues, the simplicity of the modernisation logic is appealing. However, as case studies from Latin America, Russia, Asia and Africa have illustrated, such logic does not sit well in the real world (see Rose 1998, Murrell 2001, Widner 2001)). Given that Trubek (2000) argues that lending agencies such the Asian Development Bank and others are financially supporting the new law and development movement, the rational to implement such development policies and programs warrants closer examination.

Trubek (2000) and Weaver (2000) argue that the simplistic equation *western law = western capitalist development* framed on one idea: *the market economy can only function efficiency through the transformation of legal institutions and the enforcement of the law*. Formal political organisations, law and legal institutions have an important role to play in development. These organisations and institutions focus on securing property rights and developing contract rights which will create a political structure conducive to economic growth (Webb 1999). The main argument is this: as countries modernised, they would construct legal institutions and cultures similar to those in the West. As they were on the same unidirectional path to modernisation, post-soviet and developing countries

integrate western techniques, ideas and attitudes toward economic exchanges and legal thought. In doing so, their economies will evolve and they will become modern/progressive. External assistance, provided by the West, will hasten the process.

Different critical legal institution development scholars offer different contributions to the debate. For instance, Bates (1995) offers an important contribution to the critique of the NIE literature. He explores dividing line between neoclassical and NIE lines of thinking, and argues that they have many similarities. Nevertheless, the key intellectual figure in this discussion is Trubek (1972, 2000) who braids together critiques and counter critiques of legal development. Trubek's (2000, forthcoming) analysis of this logic's origins is instructive. He provides a historical narrative of the idea of law and development and details the critiques and counter critiques between scholars such as Seidman (1978) Burg (1977) who responded to Trubek and Galanter (1974). The topic of discussion was the theoretical and methodological elements of the LDM, and the conceptual weakness of the LDM. In short, the Trubek's and Galanter's (1974) article delegitimised the imaginary of the modernization theory and its practices.

Some of the rigorous critical legal development literature has been published. For instance, Tshuma (1999) argues that major lending institutions focus on the procedures and practices of law rather than the social justice of law. Moreover, legal reforms tend to mirror the western ideological agenda, a western technocratic style of law, despite the conflicting agendas of different legal advisors and different theories of law (rule of law). In short, he argues that the narrow interpretation of rule of law held by the World Bank is inappropriate for the unique historical, cultural and political experiences of many developing countries. Nonetheless, much of this literature is still in its infancy and has not yet been published. Weaver (2000, forthcoming), who is leading a portion of the current discussion, provides an insight into some of the new studies being produced that focus on the role of legal language. Thus, this is a new area of investigation for geographers seeking to understand the impetus behind the commodification of legal language.

Connecting Past Failures with Present Development Initiatives

The literature that best connects that complex economic/law logic is that the literature than makes the connection to the 1960s/1970s and 1990/2000s law and development initiatives. Such connections strengthen the rigorous inquiry. This inquiry expresses the illogical logic embedded in the NIE lines of thinking. The NIE argue for the need to alter legal and justice systems to manipulate and deepen *progress/modernisation* programs for economies in transition (i.e. post soviet and postcolonial countries). In the interest of quickly reviewing the key ideas of the critical legal development literature, Table 1.1 is offered. Table 1.1 provides a summary and literature review of some similarities and differences between the two-development projects: the New Law and Development Movement (1990s/2000s) and the Law and Development Movement (1960s/1970s). Although the impetus, theoretical underpinnings, critiques, social visions, methodology, program concerns, sources of funding and academic interest differs, one point remains constant: lessons learnt in the 1970s are being referred to in the current analysis. The key lesson learnt in the 1970s was that when western models of democracy and law were exported to developing countries and applied, the unique historical legal culture and context was often disregarded. The recent literature suggests that scholars are aware of the need for critical social theory and sensitive methodologies, even if such grand ideas are not always put into practice. For instance, Rose (1998) acknowledges that the work of critical race studies, feminist legal theory, law and economics theory has brought more cultural sensitivity, awareness of conflicting agendas into the NLDM. In contrast Trubek (2000) sceptically evaluates legal activists' methodological sensitivity. He argues that lawyers, legal specialists and human rights NGOs tend to superimpose their views and values upon the developing country and change the cultural and political environments that currently shape the local legal system. In many cases, legal activists are changing the rooted legal culture with top-down legal expertise to create a more efficient economy despite the unique historical context of the local legal culture.

Table 1.1: Similarities and Differences – The 1960s/1970s Law and Development Movement and The 1990s/2000s New Law and Development Movement

Theme	1960s LDM	1990s NLDM
Impetus	Development decades of 1950s and 1960s led by the United Nations	End of the Cold War and Globalisation 1989 – the rise of global capitalism and democracy meant that international lending agencies were following twinned development projects: human rights and market forces With globalisation, more transnational advocacy networks (e.g. human rights networks) have been reporting human rights abuses. With information flowing from the South to the North, more development agencies were willing to invest in human rights.
Theoretical underpinnings	Based on Max Weber's political efficiency argument <ul style="list-style-type: none"> Borrows some ideas from modernization theory: based on democratic market model of state, economy and society Main thrust of argument: Law is a central feature of a stable economy. <ul style="list-style-type: none"> Developing countries wishing to become developed should use western legal mechanisms to stabilize the developing economy. Combination of law and economics = legal liberalism 	Based on Douglass North's theory of economic efficiency Main thrust of argument: Legal foundation of capitalism - rules and institutions make markets operate. <ul style="list-style-type: none"> Law is a central feature to stabilizing formal institutions, formalizing economic exchanges, and protecting private property rights Legal reform is needed to make the local economy work.
Paradigms	Modernization theory - Rostow	New Institutional Economics – North and others
Critique of theory	Max Weber's historical explanation of the rise of capitalist societies in Western Europe was used as a template for this development initiative. After the universal perspective model was applied to postcolonial and post conflict countries, scholars began to examine the real interactions between the lawyers and the legal system. The empirical evidence suggested that such a model was constructed on a number of assumptions, many of which were dangerous to the physical and economic well being of the communities being developed.	North (1990) theory has a number of assumptions embedded. At the very least, the development argument suggests that this "top-down" reshaping of laws and legal institutions does not improve economic relations in many countries, for example, post-soviet Russia. In short, recent research on private property rights in Russia suggests that reformed legal system does not mean that business people will adapt to using law as a part of their institutions, nor does it change most Russians feelings of distrust about the legal system and the law.
Social visions	Create an overarching program of legal reform that would change whole systems <ul style="list-style-type: none"> change legal systems and legal norms in the interest of efficiency and justice. Help post-independent countries become developed 	Legal reform is a major area of programmatic concern: <ul style="list-style-type: none"> Help post-soviet countries in transition 1970s and 1980s human rights activity specified human rights norms and created machinery of international action to enforce these norms. This made everyone aware of the need for constitutional protections, independent judiciaries and access to justice. Use NGOs as a political actor, advocating democracy and the need to forge a viable civil society Emphasis: citizen participation, empower local populations.

Theme	1960s LDM	1990s NLDM
Methods Methodology	Export legal knowledge and lawyers to developing countries to modernize local legal systems	Develop local legal knowledge and lawyers, and use local knowledge. <ul style="list-style-type: none"> • Use NGOs to replace top-down, state led approach to development • Develop sensitive methodologies based on cultural and feminist theories
Programmatic concerns	Legal assistance projects and legal consulting Change legal systems and legal norms in the interest of efficiency and justice	Legal assistance projects, judicial reform, and legal consulting
Academic interest	Create an academic field in legal studies that would parallel sub fields like development economics	Empirical inquiry and theoretical speculation in 2000, for instance the *CROL 2000 Workshop
Lessons learnt	External development projects, with insensitive methodologies, are not always well integrated into developing countries	Cross cultural sensitivity <ul style="list-style-type: none"> • Research micro foundations of rule of law
Critiques	Macro-scale: conceptual underpinning of LDM was based on a misreading of Max Weber. Micro-scale: ethnocentric, imperialistic, theoretical and naïve.	At the global-local scale: discourse analysis of NIE suggests that the emphasis is on institutional strength rather than economics. The language legitimises external legal assistances in an apolitical manner. At the local scale, critiques tend to follow different viewpoints. One view is informed by critical legal studies, cultural studies and feminist theory which suggests that NLDM is repeating same mistakes as the LDM - that is ethnocentric, naïve and imperialist agendas. A second view is that judges from developing countries who seek funds from international funding agencies to support legal reform are using foreign legal cultures. A third view is that legal literacy can be built through the media.
Counter critiques	Academic legal academy is moving from pragmatic policy making to deeper forms of academic inquiry.	Simplistic evolutionary ethnocentrism still under critique. However, refined theoretical frameworks should help shape new approaches to problems.
Sources of Funding	Never had major support from development agencies Some international foundations, multilateral lending agencies, foreign assistance programs, and multinational law firms	Multilateral financial institutions (e.g. World Bank); foreign aid agencies (e.g. US AID); foundations and non-governmental organizations (e.g. Ford Foundation) and many others Billions committed to this development initiatives <ul style="list-style-type: none"> • 2000, World Bank's annual development conference has several panels on law and development. • July 9 2001, <i>Second Global Conference on Law and Justice in Russia</i>
Focus of funding	<ul style="list-style-type: none"> • International human rights movement • Legal assistance to the poor 	Massive investments are being made in legal reform and "rule of law" projects in the NGO sector
<p>*The purpose of the CROL 2000 workshop (the <i>Workshop on the Changing Role of Law in Emerging Markets and New Democracies</i> Madison, Wisconsin March 24-26, 2000) was to engage participants with theoretical, methodological and empirical questions. Participants focused on three questions:</p> <ul style="list-style-type: none"> • <i>Why is law in development?</i> • <i>Whose Law, Whose Development?</i> • <i>If you build it, will it matter</i> (building the bridge between written law and social behaviour)? 		

Sources: Bates 1995, Hendley 1997, Rose 1998, Price 1999, Weaver 2000, forthcoming; Trubek 2000, Widner 2001, Z-Insider 31/07/01-O

Economic Rule of Law Discourse = Good Governance Discourse

The critical legal development literature argues that the capitalist legal activists have a particular language, which focuses on fixing institutions. This rhetoric stresses the importance of installing democratic systems with voting rights and lobbying rights, developing intellectual freedom, and establishing independent institutions such as independence of the central bank, a professional civil service, a free and independent press, a professional army; strengthening legal infrastructure to attract foreign and domestic investment to facilitate faster economic growth and institutional capability. The economic development/legal activists use NIE reasoning and language (Cameron 2000): econometric analysis of institutions to argue that weak institutions inhibit economic growth (Chhibber 1998), and critique legal reform initiatives based on NIE logic (Harrison 1999), we see the language of the predictability of rule making, proper constitution making and new laws and institutions to maximize opportunism. The critical idea is that this is a business point of view of institutions. The rhetoric is fascinating, seductive and compelling; and the arguments are difficult to unravel. For example, Mbaku (1999) argues that if one limits the government constitutionally to reduce the opportunities by political elites, and limit state power, the business sector can increase its capability and willingness of the political order to strengthen market institutions. By manipulating institution arrangements between the state and markets and private entrepreneurs, one can change the reliability of judicial enforcement, ensure freedom from corruption, prevent corruption scandals, crimes against persons and property and construct the perception of political stability. All of this in turn will improve the economy (Keefer and Knack 1997, Ayittey 1999, Schneider 1999, Harrison 1999, Cameron 2000).

A contemporary example that should be familiar to most postdevelopment geographers, yet is not, is the *good governance* discourse which was constructed on NIE logic.

Abrashamsen (2000), Weaver (2000) and Tshuma (1999) argue that the *good governance* rhetoric has woven its way into the *modernisation* discourse in institutions around the world. This discourse operates in both general ways and with great precision. Within the international lending institutions, the good governance discourse is used to distinguish the

role of national leaders complying with human rights agenda set within the modernist framework of *progress*. While the phrase *good governance* seems to conjure up images of the state being accountable to the people and suggests that international lending institutions seek to empower local organisations and disenfranchised women and men, as Tshuma (1999) argues, this vision should be approached with caution. Indeed, this logic seeks to *improve* political leadership's use of arbitrary, unpredictable laws and institutional weaknesses and to ensure that local governments implement law within current legal frameworks.

The economic development/legal activist uses this language to serve an overarching purpose: *ensure debt repayment to lending institutions*. The deeply embedded agenda is to reform legal systems to create transparency, clear policies and regulations, clarify governmental decision-making, reduce corruption, rent-seeking, weak financial accounting and auditing systems. In short, laws will ensure economic efficiency of the country and in turn these laws will stabilise legal and financial institutions, which in turn will create economic growth for the lending institution. This critical analysis suggests the need for caution when imaging that lending institutions are invoking real empowerment for the people when they cite *good governance* and the need for institution building. James Wolfensohn, President of the World Bank, made reference to all these points in his keynote speech entitled "Rule of Law is Central to Fighting Poverty" at *the Second Global Conference on Law and Justice in Russia*. During this conference, the World Bank exposes itself as "wanting to improve... the legal and justice system". This is an indication of what the World Bank needs us to believe - that by changing an "a legal framework... human and property rights" will be respected. This vision is compelling. But after the failure of ESAP, such rhetoric highlights the need for cautious and critical reflection before moving forward (Weaver 2000, Z-Insider 31/07/01-O).

The Rule of Law Revival's Geographic Agenda

A spatial vision can be found in much of the literature: ideas are flowing from one institution to another, create contact zones for these new ideas. Carothers (1998) loosely categorised strategies used to locate structures that need to be "improved". The strategies

are used in the economic domain, law related institutions and government-law relations. Table 2.2 highlights the political structures and specific institutions which can be fixed with specific and technical solutions, affecting different economic, legal and civil society. These institutions are the contact zones where the economic rule of law discourse infiltrates a local society. The geography of this development initiative is apparent in how these different institutions are supposed to adopt western laws and legal ideas. At these sites, these ideas are adopted, challenged and mediated in local elites and international lending agencies. These institutions or organisations have their own particular method of constructing a contact zone between the North and South within which the distance between ex-patriot workers, international aid workers, psychologists, physicians, web-site creators, lawyers, human rights advocates, local writers, artists, theatre groups, politicians, economists and others is diminished.

Economic development/legal activists focus on strengthening institutions, institutions that structure information, management, private property rights, law and economics. Keefer and Knack (1997) report that despite the high ideals to import models of advanced, modern institutions, these ideas have failed when imported. Paradoxically, the presence of institutions within developing countries serves to reinforce the notion that developing countries can be “fixed” with the development strategies constructed on NIE logic.

The critical legal institution development literature offers unique insights into the capitalist political economy of legal ideas. Without minimising the potential of the NIE that Bates (1995) and Cameron (2000) identify, another set of literature suggests that many postcolonial people in Asia, Africa and Latin America perceive the law and the state as coercive, exploitive and dangerous, with a patriarchal and urban bias (Widner 2001, Meili 2001, Man and Wai 1998, Man 2001, Ibhawoh 2000, Hatchard 2000). Furthermore, the complex set of relations that have taken place between colonial and postcolonial legal systems as postcolonial people become more *modern* suggest that citizen's groups agitating for their rights, and locations where the rights discourse radicalises the legal system and society - producing multiple wants, agendas and positions - are not welcomed by the state (see Odinkalu 1998, 2001). This literature

highlights the problems involved in transferring the Euro-American legal culture to *Other* locations such as post-soviet countries, the critical legal development literatures' willingness to engage with economic theory has served a clear analytical purpose. They have made complex connections to Nobel Prize winning economists - Douglass North and Ronald Coase. Specifically, this interdisciplinary approach reveals that investigation which remains constrained by disciplinary boundaries is unlikely to expose the NIE logic, or its political implications. This logic stresses the importance of installing democratic systems, establishing independent institutions such as a free and independent press, a professional army; strengthening legal infrastructure facilitate faster economic growth and institutional capability is to engage with the hard fact this language is *not* an emancipatory language. Rather, this language originated with lending institutions' economic interests, interests that are becoming increasingly global through spatial processes as local societies are affected by externally driven legal reform initiatives. Supporting literature to this interdisciplinary attempt emphasises lessons from the 1960s/1970s law and development project in which western models of democracy and law were spatially transferred to postcolonial, post-conflict and newly independent countries.

This review suggests that different literatures illustrate different trajectories of legal activism developed through time and space. These trajectories are driving the legal-institution-strengthening initiatives. Individuals, organisations and institutions who seek to create change in international law, domestic law, economic laws, constitutional laws and humanitarian laws around the world create these trajectories. For instance, a literature review of international law and the state transformation/human rights/democracy literature illustrates a trajectory of legal activism that has sought to separate the state from the law for the purpose of institutionalising human rights, peace, etc. Whereas a literature review of the critical legal institution development literature illustrates the presence of a second trajectory of legal activism. This trajectory seeks to create international and domestic economic laws that reform legal systems to clarify governmental decision-making, reduce corruption and change weak financial accounting

and auditing systems create. This trajectory of legal activists has an overarching agenda to ensure that the government uses the law to protect the material rights of the market economy.

Table 1.2: Contact Zones where NIE Logic is *Fixed* to a Location

Legal Reform Menu: Shallow or Deep Reforms		
<<<<<<<spectrum of development strategies selected by lending agencies>>>>>>>		
Shallow Reforms	Deep Reforms	
Economic* Domain	Law Related institutions*	Increasing Government's Compliance with Law (+)
<p>Strengthen regional economic structures such as banks, industries that produce exportable commodities, and address trade barriers that restrict interregional exchanges</p> <ul style="list-style-type: none"> • Draft or redraft laws on bankruptcy • Criminal law - expand protection of basic rights in criminal procedure codes • Modify criminal statutes to include issues like money laundering, electronic transfer fund, revising regulation of police • Develop federal legislation regulating commercial banks • Privatised regional industrial structures to make use of resources more efficient 	<p>Strengthen regional legal framework and legal regimes by making economically counterintuitive decisions such as:</p> <ol style="list-style-type: none"> 2. Train and provide salaries for judges and court staff 3. Disseminate judicial decisions and professional standards for lawyers 4. Revitalize legal education 5. Broaden access to courts 6. Establish alternative dispute resolutions 7. Strengthening legislation, tax administration, local governments 	<p>Success of this reform is based on leadership and changes and values of those in power</p> <p>Citizen driven human rights and anti-corruption campaigns help change attitudes of those in power</p> <ul style="list-style-type: none"> • Genuine judicial independence • Government officials • Media • NGOs •

Source: adapted from Carothers 1998, Tshuma 1999, Widner 2001, Pistor 2001, Poliskchuk 2001

* Rule of law aid has concentrated on these sorts of reforms, which is a shallow solution to a long term problem. Unfortunately, funding has not moved into the deep reforms are those in the law related institutional domain and increasing the government's compliance with law.

+ this is the hardest and slowest sort of reform to achieve. To encourage citizen-led activities that put pressure on the legal system is difficult because it threatens entrenched interests of the politically powerful.

Appendix 1.2 Protecting the Identity of Interviewees and Key Informants

Pseudonym names and codes have been developed to protect the names of key informants. Details of how the coding was constructed is offered below.

Protecting the Identity of Interviewees, Key Informants

“Tsindi” female (SLC97-127)

“Tsindi” pseudonym for interviewee to personalize the narrative

female =gender differentiated answer

SL = my initials,

C97= Consumer Survey, the year the fieldwork was conducted,

127 = the code number of the interviewee entered in the EXCEL data base

“Tsitsi” female (SLV97-321)

“Tsitsi” pseudonym for interviewee to personalize the narrative

female =gender differentiated answer

SL = my initials,

V97= Vendor Survey, the year the fieldwork was conducted,

321 = the code number of the interviewee entered in the EXCEL data base

“Ngoni” female(SLV98-008)

“Ngoni” pseudonym for interviewee to personalize the narrative

female =gender differentiated answer

SL = my initials,

V98= Vendor Survey, the year the fieldwork was conducted,

008 = the code number of the interviewee entered in the EXCEL data base

Protection of Identity of Key Informants

“Tariro” female (SLI98-01),

female =gender differentiated answer

“ Tariro” pseudonym for interviewee to personalize the narrative

my initials, the year the fieldwork was conducted, and the code number of the interviewer

Protecting the Identity of Key Informants who used their social networks to access information

Example One:

Rudo (SLI98-05) did a number interviews with her own social network of key informants

“Manyame” (SLC98-UG-03)

“Manyame” pseudonym for interviewee to personalize the narrative

SL = my initials,

C98= Consumer Survey, the year the fieldwork was conducted,

UG- Urban Gardener

03 = the code number of the interviewee entered in the EXCEL data base

Example Two

“Bekai” (SLI98-04 -02)

“Bekai”=pseudonym for interviewee to personalize the narrative
SLI98= my initials, the year the fieldwork was conducted
-04 -02)the code number of the interviewer, and the number of the interview that
researcher carried out with her/his own key informant (the number protects the
anonymity of the researcher and the key informant)

Reference to Local Reports, Papers, Theses, Unpublished Research Reports

LZR- Local Zimbabwean Researcher

UZR-University of Zimbabwe Researcher

CUR-Carleton University Researcher

SLI-my initials - Interviewer/Informant (code ##)

SLK-my initials - key informant (code ##)