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Introduction: In Praise of Martin Chanock

*Stephen Ellmann, Heinz Klug and Penelope Andrews**

It is a pleasure to introduce this symposium in honour of Martin Chanock. All of us have admired his insightful scholarship and enjoyed exploring ideas with him for many years. When one of us (Penelope Andrews) had the idea for a conference to celebrate Martin's work, the others of us were delighted to take part. Out of that conference, co-sponsored by La Trobe University's School of Law, and held at the University of Cape Town and the University of Stellenbosch in December 2010,¹ comes this volume, a rich array of scholarship reflecting the profoundly and valuably provocative contributions Martin has made over the years – as a scholar, as a professional colleague across international boundaries and as an educator.

A central aspect of Martin Chanock's distinguished scholarship has been his insight into the tangled roots of legal systems, whether systems of customary law or the elaborate designs of Western rule of law states. Both of these areas of his scholarship have influenced the writers here.

Much of Martin Chanock's work, exemplified by his influential book *Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia* (originally published in 1985 and reissued in 1998), has investigated the sources of customary law, generating the central perception that culture and customary law are *created*. Moreover, they are created by some rather than by others; they are the products and the vehicles of social conflicts and power struggles, rather than the ineffable essence of a people's history. This insight – illuminating as history, and deeply challenging to contemporary political ideologies built around supposedly traditional culture – fuels a number of the articles in this volume.

Fareda Banda's article, *This One is from the Ladies: Thank You Martin Chanock, Honorary African Feminist*, attests to the significance of Martin's work. Banda thanks Martin both for his personal generosity to her – we will return to this personal side of Martin's contributions at the end of this Introduction – and for the 'centrality' (Banda, 2012: 9) of his scholarly work. As she observes, '[a]n academic thesis on most aspects of law in Africa is incomplete without reference to Chanock' (9). She recounts his impact on her own thinking and on the scholarship of many others, above all with respect to 'the gendered construction of customary law' (9). She emphasises that his ideas have fuelled not only scholarly inquiry but also political advocacy on behalf of African women – and continue to be relevant to political struggles going on in Africa today. As Banda explains,

moreover, Chanock's scholarship is valuable not only for its results but also for its methods – for fostering a process of 'interrogat[ing] norms' (12), for resisting a focus on Western assumptions in favour of a close examination of what we can discern of the concrete context of actual African lives, and for being one of the earliest instances of 'intersectional analysis' (14).

Julia Sloth-Nielsen and Lea Mwambene also draw on an insight of Martin Chanock's, that 'the development of customary law is at its best a method of legitimation and not a system of rules' (Sloth-Nielsen and Mwambene, 2012: 44, quoting Chanock, 1998: 238). They illustrate this point in their article, *Talking the Talk and Walking the Walk: How Can the Development of African Customary Law Be Understood?*, by examining how South Africa, now committed to embracing customary law as part of the ordinary law of the land, is actually going about this. It turns out that South Africa's courts and law makers are trying many different approaches in this effort (seven that Sloth-Nielsen and Mwambene identify) and these approaches generate a range of problems. The authors point to confusion in the courts' jurisprudence: a court may 'confirm' a pre-existing customary law principle, for example, but on the other hand it may decide to 'develop' the rule in light of emerging conditions or constitutional values. They find legislative attempts to address customary law even more problematic, indeed perhaps 'repeat[ing] wholesale the mistakes of the positivist past' (28). Attractive and legitimising as the customary law ideal of norms developing in response to the evolution of the community is, in other words, it is clearly no simple matter to meld customary law and civil law together, even with the best of intentions.

Jonathan Todres emphasises that Chanock's lessons about customary law are actually lessons about the law of 'the North' as well. In *Out of Africa: Reading Martin Chanock's Scholarship in the Global North*, Todres focuses first on the salience of Chanock's link between 'power and explanation' (Todres, 2012: 48). Just as power shapes the account of traditional culture in African states, Todres reminds us, power shapes the North's view of African states and its view of itself. From the North, the South appears full of problems that are the heritage of outmoded culture, but a closer look at the North reveals similar problems, including gender discrimination and human trafficking, in those cultures as well. Todres writes that '[t]oday, as Chanock identifies, we no longer assert scientific justifications for thinking whites or Westerners are superior, but have instead substituted "culture" to speak of difference where we once spoke of "race"' (56). At the same time, the attachment to an imagined, fixed past has its echoes in the North too, not least in the current jurisprudence of American constitutional law. A point Todres makes about children in particular can be generalised: to remedy injustice, the actual voices of victims need to be heard. Doing so will promote 'the common bonds of humanity' (56) that Todres sees Chanock as helping us to understand.

As significant as Chanock's customary law work is for a wide range of legal systems, customary and otherwise, he has also focused close attention on one legal system in which customary law is only a component – the law of South Africa. In 2001 Chanock published his remarkable volume, *The Making of South African Legal Culture 1902-1936: Fear, Favour and Prejudice*. Two of the articles in this conference directly respond to Chanock's examination of South Africa.

Hugh Corder, in *'Building a Nation': The Judicial Role in South Africa*, engages with Chanock's effort to draw lessons from the law's role in creating the Union of South Africa in the early 20th century for the process of building a post-apartheid nation now. Corder focuses on one striking institutional comparison, between the Appellate Division of the Supreme Court (the highest court of the old South Africa) and today's Constitutional Court. After surveying a number of aspects of the two courts' situations, Corder argues that the Appellate Division sought to consolidate a nation that it understood, above all, as governed by whites but he also affirms that the court's promotion of a 'concept of the rule of law', however imperfect, 'was not an insignificant achievement' (Corder, 2012: 70). Turning to the Constitutional Court, he finds it engaged in a strikingly similar effort at state-making, though for a state guided by far different fundamental values. Corder reads *The Making of South African Legal Culture* as somewhat pessimistic about South Africa's prospects, and finds some grounds for greater optimism in his examination of the two courts. But he closes by commenting on the 'myriad challenges' faced today by South Africa's 'constitutional project of governance' (72), and with the possibility that events 'may yet prove Chanock's prognosis to be the more accurate' (73).

In addition, one of us (Stephen Ellmann) explores another aspect of the lessons of Chanock's study of South African law, in *A Bittersweet Heritage: Learning from The Making of South African Legal Culture*. Ellmann takes to heart and elaborates Chanock's insight that a racist system of law is not racist only in certain discrete areas but will instead feel the pressure of race in every aspect of its operation. He then asks, however, whether the logic of this critique leads to the conclusion that the entire edifice of Western legalism in South Africa should be dismantled. He answers that the core idea of formalism – that courts have a 'special expertise and responsibility in interpreting law and protecting rights' (87) – remains correct, though of course only a part of the new, value-based jurisprudence the Constitution fosters. Ellmann urges that the courts can contribute to the shaping of a better nation by creating a 'constitutionalism of no slogans' (Ellmann, 2012: 88), in which (somewhat as Todres suggests) the courts hear as fully as possible the diverse and complex appeals of South Africa's people.

Frank Munger, responding to Ellmann's argument, suggests in his article, *The Cause Lawyer's Cause*, that the path to the rule of law may be even more crooked than Ellmann's reading of Chanock suggests. Not all courts have the independence and the legitimacy that South Africa's courts enjoy, founded partly on their professional virtues and partly on the new nation's substantial embrace of rule of law values. Nor are all lawyers committed to democratic and egalitarian principles. Yet Munger suggests that lawyers' work may appear less exalted and yet still offer important promise. In a country without elite support for legalism, 'grass-roots advocates' (Munger, 2012: 100) may still manoeuvre for change at local levels and may even achieve results not through appeals to judges but through alliances with members of the bureaucracy. They may in fact have such effects, Munger argues, though they themselves do not fully embrace Western 'rule of law' ideas. Munger closes, however, with an observation true to Chanock's approach as well: that these benign effects depend on the 'co-evolution of society', a project 'courts and cause lawyers alone have little power to determine' (104-5).

Chris Arup's analysis of Australian public interest law also emphasises how much cause lawyering in any given country is shaped by the particulars of that setting. In *Educating Cause Lawyers in Australia After South Africa*, Arup notes that Australia has not embraced constitutional rights to the same extent as the United States and South Africa. At the same time, however, Australian lawyers have deployed the legal resources they do have – rich legal resources, though primarily involving common law claims and regulatory law arguments instead of constitutional assertions – to considerable effect. Arup traces the ways that cause lawyering in Australia confirms Chanock's insights about the essential institutional elements of the rule of law. This is 'largely ... conventional lawyering' (Arup, 2012: 107), and it is conventional lawyering that seems to work in the Australian context.

All of these articles' efforts to discern a path towards more just societies through the sometimes very imperfect institutions of the present are addressing a problem very much at the heart of Chanock's own current work. In his article, *Constitutionalism, Democracy and Africa: Constitutionalism Upside Down*, Chanock offers a preview of the book he is now writing, in which he examines the difficult history of African constitutionalism, and concludes that a critical problem has been the 'lack of any underlying sense of a rule of law' (Chanock, 2012: 137). Where can African constitutionalists find a foundation on which to build this sense? Chanock is not certain that an answer will be found, but he maintains that the way to find the answer is a contextual one: 'The rule of law cannot be built from the top down, some attachment to it must inhere in the society itself' (137). He is deeply sceptical of constitutional innovations that 'float above (and indeed contradict) the ways in which laws are actually

administered and the perceptions of lawfulness in the society as a whole' (139). Even 'the discourse of human rights, like the discourse of socialism, is primarily an imported discourse' (137).

Instead of relying only on such imports, Chanock would return to the customary law. This is a customary law understood, to be sure, not as some set of fixed legacies of the past (the conception he did so much to disestablish) but rather as 'newly and continuously produced by ongoing economic and political processes' (138) and as a 'dialogue, including a dialogue with the imported individualising discourse and centralising ambitions of bills of rights' (141). Acknowledging the paradoxical element in seeking to achieve constitutionalism and the rule of law by a path that is 'not simply through a bill of rights' (142), he concludes that 'a process and context oriented law may well be a necessary part of the creation of a rule of law culture, which must underlie a rights culture, precisely because it is one which people can fully inhabit, and one which is less a creature of post-imperial national and international elites' (142). Even this brief summary of his argument leaves no doubt that Chanock, as always, is pressing us all to think beyond our limits.

Important as Martin Chanock's scholarship has been, however, he has been a teacher as well as a scholar. Chris Arup, in his article, not only provides a picture of Australian cause lawyering but also traces Chanock's contributions to educating the lawyers who now do Australia's lawyering, cause and otherwise. Over 30 years as a legal educator, Chanock helped create the program at La Trobe Law School. He and his colleagues devised interdisciplinary courses – no longer offered today but still plainly influencing the courses in the present curriculum. Chanock also supported educating students for the practice of cause lawyering, and while it turned out that many students' interest lay elsewhere, an 'optional social justice path' (Arup, 2012: 120), and a leading clinical program as part of it, have become ongoing elements of La Trobe's pedagogy.

As much as these articles reveal the impact Martin has had, we want to close with a personal account of Martin's contributions as a member of the La Trobe faculty and the world's intellectual fellowship from one of his close colleagues, Professor Jianfu Chen, former Head of School at La Trobe. Professor Chen eloquently introduced the conference and we are very happy to quote here some of what he said about Martin (Chen, 2010: 4-5):

There is a Chinese saying ... which means, to paraphrase, let the decent be in power and the capable in position. This initially sounds as if decency and capacity (or talent) are separate from each other, but that is not true. Confucian tradition, at least the 'proper' one, has always emphasised that one is never a great scholar without being decent. Chinese culture equally emphasises that one must first learn to be a human person before becoming

a scholar, a musician, a teacher, or maybe even a lawyer. Here, being a human person means being a decent person.

Decency is what we desire at heart, but decency is rarely mentioned in public discourse, and certainly not one of the criteria in any job selection. The requirement for decency is too closely associated with rule by man, not rule of law. And in rule of law, we have for long firmly believed, despite frequent disappointment, that a strong institutional arrangement will itself curb human indecency. You do not need to look too far in your life to find disappointment in this regard.

Decency means you dare to stand up and be counted for your beliefs, principles and independent thinking. In this regard it also means that you welcome differences, diversity and opposition. As we know, and as Chinese would say, sincere advice is not pleasant to the ears, but beneficial in practice. Too often, this is easier said than done.

Decency means consistency; you practice what you preach. Or, once again to paraphrase a Chinese saying, what one does not like oneself, one must not do to others.

Decency means your passion and compassion for your fellow human beings, especially those around you such as your family members and your colleagues. Mentoring and cultivating your junior colleagues is not meant to be a duty; it is simply part of being decent.

Decency takes nothing as given; you get what you give and you deserve what is due.

In short, the seemingly easy task of being a decent person demands the output of the highest quality of human beings: honesty, integrity, passion, and compassion.

I am, of course, not talking about philosophies, I am talking about Professor Martin Chanock as a person – my mentor and dear friend and, above all, one of the most decent human beings I have encountered in my life.

I salute you, Martin. You taught me and many others, by your conduct and behaviour, how to be a decent person, even when being so is sometimes at a personal cost. You have set an extremely high bar for being the decent scholar that we all aspire to be.

Professor Chen closed with two words, which we want to make our own as well: 'Thank you!'

Notes

- * All of us thank Professor Paula Baron for her assistance throughout the process of bringing this volume to completion. Thanks also to the librarians of the Mendik Law Library at New York Law School for timely and resourceful research help, and to Rebecca Fung of The Federation Press.
- 1 Law, Culture, Constitutionalism and Governance: Conference to Honour Martin Chanock, University of Cape Town and University of Stellenbosch, 10-11 December 2010.

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