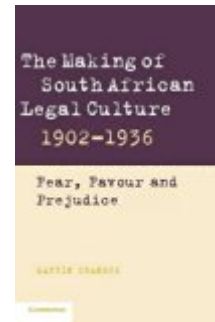


**Martin Chanock.** *The Making of South African Legal Culture 1902-1936: Fear, Favour and Prejudice.* Cambridge: Cambridge University Press, 2001. x + 571 pp. 00, cloth, ISBN 978-0-521-79156-4.



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## "Imagining" South African Legal Culture and the Processes of State Building

For many scholars who study African history or politics, the significance of the law and legal culture are often ignored. Because many African states have not constructed, or respected, the "rule of law," it is perhaps understandable why this is the case. In this respect, however, South Africa is an important exception. South Africa's bifurcated, racial state, which became much more rationalized and institutionalized at the turn of the twentieth century, was founded on distinctions in law—namely, the civil sphere and the customary sphere. Thus, whereas in many African states scholars routinely, and I would argue mistakenly, dismiss the importance of law and legal culture as explanatory variables to understand state building, state-society relations, and political culture, in the case of South Africa, where the "rule of law" was applied unevenly between whites and blacks, it has received much more scholarly attention.

In his most recent work, Martin Chanock offers a compelling and well-documented account

of the process of state building and the formation of legal culture in early twentieth century South Africa. Chanock analyzes, in great detail, the formation of the bifurcated state and of the legal culture which supported and constrained this effort. In doing so, this book not only tells an important story about the intersection of law and culture, but it also raises further questions concerning the processes of state building, and state-society relations, more broadly. In the end, Chanock's effort deserves attention from both historians and non-historians as he raises important issues and questions that reach across a variety of different disciplines.

The book is divided into six sections. Each section deals with a different area of the law and the dialogue between public officials, mainly judges, politicians, and bureaucrats, on the creation of legal doctrines and principles. The four substantive sections of the book each address such areas as, law and order, the common law as it developed from its Roman-Dutch origins, customary law, and law and government. The breadth of the analysis is impressive and it en-

ables Chanock to comment more broadly in the concluding chapter on the nature of law in South Africa and the creation of a legal culture which would provide the foundation for future political, social, and economic developments.

Not surprisingly, some portions of the book can be dry, as Chanock explains and distinguishes many different legal cases, statutes, and regulations. In most cases, however, this is not the case because Chanock's focus on legal rules and doctrines is situated in a broader conceptual framework that highlights much more than simply rules and decision-making. The importance of legal culture as an explanatory framework is set forth in the opening section of the book and is discussed again in the concluding section. In this way, Chanock reminds his readers of the theoretical importance of legal rules, precedents, and regulations and that these legal forms are utilized as a mechanism for us to understand better the ways in which different officials "say things about the law" and how this helps to create South Africa's legal culture.

For Chanock, the central paradox of South Africa's legal development is the existence of a "liberal legal system at the heart of a racist and oppressive state" (p. 20). To understand this contradiction, that is, between what the law says about itself, and how it actually affects people on a daily basis, Chanock utilizes the concept of legal culture. He defines legal culture as "a set of assumptions, a way of doing things, a repertoire of language, of legal forms and institutional practices" (p. 23). He goes on to state that it "embodies a narrative, encompassing both past and future, which gives meaning to thought and actions" (p. 23). Further, he suggests that this analysis can emphasize the "multi-vocality and dissonance" of a legal culture within a state based on racial dominance (p. 4). Through an examination of a variety of different public records, Chanock demonstrates that different state actors understood, and imagined, the law in different ways and the key to un-

derstanding South African legal culture is an understanding of the "complex relationships between different ways of saying things about the law" (p. 24). Thus, Chanock's understanding of legal culture encompasses more than just the judicial common law or statute law emanating from the Parliament. Instead, legal culture includes additional discourses from the bureaucracy, between the bureaucracy and politicians, commissions, common law, and customary law. As Chanock makes clear, the focus for many of the actors, especially bureaucrats, was on the policy outcomes facilitated by the law rather than the internal discourses between judges on the ultimate direction of the common law itself.

According to Chanock, this approach, with its focus on process and style, can be distinguished from both the positivist paradigm, which focuses on rules, and the realist paradigm, which focuses on legal outcomes. Instead, the concept of legal culture brings together "an interrelated set of discourses about the law: some professional, some administrative, some political, some popular" (p. 23). For example, one of these legal discourses in South Africa is that of formalism. This legal doctrine and interpretative tool is one that draws a stark boundary between the legal and the political spheres. Most judges at the turn of the century endorsed the idea of formalism, as it was the predominant view in the United Kingdom as well as the United States. At a practical level, what formalism allowed judges to do was to ignore, at least in theory, the political and social ramifications of law as they were supposed to be "above" such concerns. While Chanock takes seriously this formalist tradition, he also notes that it is only one tradition among many utilized by South African judges and other public officials.

In each section, Chanock focuses on how judges, politicians, and bureaucrats wrestle with the values of formalism as they also seek to create a racially defined, and discriminatory, state. For example, in many circumstances, the judiciary's

interpretation of Roman-Dutch common law precedents frustrated the administrative state as it adopted more restrictive and discriminatory policies. In some cases, judicial decisions struck down legislative actions and forced the Parliament to enact more specific statutes or to bypass the courts altogether. This is what happened in the 1920s after the judiciary struck down many laws restricting the free speech of black South Africans. To avoid court prohibitions, the legislature simply put this issue beyond the reach of the courts and gave the Native Administration jurisdiction. Over time, however, most judges ultimately rejected the idea of black South Africans as rights bearers in law. In the early 1900s, judges often created a version of Roman-Dutch common law that discriminated on the basis of race. According to Chanock, judges "imagined" and created Roman-Dutch common law as an opposition to both English law and African law as a way to create "a national self-narrative" (p. 527). For example, he demonstrates that although South Africa created a bifurcated state based on the separation of the civil and customary spheres, these two areas of law, Roman-Dutch common law and customary law, represent two distinct, yet overlapping, forms of South African common law. Chanock persuasively shows how these two versions of common law "are not historically comprehensible without each other" (p. 35). The result is that the South African legal culture is mixed as it embodies the values which provide the foundation for both legal liberalism and a race-based, discriminatory state.

By focusing on the ways in which judges, bureaucrats, and politicians discuss the law in the context of state building, the reader is able to appreciate the ideological complexity, and limits, of the South African state. Whether dealing with law and order issues such as policing, criminology, or criminal law, or with "customary law," or land and labor legislation, Chanock argues that the legal culture in South Africa allowed judges and other public officials ample space to "imagine" the

law in different ways. This was especially the case in situations where laws denied rights to white wage earners, Afrikaners, and Asians. Where these groups were affected, legal liberalism and the rule of law reigned supreme and the courts were reluctant to allow Parliament to curtail common law rights. The tension in South African legal culture is between the narratives of legal liberalism and those of race based discrimination.

In addition, Chanock maintains that those who study South Africa should not draw too sharp a distinction between law and politics. Rather than interpreting the law as "arcane and specialised," Chanock suggests that we should recognize that law is "part of the polity and culture" of which it is embedded (p. 20). In fact, legal culture is made up of "an interrelated set of discourses about law: some professional, some administrative, some political, some popular" (p. 23). While each of these discourses differ, they do not exist in isolation to each other and they are all situated within the broader social and political discourses of state and society. More importantly, Chanock demonstrates that during this period of South Africa's history, the law was not used to limit power, but instead, to create it. As has been documented in previous studies, this was most often accomplished at the expense of the judicial branch and to the benefit of the executive branch. Rather than interpreting the law as a determined "given," Chanock argues that rarely do officials simply "apply" the law to a set of facts. Indeed, in South Africa where the law was used to create power, most officials utilized the law as a vehicle to achieved certain policy outcomes rather than as a means to adjudicate conflicts between litigants.

Chanock's discussion on legal culture ultimately raises additional issues which go beyond the mere act of "imagining" the law or understanding different "narratives." While this book clearly has much to say about South African legal culture, it also provides interesting arguments concerning South African state building and the

manner in which the values, assumptions, and discourses associated with law all speak to the larger issue of political power and the desire of state officials to utilize it for their own interests. In the end, it establishes a framework, and an empirical and analytical foundation, to examine more closely the legacy of the apartheid state and the specific challenges facing the post-apartheid state.

The intersection of legal culture and state building more broadly raises important analytical issues. The first is that culture and the state are interconnected in important ways. As Chanock correctly notes, "[l]aw depends on administrative efficiency, rights upon a strong state, not a weak one. A declining effectiveness of the state's administrative machinery and a growth of corruption at a time in which new rights are being proclaimed would weaken any new legal order" (p. 536). This, in turn, will affect the legal culture associated with the emerging legal order. The development of a "democratic" culture and the establishment of state capacity are inextricably related and the two processes may interact in a mutually transformative manner. Perhaps the issue where this is most visible in post-apartheid South Africa has to do with the official recognition of "traditional leaders" and their ambiguous position in the new constitutional order. Do "traditional leaders" threaten the establishment of a "democratic" legal culture or was their recognition needed to ensure social control and state capacity? While "traditional authorities" may imbue principles and values inconsistent with those of the new state, they are needed to provide social control and help the state deliver on its promises. The trade-off here might be one of enhancing state capacity (at least, that is the hope) at the expense of spreading more efficiently those values, ideas, and practices which are necessary for a democratic state to function.

In the concluding chapter, Chanock tackles contemporary issues concerning the establishment of a new South African state adorned with

the values of democracy, rule of law, and constitutionalism. While the questions raised in the final chapter are important, these arguments are also the most tenuous as the reader is immediately transported from 1936 to 2000 without any discussion of the legal developments which occurred during this period. Despite these difficulties, Chanock's conclusions are important as he grapples with some of the most important contemporary political issues.

The central question posed in this chapter highlights both the enormity and the complexity of this process: "How can South Africa develop a democratic legal culture which is open to dialogue yet retains the distinctive characteristics of a 'rule of law'?" (p. 512). One consideration here is the passage of a democratic constitution in 1996 and whether the new institutions, ideas, and processes embedded in this document can transform South Africa's legal culture in this fashion. Yet here we are confronted with two important analytical issues: first, what is the exact relationship between institutions and culture, and second, what affect will particular "undemocratic" or "illiberal" provisions have on such a cultural transformation? Indeed, Chanock's study not only demonstrates the ability to imagine law in different ways but it also provides us with an understanding of the limits of the imagining. Future change will undoubtedly have to take place within the broad constraints, many of which were developed during the period described by Chanock and many others, which were the product of other historical periods. In addition, indigenous values, concerning the law, politics, and economics, should not be dismissed and must be integrated into any analysis of South African political or legal culture.

For example, there have been significant differences as to how whites and blacks have experienced the law. For blacks, Chanock notes that the "law" has meant "police." The Janus-faced nature of South African law, and its legacy, signal another line of inquiry in the future. If Chanock is correct

in that "the decline in legal liberalism was not due to original sin but to its inapplicability to the regulatory tasks of the colonial state," then we must explore how ordinary South Africans "imagine" legal liberalism in the post-apartheid era (p. 522). Namely, before we explore such concepts as "rule of law," "democracy," "rights," or even "politics," we must make sure we have a firm understanding as to how different communities understand these terms. In many cases, we may find that there exist crucial differences concerning definition, interpretation, and utility that provide the foundation for how people evaluate other political dynamics. These local understandings and attitudes towards the law and the state are missing from Chanock's analysis largely because he chose to focus on public records where many of these voices are not heard. While Chanock defends his use of sources on the assumption that "legal culture is within the public realm" (p. 26), I think Chanock's framework of analysis almost presupposes the use of non-public record sources and I think his argument would have only been enhanced if such sources were included.

In the final analysis, Chanock's study is a welcome addition to the growing literature on the law and legal culture in South Africa. His work demonstrates the significant analytical and empirical leverage one can gain through an examination of the intersection of law, politics, and state building.

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