

2010

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Recommended Citation

Law in Context: A Socio-Legal Journal, Vol. 28, Issue 2 (2010), pp. 76-94

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A Bittersweet Heritage: Learning from *The Making of South African Legal Culture*

*Stephen Ellmann**

This essay responds to Martin Chanock's argument that race tainted the entire enterprise of South African judging. It seeks to understand how that could have been so, and looks to such driving forces as whites' guilt, denial, identity-building, self-protection, and legitimation for explanations. Then it asks whether an institution so tainted should now be altogether abandoned as part of the rebuilding of post-apartheid South Africa. The essay answers that much should be changed, but that the existence of a judiciary laying claim to a special expertise and responsibility in interpreting law and protecting rights – a key heritage of the old South Africa's judicial system – is an important safeguard of liberty and should not be sacrificed.

Martin Chanock's book *The Making of South African Legal Culture 1902-1936: Fear, Favour and Prejudice* (Chanock, 2001) is a deeply unsettling volume.¹ What makes it unsettling is not, however, his demonstration that brutal and arbitrary racial laws pervaded the old South Africa, nor his careful reporting of a variety of decisions by the regular courts of South Africa that accepted and gave effect to these unjust laws. It is not news that South Africa was unjust, though it remains valuable to detail the elements of that injustice. Rather, what is unsettling is Chanock's argument that race was at the heart of the entire enterprise of South African judging, not only the regrettable decisions but even the admirable ones.

I want to begin by considering how this was so, as I am now inclined to believe it was, though I will not seek to substantiate Chanock's account (doing that is the subject of his book) so much as to illustrate and then seek to explain it. Then I want to ask what should be done about it now, in the process of state-making now underway – a process which aims, centrally, to remove the taint of racism from South African life. I will argue, in the end, that the heritage of racial injustice that is part of the soil in which South African law has grown does *not* counsel in favour of abandoning the institutions of law that have emerged from that past.

How Pervasive Was the Role of Race in South African Law?

We may begin very simply. As a matter of sheer mathematics it is implausible to say that the core of law was pure, while only certain exceptional areas were distorted by race. Race was too huge a portion of what law was about. It is worth adding, though this is not an argument from sheer quantity, that what the law did with race was too invidious not to echo disturbingly elsewhere in the legal system.² Vast percentages of criminal law arrests, for example, were for crimes focused on controlling Africans, such as prohibition (116). Chanock also observes the shift in burden of proof effected by statute 'precisely in those cases that affected a large number of black rather than white accused' (122).

Civil law presented a similar picture. In delict or tort, the single greatest source of workplace injury was the mines, where conditions amounted to 'carnage'. Chanock writes that 'however conceptually advanced the doctrines of the Roman-Dutch law were, most of the victims of negligence in South Africa were not the beneficiaries of tort law, which offered them no compensation and no protection' (189). At the same time, black workers on the mines were subject to versions of contract that could not have been further from an implementation of free choice. As Chanock writes:

In the single contract that affected more people than any other, the one workers signed to work on the gold mines, the mine at which work was to be done was not specified, nor was the range of duties, and nor were the wages to be paid, which, in the standard contract, were to be 'at the ruling current rate'. (173-4)

On the farms, meanwhile, Chanock observes that:

[P]erhaps the next most important contract in South African life in this period was that between white landlord and African tenant farmer, and again the realities seem to escape the conceptual world of the civil law. Of the sharecropping agreements, Macmillan wrote that 'perhaps the main characteristic of the system is the absence of any formal written agreement or contract, this being also its greatest defect'. (175)

Black farm workers' lives were further regulated by the *Native Service Contract Act* passed in 1932, which:

gave statutory effect to the idea that the household head contracted on behalf of his whole household, adults and juveniles, who could all now be bound by him to six months service each year. Breach by any household member could result in the eviction of all. Lashes could be imposed for any breach of the contract. Notionally using the instrument of contract, with its aura of freedom of choice, the statute intensified coercion. (400)

(Or at least the statute would have had this effect if it had actually been enforced (400, n 11)). Chanock observes that the 'purity of doctrine' of South African contract and delict law:

coexisted with a state of affairs which mocked the jurisprudence developed, which systemically denied compensation for the major areas of wrongful

damage, and in which contracts were focused on the disciplining of racial subordinates. (190)

But still it might be said that bad as law was in areas directly involving blacks or later directly involving political suppression, the law in these fields did not usually spill over into other areas – and that that reflected the judges' commitment to guarding the purity of doctrine, including doctrine limiting state power, in those other areas. Since much of the law of race and internal security was statutory law, it is also possible to argue that when judges did not protect common law rights, they were acting under the compulsion of a constitutionally supreme parliament. Chanock offers illustrations of such interactions between the courts and parliament.³ He is not, however, ultimately persuaded. In a chapter focusing on '[t]he native appeal courts and customary law', he writes:

In a society dominated by racist politics, and racially inspired public policy and legislation, the private law and the high courts have often been seen as essentially only racist when explicitly forced to be by a sovereign legislature. However both the supreme courts and those special higher courts that dealt with African cases were crucial to the elaboration of a differentiated and segregated law [that is, to a law for blacks that was separate from the law for whites], and contributed both to the crushing of an assimilative legal liberalism [that would have moved toward one law for all races] and to the elaboration of a restrictive and authoritarian style of customary law [a separate law for blacks] based on differential racial capacities. (291)⁴

As that comment suggests, it simply does not appear to be the case that South Africa's Supreme Court judges – let alone the magistrates below them – fell short only when forced to by legislation.⁵ Chanock reports a number of decisions on race-related issues that do not appear compelled by statutory language, and indeed that seem to owe a good deal to the judges' personal racial feelings. He notes the 'prejudiced remarks' judges sometimes uttered (though he emphasises that 'what is involved is more than just these remarks').⁶ For instance, one of South Africa's Chief Justices, Wessels CJ, wrote in a 1933 decision that:

In punishing them [Africans] we must remember that they are not civilised Europeans but kaffirs living more or less in a state of nature and when they act according to their natural and inherited impulses they do not deserve to be punished too severely as if they were civilised Europeans dwelling in a city or village.⁷

So, too, in an immigration case, the Appellate Division upheld the government's prohibition of immigration by 'every Asiatic person' under a statute which allowed the minister to bar 'any person or class of persons deemed by the minister on economic grounds or on account of standard or habits of life to be unsuited to the requirements of the Union'. One member of the court, Solomon JA, explained why even Asian professionals could be barred:

A 'person of that [professional] class', Solomon reasoned, 'exercising influence over his fellow Asiatic, may become a disturbing factor in the industrial processes of the country, as actually happened in the now historic case of Gandhi'.⁸

Nor were these cases unique.⁹

But no one can deny that there were judicial decisions that protected rights, even rights of blacks and of blacks opposed to the state. I do not question the sincerity or the courage of these decisions, nor do I take Chanock to do so. Chanock observes at one point:

It could be argued that in the first decades of the twentieth century South African judges were, even in the circumstances of a strongly contested political order, and the highly politicised nature of many of the appellate cases, bolder in their defence of some of the 'liberties of the subject' than their English counterparts. (507)

What Chanock presses us to do, however, is to ask what else, besides personal virtue and professional fidelity to principle, might have been at work.

Once that question is asked, we must recognise that it is a good one. Judges, no matter how principled and independent, live in the same world as their fellow human beings, and they are as shaped by that world as everyone else. The judges of South Africa, virtuous and principled as they may have been, lived in their world and responded to it. They were *people*, and to call a person an 'upright judge' may well be appropriate but it is never complete: a person is more complex, and more shaded, than the simple, though important, idea of an 'upright judge' can convey.

In the world in which South African judges lived and judged, what functions did decisions that upheld legal rights play? One answer is that they achieved a measure of the rule of law, and that is no small feat, as Hugh Corder reminds us.¹⁰ Indeed, rightly deciding particular cases is most of what judges do to contribute to their society being a just one. But while that answer is correct, it is incomplete. Chanock's analysis challenges us to consider other, less benign functions as well. In what follows I partly rely directly on Chanock's study, but I also try to accept his invitation to think more freely about what virtue may be about in the midst of injustice. Here are several possibilities, which begin with what might be called negative functions (guilt and denial) and move on to more affirmative processes (identity-building, protection of whites, and legitimation):

- *Guilt*: I wonder whether judges who were authorising so much injustice to so many felt a special impetus to protect justice where they could. When I studied the decisions of the Appellate Division under Rabie CJ (later Rabie ACJ) during the state of emergency in the 1980s, I felt that I encountered a similar phenomenon: the most

important cases were decided in favour of the government, but not every case, and in those that went against the government I saw the possibility that:

For judges who sought to harmonize their determination to protect the emergency order with their fidelity to law, the sense that these two goals were in tension would have been disquieting indeed. Perhaps it is just such disquiet that helps explain the alacrity of the Rabie court's response ... where it could, without undercutting the fundamental features of the emergency system, once again vindicate the integrity of the law. (Ellmann, 1992: 204)

- *Denial*: In being careful about the rights of whites and sometimes those of blacks, judges could look away from the system of command and discretion that they were helping install for blacks. They spoke, one might say, only of what could be spoken of. Thus Chanock points to the technical reasoning of the *Detody* case, which read an inclusively worded pass law not to require passes for African women, and suggests that the judges focused on legal fine points because pass law policy was too fraught for discussion.¹¹ More broadly, Chanock says that the bench came to be 'dedicated more to the elaboration of a distinctive South African private law than to playing a part in the making of the South African polity'. In that role, the judges were 'increasingly immune from the vituperative criticism they had earlier attracted'.¹² And perhaps the motive was not just to steer clear of controversy and criticism, but to avoid thinking about the unthinkable – as a mining engineer did when he told an investigatory commission: "I do not dare to think about what is happening among the Kafirs", whose work is "far more dangerous" than that of the whites'. (192)
- *Identity-building*: Chanock emphasises the importance white society attached to affirming the contrast between civilised, enlightened white justice and the primitive despotism and ungoverned violence whites chose to discern in customary law and African communities. Describing a case involving a debt secured by a pledge of oxen, Chanock points to the 'determination of the judges to develop and display the fully flowering jurisprudence of the Roman-Dutch law'.¹³ He goes on:

As an exercise in scholarship it can be read with pleasure. But it should also be read with incredulity if one asks why Carpzovius' 'Law of Saxony' or the rescripts of the emperor Severus could have been applied to Mapenduka's oxen. Neither Hutton [the trial court judge] nor the appellate judges had any thought for the concepts of right and law which might have been in the minds of the litigants ... The narrative here is one of 'whose law', and the court was making very clear that it was not Africa's.¹⁴

Even decisions that in an immediate sense might have been contrary to many whites' interests – and there is no reason to assume that most private law decisions *were* contrary to whites' interests – could, from a broader perspective, help justify the broad structure of white rule. Chanock writes that 'the higher courts were refiners of the definitions of self and otherness' (129), and that the judges of the Supreme Courts:

In a feat of self-imagining ... saw themselves as brothers to Grotius and the Master of the Rolls rather than to the farm foreman and the prison warden ... This legal identity not only helped evasion of South African actualities, but constructed a philosophical, juristic, correct and formal self which could be opposed totally to the barbarian other. (130)

(Ironically, of course, the labour of black South Africans provided the basis for the country's economic strength, which made any set of legal rules easier to live by.¹⁵) Chanock concludes:

Excluded increasingly from the political realm by frequent bruising public criticism and executive determination, the judiciary's prestige and independence were developed in the core areas of common law, in which they were granted a wide degree of latitude. This was an integral part of the development of white cultural nationalism, taken up with renewed vigour when nationalist-minded judges finally took control of the appellate courts in the 1950s and 1960s. (527)

- *Protection of whites*: Chanock points to a number of fields of law in which special judicial vigilance reflected, he suggests, that whites were directly affected. Of judicial limits on the liquor prohibition laws, he writes that:

Many in the target population of the law, blacks who wanted to consume alcohol, were caught by simple police action, or in the lower courts where convictions and punishments were handed out in a routine and administrative style barely encumbered by the Supreme Courts' legalisms. The purpose of the [Supreme Courts'] patrol [of 'the boundaries of the state's policing and punitive powers'] was to ensure that state actions did not spill over and completely engulf the wrong targets, in this case a class of offenders produced by a criminalising statute who were mainly white. (126-7).

He goes on to apply a similar analysis to judicial decisions under political offence statutes such as the *Riotous Assemblies Act*, and 'the provisions of the Masters and Servants Act which criminalised enticing workers away from a particular employer' (127).

The impact, for blacks, of such legal protections as existed was further diminished by their limited access to legal representation. Chanock notes that:

Those [whites] who were closest to the administration of justice to those living in the African reserves and who were under African customary

law, were mostly of the view that lawyers simply served to undermine the prestige of the courts and the magistrates, and that their activities were contrary to the inherent African belief in unchallenged despotic power. (234)

In a number of situations, moreover, white policy – or at least white office-holders – deliberately avoided informing Africans of the legal rights they theoretically enjoyed.¹⁶

- *Legitimation*: Chanock also feels, as it seems the government did, that the existence of an independent, admired judiciary ‘lent a non-political prestige to the enforcement of the now routinely discriminatory statute law’ (508). It is certainly possible to question whether those subject to such law were more likely to obey it because of its supposed legitimacy, but it still seems likely that those making and enforcing the law wanted to see their acts as legitimate (Ellmann, 1992: 178 & n 76). Chanock writes that:

For the politicians the appearance of correctness which the growing formalism gave to the careful but unquestioned judicial enforcement of the statute law was a small price to pay for the acknowledgement of judicial independence in carrying out this role. (508)

We might infer that this exchange was not altogether unconscious for the judges either. Their role would be especially problematic to the extent that they understood that their benign statements functioned as window-dressing. Chanock observes that ‘quotable dicta tend to live on as emblematic’, even when the actual course of decisions is less exalted.¹⁷ He writes as well that ‘a display of the limited repertoire of liberal legal dicta from cases past should not be allowed to distort the picture of the racial foundations and purposes of South Africa’s law’ (530). Meanwhile, of course, law – with its sheen of legitimacy – provided a crucial resource for whites’ daily rule over blacks. As Chanock observes in discussing ‘master and servant legislation’:

In a society with an endowment from the previous rulers of judicial institutions, officials could not act without law. They needed law to carry out their functions and ambitions and to authorize the enlargement of their sphere of control. Without it there could not be the detailed control of the social order that they wanted. Law did not so much control the administrators as authorise and empower them. (428)

The climax of this development was the enactment of the *Native Administration Act* of 1927, whose ‘crucial feature’ was ‘[g]overnment by proclamation under the Governor-General as supreme chief, which finally placed Africans beyond the “rule of law” in the constitutional sense’ (281).

The upshot is something that on reflection should not be surprising: a society pervaded by racial injustice is a society *pervaded*, really pervaded, by racial injustice. Chanock speaks of ‘coming to terms with Maitland’s

idea that all of the parts of law are interrelated' (28). There will not be any areas of purity, because everyone knows, at least roughly, that something very different is happening in the next room down. That their knowledge of what is happening in other rooms may be incomplete and euphemistic is itself one implicit function of even benign law in a deeply unjust state.

What Should Be Done About It Now?

The fact that an institution or a practice has repellent roots does not, by itself, mean that that institution should be abandoned – unless one believes that abandonment is a necessary punishment for past injustice. Probably few people do think that, however. What most of us want to know is what the right thing is to do now, for the people living now and for those to come in the future. That requires a different kind of inquiry. As Chanock puts it:

How far can the existing practices and meanings stretch? ... [H]ow far can they continue to be usable as a part of a fundamental rejection of the order of which they were a part? (524)

This is a very hard inquiry. As difficult as it is to understand the past – in Chanock's words, '[a]s the present changed, so did the past' (xi) – still the task of charting a course today is even more challenging, because it is very hard for us to know what historical moment we are part of before it is already over. Still, this is the job – our job, but also the job of all those, not least Constitutional Court judges, who seek to help build the new state.

I want to start by sketching what would be involved in a thoroughgoing disestablishment of the institution of judging that Chanock demonstrates was shaped profoundly by racial considerations. Let us approach this task as a thought experiment, but I should emphasise that this utter abolition is not what Chanock calls for – rather, I want to make this effort in order to think about what Chanock's analysis might suggest we should call for.

What might be disestablished, if we set out to abolish all aspects of judging that were shaped by race? Here is an answer: we would not only have needed to discharge the judges of the old order, but also to overturn the very institution of an independent, objective judiciary, an elite body carefully distanced from the larger society, whose scholarly, unemotional exposition of the dictates of justice and of law merited acknowledgment as one of the achievements of the old South Africa.

Chanock might characterise the institution differently. He focuses on the word 'formalism', and emphasises that the period he is studying 'produce[d] a model of judges divorced from "politics", yet attached to "law". This could only mean an entrenchment of the literal style of formalism' (515). This particular mode of adjudication may be characteristic of judiciaries seeking to fend off the wishes of more or less inarticulate legislators

and executives, as Chanock suggests (518). I do not think, however, that literalism is integral to the existence of an elite, independent judiciary, and South African statutory interpretation in fact included a number of non-literalist moves in the judicial repertoire – sometimes employing them in the defence of common law rights.¹⁸ I do not resist Chanock's use of the term 'formalism', but I would call the entire apparatus of the austere, independent judiciary, engaged in determination of outcomes through the application of a highly rationalised and complex logical process, a formalism.

So what would it take to end this? There are a number of steps that would need to be taken, and many of them have in fact been taken. A significant part of the development of the new South Africa's legal system has been a tempering of the most hierarchical, elitist and technical aspects of judging as it had been practiced in the old order.

Some of these changes are stylistic (and style does matter). The Constitutional Court, in particular, has paid close attention to these concerns, though it may be that lower courts remain less re-cast. It is no accident that a lawyer addressing the Constitutional Court faces the judges roughly at eye level, rather than having to lift her eyes to address the judge on an elevated bench. (It remains true, however, that the lawyer stands, while the judges sit; not all hierarchy of design has been removed.) The robes worn by the justices of the Constitutional Court are not the robes of the old order, and instead echo in part the colours of the new flag.¹⁹ The court's building, famously and beautifully, embodies and reclaims the remains of a notorious apartheid jail. Its remarkable art invites visitors, sometimes in quite difficult and unsettling ways, to engage emotionally rather than just intellectually with South Africa's quest for justice.²⁰

Other changes are entirely, and profoundly, substantive. The Constitution unmistakably and emphatically declares the new values of the nation,²¹ and the Constitutional Court has made clear that all law must be based on the Constitution.²² Law is henceforward value-based rather than fundamentally a subject for technical exegesis (Ellmann, 2009: 107-9). The Constitution rejects the idea of law as unfettered bureaucratic discretion and command (though that certainly does not mean that all officials honour the law's requirements).²³ The law of all South Africans is now honoured, as customary law has become both protected and regulated by the Constitution.²⁴ And the judges themselves, in their public interviews before the Judicial Service Commission as part of their consideration for appointment, can be asked to declare their own constitutional values.²⁵ Surely it is fair to say that the judiciary is in the process of being remade, in part around adherence to the new order's values (or some version of them).

There may be more that should be done. Chanock discusses a return to forms of lay participation in judgment,²⁶ and certainly observers from

countries that embrace trial by jury can see the potential value of such steps, which reduce the degree to which judging is actually the exclusive province of elite judges. Chanock also emphasises the need to attend to a wider range of voices than just those of judges in shaping the law. He writes:

[I]n spite of the increase in judicial power around the world as new constitutional states spread and the discovery of ‘rule of law’ and ‘governance’ issues become[s] a part of the language of globalisation, the judicial voice, even when it rises to inspiring heights, cannot alone bear the burden of envisioning the new legal order. (537)

This idea too will resonate with those who see the importance of a ‘constitutional culture’ for the strength of a constitutional state.

But what about the stance of objectivity itself? Chanock at one point cites, seemingly with approval, an argument made in the Truth and Reconciliation Commission hearings ‘that what was needed was “to break the tradition of distanced judging in our society”’ (535). He also asks:

Can there be a formalism without the claim of legal professionals to control validity in reasoning about law? ... There will be obvious fears for a ‘rule of law’ if the narrow claim to control the definition of law is abandoned, and the danger of the possible rejection of law if it is maintained. (534)

But I would not read these suggestions to call for an end to objectivity. I have argued elsewhere that even when we recognise, as we should, that constitutional judges’ values and emotions are an integral part of their judging – so that they are not ‘distanced’ – we can and should still value the goal of objectivity (Ellmann, 2009: 131-7). So, too, it is quite possible to understand constitutional (and other) judging as interacting with the values of a society, as those values are shaped over time in the society’s culture as a whole – so that judges do not autonomously ‘control’ the definition of law – without saying that what judges should do is simply to take the pulse of the people and then announce it.

South Africa’s Constitutional Court still holds to the goal of judgment without ‘fear, favour or prejudice’, most notably in the *Thint* case, which involved a tangle of issues around potential criminal charges against Jacob Zuma, now South Africa’s president.²⁷ This is a goal that human beings cannot perfectly achieve, but if we really seek to disestablish the old formalism we would abandon this formalist goal. We would then *not* seek to judge without fear, favour or prejudice. Presumably we would also not seek in any measure to characterise judicial appointments as nonpolitical. And we would no longer value the particular stance of independence from the executive (and for that matter from parliament). There would, then, be no base from which to criticise the appointment of the most executive-minded of judges.

So, too, there would be an end to literal interpretation. But equally an end to values-based interpretation or purposive interpretation: each

of these is inescapably an elaborate structure of reasoning and argument. Each also involves some measure of judicial authority over other voices – to my mind an element of formalism – in ascertaining the true meaning of constitutional values, for instance, or in discerning the purposes that will support departure from what might otherwise appear to be the literal meaning of a legal text being applied. Could we dispense with all such forms of interpretive expertise, or with the ultimate prerogative of the courts to employ them more or less authoritatively?²⁸

Indeed, we would need to give up the idea of the judges as experts, with special ability to discern the meaning of law from study of more or less arcane texts. In the period Chanock's book covers, the texts were those of Roman-Dutch authorities, but today's judges study international or comparative law materials, some of them in languages few South Africans can read. It is not easy to think of how we would disestablish this, and the fact that it is not easy is important. Do we want judges to be less learned? Or less thoughtful in their decision making? Or to disregard the lessons they might derive from consulting those obscure and inaccessible sources? Or to disavow, as pretensions, claims to a deeper insight into constitutional values than politicians possess, or a more fundamental authority to rule on such matters? Or simply to step back from constitutional adjudication altogether? We might accomplish all this by saying that the meaning of legal terms is no more and no less than what South Africans say that it is (however we would determine what they are saying). But at that point, as Alice learned, the issue of meaning is just the question of who is master (Carroll, 1871: 213).

I hope I have managed to show that completely disestablishing the elitist judiciary would involve removing crucial elements of what South Africans, and citizens of many other nations around the world, now regard as essential to the protection of their rights. Perhaps all this should be disestablished, as a thoroughgoing advocate of 'popular constitutionalism' might urge, but that strikes me as a very rash gamble.²⁹ I acknowledge that we cannot simply assert as a fact that reliance on courts to play this protective role is in the end better than reliance on other parts of government, or on the mobilised people themselves – but the very difficulty of assessing such vast institutional questions to my mind counsels broadly in favour of preserving the judicial function we have evolved.³⁰ To this extent, I believe we should all be formalists now.

On this ground, I think the lawyers' desire to maintain legal continuity as part of the constitutional transition from apartheid was well-founded – even when we recognise, as Chanock shows us, just how flawed an enterprise even the best of the old legal order was. Chanock himself writes that 'without the centrality of formalism a state cannot be based on a "rule of law"' (512). He is against an 'uncompromising formalism' (535) and he feels that the new formalism of rights needs to become 'less exclusive and

less absolutist', (534) but as I read him, he is concerned to maintain the integrity of the process and judgments of the courts at the same time, and to figure out how that can be done.

Thus I think the goal should be to reduce the pretensions of the judiciary – in ways that the Constitutional Court has already sought to do – while maintaining what might be called its formalist core, that is, its claim to a special expertise and responsibility in interpreting law and protecting rights. This course is better than total disestablishment (if that is even conceivable) because we do not sacrifice an institution that provides some security for rights and that required the work of centuries to establish.

It is also better because it may help us avoid another peril: a turn by society to unprincipled manipulations of the ideals of the past. In the United States, the Republican Party long after the Civil War 'waved the bloody shirt' – bloodied in the course of the Union's effort to deal with postwar Southern resistance – to maintain its political power even as the rights of the freed slaves were abridged almost to extinction.³¹ In South Africa, it is not impossible that resentment of whites will similarly be employed by a self-serving elite no longer mindful of the Constitution's humane and egalitarian aspirations. We can at least hope that a judiciary still embracing the task of giving meaning to law will somewhat undercut such distortions, although in a direct clash between judges and politicians, judges do not have the stronger hand – and there are already troubling signs of political pressure being mobilised against the courts.³² As Chanock also observes:

[T]here is much sense in separating internal professional legal discourses from discourses about law as their categories and ways of reasoning can be, and have often been in the South African case, not only very different but also more just. But one needs to do this without forgetting, and when necessary exhuming, the relationship between the discourses internal to law, and those about law. (526)

In short, I think it is essential not to wage unlimited war on formalism; that is yesterday's battle. Instead, what we need is to find new ways to make adjudication stronger and wiser. And, borrowing one of Chanock's central lessons – that law is not spoken about just by courts, but by other political actors and the society as a whole³³ – we need to find ways to produce a politics that is stronger and wiser as well.

The Constitutional Court has taken a number of steps that point in this direction. Its cases requiring engagement between municipalities and people facing eviction give courts more direct access to the concrete needs and wishes of people, and ensure that administrators encounter them as well (for example *Occupiers of 51 Olivia Road*, 2008). Its cases on parliament's obligation to make space for public participation may deepen the extent to which members of parliament encounter, and represent, their

constituents (for example *Merafong*, 2008).³⁴ Its welcome of customary law reforming itself clearly aims to foster a lived constitutionalism in customary communities (*Shilubana*, 2009). The Court's use of its authority to suspend the application of its constitutional judgments, and to grant Parliament time to decide how to rewrite unconstitutional laws the court has identified, also seeks to enlist the political branches of the country in the task of giving constitutional values meaning.³⁵ So too the Court's recent articulation of a constitutional duty to establish an independent anti-corruption body is a striking effort to bind politics by law (*Glenister*, 2011), as is its decision that the statute permitting the president to extend the term of the court's own Chief Justice was unconstitutional (*Justice Alliance*, 2011).

But wisdom in politics requires even more than a sincere knowledge of constitutional values. It is all too easy to encounter the world through structures of preconception so firm that much that is expressed goes unacknowledged. Chanock made this reality apparent in his book on customary law, in which he incisively demonstrated that assertions of what was traditional and customary were constructed to meet contemporary anxieties and objectives.³⁶ Similarly, at our conference in Cape Town, Aninka Claassens and Sindiso Mnisi emphasised the many ways that women were rearticulating the requirements of customary law, ways that departed from the supposed dictates of past tradition (see Claassens and Mnisi 2009: 499-502). The point, however, is not only to hear voices that might in the past have been disregarded. Each voice must be heard, with respect but not credulity. George Orwell once wrote that he:

had reduced everything to the simple theory that the oppressed are always right and the oppressors are always wrong: a mistaken theory, but the natural result of being one of the oppressors yourself. (Orwell, 1958: 180)

If the courts are to listen, and to help shape a country in which other government actors also listen, then perhaps what South Africa needs is not to beware of formalism but to beware of formulas. Let us seek a constitution of no slogans, in which courts – continuing their historic role of providing a measure of independent judgment about society – deepen their contribution by being as sensitive as possible to the entitlements, and imperfections, of all who come before them.

Notes

- * I appreciate the comments of two anonymous reviewers, as well as discussions at the conference in honour of Martin Chanock, at which I first presented these ideas.
- 1 Page citations in the text and endnotes are to this volume unless otherwise indicated.
- 2 South Africa today wrestles with the challenges of accommodating different racial or religious communities' distinctive laws within an overarching

- democratic order. That can be a perplexing task – but ‘dealing with difference’ in this way is far from the enterprise of domination-by-differentiation that characterised the old South Africa.
- 3 For an example of a judicial decision ‘conclud[ing] with the customary expression of regret’ and urging legislative reform – which was subsequently accomplished – see Chanock, 2001: 421 (discussing *Hashe v Cape Town Municipality* 1927 AD 380); and for an example of a judicial decision restricting rural whites’ power over squatters, a decision that prompted a ‘white rural outcry [that] led to a swift statutory response’, see Chanock, 2001: 425 (discussing *Maynard v Chasana* 1921 TPD 243).
 - 4 On whites’ perception and shaping of African institutions, Chanock writes:
 Drawing upon the prevailing images in white South African society, both courts and legislatures in the early twentieth century fashioned an African institution to fit not only the administrative needs of the state but also the symbolic needs of white discourses, legal and general, about the nature of African political institutions. The definition of the chiefs powers in the courts was part of the process by which Africans were placed, justly and reasonably, and according to their own ways, beyond the scope of association with political democracy and the rule of law. (283)
 - 5 Chanock comments that ‘[m]agistrates’ courts, like lower courts everywhere, delivered a sort of administered law, and were less concerned about the niceties of interpretation than the higher courts were’ (119). Later he characterises ‘the lower courts’ as ‘agencies through which labour and other disciplines could be imposed’ (128).
 - 6 Chanock, 2001: 128, quoting Corder, 1984: 132.
 - 7 *R v Xulu* 1933 AD 197 at 200, quoted in Chanock, 2001: 129.
 - 8 Chanock, 2001: 504, and at 505 quoting *R v Padsha* 1923 AD 281 at 288-9 (judgment of Solomon JA).
 - 9 Chanock, 2001: 499-501 (discussing other cases). See also at 321, discussing *R v Msweli* 1911 NHC 64. The case, as Chanock explains it, was about the brutal killing of a white farmer’s wife, a crime committed by the son of an African chief in response to the farmer’s cutting down trees surrounding the grave of the accused’s father, who was buried on the farmer’s land. Chanock quotes the uncomprehending words with which the judge, Boshoff J, began his decision, 1911 NHC at 64:
 In spite of the most earnest missionary and educational effort, the native population of this Province still continues to contribute largely to the criminology of this country. One feels irresistibly driven to ask oneself the question: What can be done, if not to obliterate, certainly to mitigate these terrible evils?
 - 10 Corder, 2012: 70.
 - 11 Chanock, 2001: 506-7, discussing *R v Detody* 1926 AD 198.
 - 12 Chanock, 2001: 508. Earlier, ‘one of the features of South African legal culture in the first decades was the intensity of public criticism of the courts’ (517).
 - 13 Chanock, 2001: 14, discussing *Mapenduka v Ashington* 1919 AD 343.
 - 14 Chanock, 2001: 15. Chanock says of Roman-Dutch law, in particular, that ‘[n]othing could be more demonstrably different from the customs of savages. In a sense the Roman-Dutch law embodied the capacity to be civilised’ (166).
 - 15 Sometimes the connection between deprivation of blacks’ rights and maintenance of pure legal rules for whites may have been even more direct. Chanock writes that ‘cutting down non-white access to land was one way of seeming to

- ensure white access. It could be done this way without sacrificing any of the ideological attachment to the rights of ownership, and raising ugly debates about the distribution of ownership within the white community' (370).
- 16 Chanock notes that 'no steps were taken to inform Africans of their [statutory] rights' to compensation for phthisis, a disease of the mines (195). Similarly, he reports a statement by a white official 'that although he had in law no authority to apply African law, nor to act as a court, he did so without legal sanction "by judicious bluff" and, in Chanock's words, 'asserting an administrative prerogative to ignore the law' that permitted women to go to towns 'on their own' (276-7). So, too, Chanock describes the unmentioned legal right of black miners to leave the mines' 'closed compounds' where they lived (433-4).
- 17 Chanock, 2001: 503, n 5. In similar vein, Chanock describes the stance of the distinguished judge Sir James Rose-Innes about review of administrative agencies: 'a story marked by wide dicta asserting the scope and power of review, combined with a narrower reluctance actually to exercise the powers claimed' (480).
- 18 I discussed modes of South African statutory interpretation at some length in Ellmann, 1992: 26-56 (chapter on 'Hurley's Case and the Doctrinal Basis for Human Rights Jurisprudence in South Africa'). There (at 43), I pointed to *R v Detody* 1926 AD 198, as an example of a contextualist rather than literalist decision favouring human rights claims – though Chanock emphasises the technical character of the judges' arguments, and it is striking that the majority justices reach their conclusion, narrowing the reading of a pass law so that it exempted African women, with little if any reference to the burden on liberty that the pass laws might represent. I also looked closely at the much later case of *Minister of Law and Order v Hurley* 1986 (3) SA 549 (A), which invoked a canon of interpretation favouring judicial review to minimise the impact of statutory language that at first blush appeared to 'oust' the jurisdiction of the courts, see Ellmann, 1992: 50-3.
- 19 Rickard describes the 'long, green black-buttoned gowns with black waist sash and white lace neck frill, robes which were specially designed for them and were first worn when the Court was formally sworn in on 14 February 1995', in Rickard 2001: 232. Green and black are two of the colours of post-apartheid South Africa's flag. See South African Government Information, 'National Flag' at <www.info.gov.za/aboutgovt/symbols/flag.htm> (accessed 27 March 2012).
- 20 See generally Law-Viljoen nd [2006], and Law-Viljoen, 2008.
- 21 Section 1 of South Africa's Constitution, adopted in 1996, declares:

The Republic of South Africa is one sovereign, democratic state founded on the following values:

 - (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
 - (b) Non-racialism and non-sexism.
 - (c) Supremacy of the constitution and the rule of law.
 - (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.
- 22 *Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa* 2002 (2) SA 674 (CC) para 44.
- 23 Constitution, s 35 (constitutional right to '[j]ust administrative action').

- 24 Constitution, s 211(3) ('The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law').
- 25 For the constitutional role of the Judicial Service Commission (JSC), see Constitution, s 93. The transcripts of the JSC hearings of a number of the justices on the Constitutional Court are available on the court's website as links from the biographies of the justices; for example, the 1999 JSC interview of Sandile Ngcobo, who went on to serve as Chief Justice of South Africa, is at <www.constitutionalcourt.org.za/site/judges/transcripts/ngokobo.html> (last accessed 4 February 2012; "Ngcobo" is misspelled in the URL). Perhaps Chief Justice Ngcobo's most striking comment in this interview was his response to a question about what court he would most like to serve on; his first words were that 'I have come to realise over the years that my interests are somewhat irrelevant in this country because of the responsibility that one has as a black person', specifically to contribute to meeting the constitutional mandate that 'the judiciary must be broadly reflective of the race and gender composition of South Africa' (transcript at 8).
- 26 Chanock points to 'many obvious things to be thought about if a version of formal liberal law is this time to be more successful. Some are already in process: a lower-court system not entirely dominated by public officials; a return to forms of lay participation in judgment; a less remote Bar; a less exalted judiciary more widely chosen; a more comprehensible and accessible common law; different forms of legal practice' (535).
- 27 *Thint (Pty) Ltd v National Director of Public Prosecutions* 2009 (1) SA (1) (CC), para 6. I discuss this aspect of *Thint* in Ellmann, 2009: 129-31.
- 28 I say 'more or less' because I do not think that a commitment to judicial enforcement of constitutional provisions must be absolutist. A system such as Canada's (*Canadian Charter of Rights and Freedoms*: s 33) that permits explicit, time-limited legislative override of judicial decisions can be one that leaves the courts' role still highly authoritative. There is certainly room for argument, within the general framework of affirmation of judicial constitutionalism, over just how sweeping judicial authority needs to be.
- 29 Or perhaps even the most ardent popular constitutionalists, while prepared to dispense with judicial review of constitutional questions or with the ultimate supremacy of judicial determinations, would still preserve a judiciary that, though diminished, remained formalistic. We might imagine a return to Diceyan constitutionalism, in which courts vigorously scrutinise and circumscribe legislative action, while the legislature retains the authority to override all the courts' limits if it is prepared to do that.
- 30 Two American scholars, one an advocate of 'popular constitutionalism' and one a critic, both describe a formidable range of issues that would have to be compassed in order to compare, empirically, the constitutional performance of courts, other branches of government, or popular mobilisations: see Tushnet, 2006: 1001-5; Chemerinsky, 2004. Another leading American advocate of popular constitutionalism has argued that the inclination to resolve these uncertainties in favour of judicial supremacy fundamentally reflects distrust of the people: Kramer, 2004: 1001-8. I would put the point differently, and maintain that all power, including popular power, needs to be checked.
- 31 Garaty writes that '[t]his dead horse was beaten repeatedly to distract northern voters from the inadequacies of Republican candidates' while 'Republicans repeatedly dealt in the most cynical manner possible with the

- only meaningful question related to sectional animosity: the treatment of Negroes in the southern states' (Garaty, 1968: 241). For the judicial contribution to these events, see *Plessy v Ferguson*, 163 US 537 (1896).
- 32 Bizos, 2011; Corder, 2012: [72-3]. For cogent defences of the courts' role as part of South African democracy, see Budlender, 2011; Chaskalson, 2012; O'Regan, 2011.
 - 33 Chanock writes in his preface that 'law ... is, like any complex cultural activity, always in the process of making, of contemporary creation ... [I]n this making there was no authoritative rule-producing voice but a multiplicity of voices and dialogues both within and outside the state' (xii).
 - 34 Bishop insightfully discusses this case, and the 'engagement' cases, in Bishop, 2009.
 - 35 See for example *Minister of Home Affairs v Fourie* 2006 (1) SA 542 (CC). The court's rule that where a statute has been enacted to implement a constitutional command, a lawsuit about that constitutional area must proceed under the statute rather than directly under the Constitution unless the statute itself is being challenged, is also an effort to vindicate parliament's role in constitutional interpretation. *South African National Defence Union v Minister of Defence* 2007 (5) SA 400 (CC) at para 51.
 - 36 Chanock, 1998. He writes in this volume:

The law was the cutting edge of colonialism, an instrument of the power of an alien state and part of the process of coercion. And it also came to be a new way of conceptualising relationships and powers and a weapon within African communities which were undergoing basic economic changes, many of which were interpreted and fought over by those involved in moral terms. The customary law, far from being a survival, was created by these changes and conflicts. (4)

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