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0521791561 - The Making of South African Legal Culture 1902-1936: Fear, Favour and Prejudice

Martin Chanock

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THE MAKING OF SOUTH AFRICAN LEGAL
CULTURE 1902–1936

Fear, Favour and Prejudice

The development of the South African legal system in the early twentieth century was crucial to the establishment and maintenance of the systems that underpinned the racist state, including control of the population, the running of the economy, and the legitimisation of the regime. Martin Chanock's highly illuminating and definitive perspective on that development examines all areas of the law including criminal law and criminology; the Roman-Dutch law; the state's African law; land, labour and 'rule of law' questions. His revisionist analysis of the construction of South African legal culture illustrates the larger processes of legal colonisation, while the consideration of the interaction between imported doctrine and legislative models with local contexts and approaches also provides a basis for understanding the re-fashioning of law under circumstances of post-colonialism and globalisation.

MARTIN CHANOCK is Professor of Law and Legal Studies at La Trobe University, Melbourne, Australia. His publications include *Law, Custom and Social Order. The Colonial Experience in Malawi and Zambia* (1985), and *Unconsummated Union. Britain, Rhodesia and South Africa 1900–1945* (1977).

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MARTIN CHANOCK

La Trobe University, Australia



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*For Jennifer, Abigail, Alice and Rebecca
And to the memory of Edward Roux*

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PREFACE

When I first thought of writing this book towards the end of the 1980s the apartheid regime in South Africa was in a state of violent disintegration. The state itself had become increasingly 'lawless' and the courts had become arenas for political theatre. In the face of state lawlessness there was much anxiety among lawyers who looked both forward towards an ideal future for law and justice in a democratic state and backwards towards an idealised version of what South Africa's law had been like before its corruption by the apartheid and the security state. It seemed to me, though, that there was little on which to base an understanding of South Africa's legal past that could consider the law on anything but its own terms as a body of authoritative doctrine, a story which usually concentrated heavily on the history of the unique development of the white private law. Indeed texts and courses that treated legal history placed South Africa's legal past in Rome and Renaissance Europe rather than in European law's encounter with Africa and with the context of the rule of white over African which was the overriding factor in the development of the legal system. My first aim, therefore, was to try to situate an account of South Africa's legal history firmly within this local context, and to try to provide the beginnings of a re-mapping and the indication of a new archive for the interpretation of South African law.

Soon after I began, the dramatic process of the collapse of apartheid and the unanticipated negotiated transition towards democracy began. As the present changed, so did the past. The issues that now presented themselves were seen through a lens not of violent disintegration, but of the hopeful, and painful, processes of reconstructing the state. These processes re-shaped my project, which became increasingly concerned with the analysis of law in the process of state construction, for it was this that seemed to be of most interest for the present and future in which, to

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confess to a heresy for a historian, I was most interested. It became clear that it was most important to illustrate first how law, however much its imagery works through long pasts, continuities, inheritances and authoritative doctrines, is, like any complex cultural activity, always in the process of making, of contemporary creation. Secondly I have tried to show that in this making there was no authoritative rule-producing voice but a multiplicity of voices and dialogues both within and outside the state. For it is through these concepts – of making and multiplicity – that the processes of the legal past become a part of the legal future. Finally, while I had begun with the intention of emphasising the localness of South Africa's legal history, it became plain, again through the lens of contemporary developments, that I was writing also about a larger process of legal colonisation – a transfer of ideas, images, doctrine, institutions and legislative models – which was taking place globally during the period I cover. These themes became an essential part of the framing of a narrative that would have meaning in the current period of globalisation, renewed legal imperialism, and the re-formation of states.

While I have opened the book with a series of narratives which exemplify the essential themes in the legal culture, I have discussed the methodological questions in a more systematic way in the second chapter. I have taken my period of state construction to be the years between the end of the South African War and the achievement of consensus among the white ruling elites on the basis of 'segregation'. The substantive parts of the book attempt a comprehensive picture of the law. It starts with colonial policing and 'law and order' rather than with Roman law; it illustrates the simultaneity and connectedness of the making of Roman-Dutch and African customary law; and underlines the importance of the state's project of segregation in all of the law. The final chapter leaps over the intervening years to take up these questions in their current context.

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exchange before the project began Arthur Chaskalson, with an expression of great alarm, told me that if that was what I thought, I ought to write a book about it. Tony Blackshield advised me as I hesitated between different histories that I should write about South Africa rather than Australia. Finally one comes closer to home. Finola O'Sullivan at the Press has been very helpful, and I am most grateful to my copy-editor, Mary Starkey. I have learned much from listening to colleagues in La Trobe's School of Law and Legal Studies which is the home of a formidable group of interdisciplinary legal scholars. The Australia Research Council has provided financial support, and La Trobe University the indispensable periods of research leave. Kate Chanock's editorial skills and intellectual insights have palpably shaped the manuscript. Finally there is the question of a dedication. Those South African lawyers who worked with such commitment and talent for justice during the apartheid years, and since in the processes of re-making law, deserve to be honoured. However, fearing that I might not get around to writing another book I offer this to my children, and ask them to share the customary familial dedication with someone whose writing introduced me to counter-narrative in South African history and who was for me in many respects when I was young, an exemplary South African.

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ABBREVIATIONS

AC	Appeal Court (UK)
AD	Appellate Division
CPD	Cape Provincial Division
EDC	Eastern Districts Courts
EDL	Eastern Districts Local Division
GWLD	Griqualand West Local Division
ICU	Industrial and Commercial Workers' Union
NAC	Native Appeal Court
NHC	Natal Native High Court
NPD	Natal Provincial Division
OPD	Orange Free State Provincial Division
SALJ	South African Law Journal
SALT	South African Law Times
SC	Select Committee
TPD	Transvaal Provincial Division
TS	Transvaal Supreme Court
UG	Union Government