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### Book Review: Martin Chanock, *The Making of South African Legal Culture, 1902-1936: Fear, Favour and Prejudice*

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Book Review: Martin Chanock, *The Making of South African Legal Culture 1902-1936: Fear, Favour and Prejudice* (Cambridge: Cambridge University Press, 2001) (571 plus xv pages)

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Martin Chanock's *The Making of South African Legal Culture 1902-1936: Fear, Favour and Prejudice* is a welcome addition to a developing literature that places legal history squarely in the context of Empire.<sup>1</sup>

Disconcertingly, the history of South Africa is particularly germane to Canadians. The cultures that generated the South African state were first-kin of the cultural, intellectual, political, and social currents that shaped European and North American societies in the same period. Moreover, and however much we might wish to reject the apartheid state, Canada shares with South Africa a heritage within British colonial constitutionalism - and much else as well. The "making of South African Legal Culture" is a story whose outlines are in many respects familiar to students of law in Canadian society.

The book is divided into separate "Parts" dealing with conceptualization and research method ("Puzzles, Paradigms and Problems"), "Law and order" (crime and punishment, including political offences), "South African Common Law" (commercial law, delict, marriage, legal profession, and the relationships between state law and customary law), "Law and Government" (land law, labour law, and administrative law); and conclusions ("Reconstructing the state: legal formalism, democracy and a post-colonial rule of law"). This hefty tome, jam-packed with information, analysis, and documentation, will be welcomed both as an authoritative research resource and for its methodological contributions. Wishing to show that South Africa was not entirely idiosyncratic, Chanock demonstrates that it drew upon knowledge of developments elsewhere in the British empire, in the USA (a rich resource for racist lawmakers of the time), and in other parts of the "civilized" world in developing their own legal regimes. Canadians, like South Africans, were Imperial subjects. As we too fancied ourselves as

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1. Amongst others, see: Christopher Tomlins, "The Legal Cartography of Colonization, the Legal Polyphony of Settlement: English Intrusions on the American Mainland in the Seventeenth Century" (2001) 26 *Law and Social Inquiry*, 315-372; Diane Kirkby and Catherine Coleborne eds., *Law, History and Colonialism: The Reach of Empire* (Manchester: MUP, 2001); Peter Karsten, *Between Law and Custom: "High" and "Low" Legal Cultures in the lands of the British Diaspora: the United States, Canada, Australia, and New Zealand, 1600-1990* (Cambridge University Press, 2002); Laura Benton, *Law and colonial cultures: legal regimes in world history, 1400-1900* (Cambridge University Press, 2002); "Colonialism, Culture, and the Law", *Law and Social Inquiry*, 26(2) Spring 2001, (Symposium Issue); Ronen Shamir, *The colonies of law: colonialism, Zionism, and law in early mandate Palestine* (Cambridge University Press, 2000); Douglas C. Harris, *Fish, Law & Colonialism: the legal capture of salmon in British Columbia* (Toronto: University of Toronto Press, 2001); Rob McQueen & W. Wesley Pue, eds., *Misplaced Traditions: The Legal Profession and the British Empire*, 16(1) *Law in Context*, 1999 (Symposium Issue); W. Wesley Pue, ed., "Postcolonial Legal Studies", *Law, Social Justice & Global Development* (Symposium Issue: April, 2003) (published by Faculty of Law, University of Warwick, <http://elj.warwick.ac.uk/global/>); R. Cole Harris, *Making Native Space: colonialism, resistance, and reserves in British Columbia* (Vancouver: University of British Columbia Press, 2002).

"civilized", and participated in overlapping discursive universes, it is not surprising that there is much here that resonates with Canadian history. Many contextual differences are, of course, profound, but a sameness is recognizable in many fields. Chillingly, these include aspects of immigration policy (hostility to Asian immigration, for example) and "native" affairs.

The book makes several conceptual contributions to law and society scholarship. First, Chanock seeks to transcend the "gap" approach to the sociology of law and its associated critiques of law's hollow promises, mystifying ideologies, or whatever. In South Africa the "gap" between "professed legalism with its accompanying rhetoric of justice, and the racist abuse of power by the state" seems clear and undeniable. Chanock claims to have overcome the limitations of earlier approaches to law in society by "thinking again about the notion that legalism was about the limitation of power, which has been so ingrained in assumptions about law." In its place he offers an understanding that "in the processes of building a new colonial state, law could best be understood as a way of creating powers, of endowing officials with regulated ways of acting, a weapon in the hands of the state rather than a defence against it." (22)

Secondly, the book locates "law" not just in society but in discourse. Rejecting conventional approaches to "contextualised legal study" which, Chanock says, seek to describe how law really works by developing "a combination of legal realism and versions of functional, structural and materialist social science" (25), the book takes up the discursive turn with enthusiasm. It seeks to locate "the internal discourse of law within a set of related discourses which include 'external' discourses about law, as well as those on economy, politics, evolution, race, history and justice. The discursive construction of lawyers' law is placed within an opened and broadened realm of discourses." (25)

In a related move, the book usefully attempts to give meaning to the increasingly central notion of "legal culture", defined as being located in "these multiple discursive sites, along with the institutional practices so constructed" (25):

"... it is obvious that the lawyers 'speaking' about law is only a small part of the discursive universe of law. Not only judges and legislatures speak about law, but so do people at large; religious organizations; the press; special interests such as trade unions and mining and industry; and ... so do bureaucrats. ... A legal culture consists of a set of assumptions, a way of doing things, a repertoire of language, of legal forms and institutional practices.... What I am here calling a legal culture is made up of an interrelated set of discourses about law: some professional, some administrative, some political, some popular. Each understands and represents law in different ways, and each therefore acts differently on it. While the discourses differ, they do not exist in isolation from each other, and they draw upon each other, sometimes critically, sometimes affirmatively. And they are all set within the broader political and social discourses of the state and society." (23)

This book's many substantive contributions cannot be adequately acknowledged within the confines of a short review. The discussion of the legal profession, to take one example, is an important contribution both to the field of cultural histories of legal professions, and to literatures on lawyers and colonialism.<sup>2</sup> The assessment of the interplay between master and servant law

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<sup>2</sup> Egs., W. Wesley Pue and David Sugarman, eds., *Lawyers and Vampires: Cultural Histories of Legal Professions* (Oxford: Hart Publishing, 2003); Rob McQueen and W. Wesley Pue, eds., *Misplaced Traditions: British Lawyers, Colonial Peoples*, 16 (1) *Law in Context*, 1999 (Symposium Issue).

and other legal framings of labour issues are significant, while the discussions of sedition law and emergency powers exercised by the nascent apartheid state make for uncomfortable reading in the aftermath of "9-11". Similarly, Chanock's extraordinary account of administrative law's failure to protect against arbitrary power provides a distressing lesson in legal realism, while the sustained argument that *all* of South African legal development, even in the most unlikely fields, was cast in a racist foundry amounts to a significant exposé.

This, then, is a major contribution.

Nonetheless, three odd silences limit the work. First, despite Chanock's extraordinarily wide reading - the bibliography alone is worth the price of the book - both subject matter and framework of analysis suggest a greater relevance for postcolonial literatures than is manifest. A much more sustained engagement with postmodernist critiques of law, with feminist legal studies and with critical race theory would also have enhanced the work: each of these fields contributes significantly to socio-legal studies and each has been an important part of the "discursive turn" in social inquiry.<sup>3</sup>

Overlooking insights of these sorts tends to exaggerate the abnormality of the emergent South African state, a tendency compounded by a single-mindedness of empirical focus. Despite the author's desire to place South Africa within wider cultural currents, his approach is not resolutely comparative. Other colonial or state trajectories are touched on lightly and in passing as they are referenced in South African sources, rather than as part of a more thorough-going comparative undertaking. The result is a sort of limited-frame contextualization of South African developments. This is not a *criticism* as such - any task larger than that undertaken would be immense. But frames of reference affect findings and the frame of reference employed accentuates the appearance of South African exceptionalism.

Take, for example, the argument, quoted above, that law takes on a different and special meaning in situations where a "new colonial state" is being constructed, becoming a mechanism "of creating powers, of endowing officials with regulated ways of acting, a weapon in the hands of the state rather than a defence against it." (22) This is certainly true in colonial contexts. But it may well be the case that the mix of "control" as against "liberty" functions of law increases in proportion to the insecurity of any state formation, colonial or not. The appearance of South African exceptionalism tends to obscure not only similarities with colonial governance elsewhere, but also the fact that *all* states - unless they are disintegrating - are constantly "being constructed".<sup>4</sup> Chanock hints at some such possibility in his description of legal culture. It is also implicit in his discussions of the challenges post-Apartheid South Africa faces and in his account of the British models that were drawn upon in the past in developing South African emergency powers, "master and servant" law, and so on. He does not however carry the insight through to its fullest development: that all states are always in the making and, hence, all are, in a sense, "colonial".

The result, curiously, is both to claim too little and to claim too much. The book fails to note the extent to which this central finding can be generalized and does not fully develop the theoretical implications the data suggests. Conversely, the author discerns unique deviation

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<sup>3</sup> The literatures are immense but each of these fields is well represented in most issues of *The Australian Feminist Law Journal*, amongst others.

<sup>4</sup> cf. Ian Duncanson, "Close Your Eyes and Think of England" (1997) 3 *Canberra Law Review* 123-138. Literatures on state formation or internal colonization in the United Kingdom or other obviously non-colonized places are richly suggestive in this context.

where others perceive essential features of liberal legality. Chanock is largely correct in concluding that "Colonial law, depending on towards whom it was facing, could be either arbitrary or legalist, discriminatory or fair: its forms contained both stances." (526) His error lies in the first word only for the same point applies well beyond colonial contexts. After recounting the developing totalitarianism of the apartheid state Chanock emphasizes a colonial/ non-colonial dichotomy, observing that "[t]he decline of liberal legalism was due not to original sin but to its inapplicability to the regulatory tasks of the colonial state." (522)

This significantly misconstrues liberal legalism, not so much by taking it at its word as by failing to acknowledge the extent to which it is, *on its own terms*, centred on the core idea of maximal freedom and self governance *for those who are capable of governing themselves*. Liberalism - and with it liberal legalism - has always sought to construct the souls of its subjects as a precondition to the grant of liberty. Its legal forms are Janus-faced: it is about freedom but simultaneously about gross interference with freedom; about liberty but also about regulation aimed at manufacturing "good" citizens.<sup>5</sup> In noting this, I do not intend to "trash" either liberalism or legalism - both of which, like the 'rule of law', are "unqualified human goods" - so much as to acknowledge the need for rethinking of some very fundamental questions relating to governance.

These are big questions arising from *The Making of South African Legal Culture*. Because their import cannot be safely confined to the history or future of "colonial" states, this important book should inform law and society inquiry well beyond the sphere of those with a specialist interest in either South Africa or colonial legal history.

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<sup>5</sup> Much recent literature has presented some such understanding of both the attainment and the limits of liberal governance. The legal profession turned out to be a significant fulcrum point in the workings out of these tendencies in at least some societies. See, for example, W. Wesley Pue, "Cultural Projects and Structural Transformation in the Canadian Legal Profession", in *Lawyers and Vampires* (Op. Cit.) and literatures cited therein. Cf. Dorothy Chunn, John McLaren, and Robert Menzies, eds., *Regulating lives : historical essays on the state, society, the individual, and the law* (Vancouver: University of British Columbia Press, 2002).