

## BOOK REVIEWS

Ian Hamnett, Chieftainship and Legitimacy: An Anthropological Study of Executive Law in Lesotho. London: Routledge and Kegan Paul, 1975. x + 163 pp. \$18.00

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This book has been written as a contribution to theoretical discussions among anthropologists, especially anthropologists of law, and "perhaps even to jurisprudence too" (p. 1). Hamnett's approach has been to reject the traditional anthropological view (stemming from Malinowski) of law as a special case of social control and, with Fallers, to reject the "familiar positivism which would identify custom with law" (p. 107). He argues that law must be seen as "a specific and irreducible category of social fact," and introduces the concept of "executive law" to explain his particular view of law and political action in chiefly societies (p. 1).

The methodology employed, according to Hamnett, departs from the usual approach of anthropologists, who base their understanding of total processes of social interaction upon a micro-analysis of cases. Instead, he takes as his starting point "the wider sociology of Sotho social organization" for the solution of certain analytical problems about law (p. 7).

The author begins by examining the characteristics of customary law against the "ideal legal 'system'" in which "all norms are mutually consistent in themselves and in their implications; there are no gaps in it--no juristic vacuum; and each item can be derived from some other item (concept or rule) of higher order" (p. 9). Since customary law falls short of all these requirements, it cannot therefore be referred to as a legal "system." Rather than define customary law in purely negative terms, Hamnett delineates some of its formal characteristics.

Customary law emerges from what the people, rather than the legal specialists, believe ought to be done, the test being which rights and duties the participants regard as applying to them. Customary law is particularized and localised. The pronouncement of the law in one case takes account of the varying social situation or context which, in itself, determines the choice of norms upon which the decision will be based. The norms embodied in customary law are both concrete and general. A decision in one case does not, as in systems based on "binding precedent," cause the rule applied to become "more narrow and specific" (p. 11). When a case has been concluded, the law returns from its "brief excursion into detail and reverts to its normal condition of generality" (p. 11). Customary law is not simply found in prac-

tice, but in those particular practices in which people vest moral authority and legitimacy. Finally, Hamnett emphasizes the social character of customary law. As he later illustrates in his chapters on succession to chieftainship, private succession and inheritance, and land tenure, the social group which defines the law or norm to be applied is determined by the subject matter involved.

The apparent inconsistency between the norms of customary law is noted, and Hamnett suggests that this inconsistency arises from the fact that legal rules are not considered in the abstract, but in the context of different social situations. Since both general and concrete principles return to generality after application, these inconsistencies may co-exist. At the same time, however, the availability of norms can "provide each of the parties with an armoury of legal arguments" (p. 15). This explains why the outcome of any case is unpredictable and apparently arbitrary.

The resolution of any case lies in the position of the chief, who is regarded as the most authoritative exponent of the law. It is he who selects the norms upon which a decision is based, and it is his position as chief which legitimates the decision. Hamnett introduces the term "executive law" to cover those cases where the chief exercises judicial authority and enjoys "unique and compulsory jurisdiction." It applies to "traditional monarchies... found in conjunction with an economy and a system of internal stratification marked by a limited degree of functional differentiation" (p. 154).

Although his analysis follows that of Gluckman, there is a significant difference. Gluckman has emphasized the chief's power of discretion in judicial pronouncements. Hamnett, on the other hand, rejects this view which, he says, is "suggestive. . . of a polarity between rule-governed (sc., judicial) behaviour on the one hand and power-based (sc., political) activity on the other" (p. 18). Although Sotho law was relatively unpredictable in its outcomes, one must not be tempted to see the operation in terms of politics or power. The unpredictability did not stem so much from administrative (discretionary) decisions as from the dense texture of facts upon which the decision was based. Though the chief selected the norms upon which to base a decision, the "political element" of chieftaincy itself was subject to normative rules.

Hamnett traces the origins of the hereditary chieftaincy, and he shows how what he refers to as the "retrospective principle" - the tracing of hereditary rights to the founder of the lineage - gave authority and legitimacy to the position of the chief. The chief's political authority was based on his control of territory. The Paramount Chief had authority over the entire country, principal chiefs over principal wards, minor chiefs over minor wards, and so on. The practice of the Paramount Chief of the day of "placing" junior sons as principal and minor chiefs, based on propinquity to the ruling house, centralised administrative control. Hamnett terms the reckoning of seniority among chiefs in terms of their propinquity to the ruling Paramount Chief as the "circumspective

principle" -- "the retrospective system tends to represent lineage authority, the circumspective to represent chiefly power" (p. 43). This was the essential ambiguity inherent in the position of a monarch and in the kind of law he dispensed, which Hamnett has described as executive law:

A hereditary chieftainship develops its own interests as an ascriptive status-group, which are analytically... separate from those of the community. Where chieftainship is itself a central political value in the society, the ambiguities of its domination grow to create a broad area of indeterminacy, and it is precisely here that "force" is mediated to "law" (pp. 15-16).

The check on the chief's powers of discretion was the necessity that his decision meet the requirements of legality as recognized by the people.

Hamnett introduced his study by pointing out that the theoretical arguments he is advancing arise "from the particular facts of a historical society - Lesotho - in a critical phase of its experience." He explains how the chieftainship, based on the lineage, "was well-adapted for the purposes of expansion and progressive settlement of unoccupied or conquered areas. . . ." The ecological and demographic factors, uniquely combined with external threats to survival, enhanced the political value of chieftaincy. Although the "internal contradictions" within the role of the monarchy, combined with the ecological/geographical limitations would inevitably have led to the hardening of the hierarchical system and a greater centralization of control over resources, Hamnett shows how colonial intervention hastened that process. Under colonial rule, judicial and administrative functions were separated and the legitimacy of the chief undermined. This process involved a gradual deterioration of the position of the chief, leading to

a polarisation of decision-making into an essentially declaratory "law" on the one hand and an essentially "power-based" or "free" discretion on the other. This was not the state of affairs under the previous system, where the customary law furnished the principles in terms of which the chief was required to carry out all his tasks, and where the dichotomy of judicial and administrative courts were [sic] both institutionally and conceptually absent (p. 94).

Hamnett cites examples of cases which took a "bizarre form" in consequence of this polarisation, and notes the confusion for both people and courts which resulted: "the effect of the institutional structure has been to confine the judicial courts to an inflexible and 'legalistic' view of their function, and to oblige the administration to act arbitrarily" (p. 99). As a result, the "courts are inhibited from exercising the functions of equity, while administration is stripped of the inhibitions of law" (p. 100).

Hamnett has set his interpretation of Sotho executive law against the backdrop of "the folklore of 'judiciality'" which, in western society, "underlines the less academic jurisprudence of many practising lawyers and judges" (p. 105). This folklore sees law as one of the administrative activities of government which is separate from political activity. Law does not, according to this myth, involve itself in policy-making or in the exercise of power.

This corresponds to the view that the English legal system has traditionally taken of itself; its function is essentially declaratory rather than creative. No matter what hesitation, debate and uncertainty precede judgment, no matter [h]ow many inferior judgments are overturned on appeal, the court tends to regard itself not as making but as declaring law, the law itself being conceived as existing disembodied, in some noumenal realm of pure essence, from which it realises itself with ever great particularity and sharpness of definition as it moves from potency to act in the mouth of judges (p. 102).

Hamnett concludes his study by noting the interesting fact that the temptation of executive law "to obscure the bifurcation and intertwining of legitimacy and self-interest should be so neatly paralleled by the equal inability of judicial systems to conform to the requirements of their own ideal theory." He points out that even the existence of an efficient legislature does not eliminate the need for decision, nor can it completely determine the decision that is made.

In practice, however, it can obscure the nature of the decision-making process that is involved by presenting the outcome as inevitable, . . . what is not inevitable is not seen as law. . . the juristic repertoire at the disposal of Sotho customary law enables a decision to be both reasonable and legitimate, since norms are not progressively specified into constraining rules, and can therefore remain reasonable, while decision-making is normatively controlled, and can therefore remain legitimate (p. 115).

One is led to question to what extent the problems Hamnett addresses would arise if the data from Lesotho he considers were set against something other than the conceptual and theoretical heritage of jurisprudential myth, folklore, and ideology. Perhaps such an approach could best be provided by an anthropologist lacking knowledge of jurisprudential literature who adopted Hamnett's methodology and applied it to our own society - that is, also taking as a starting point an overview of the whole society to elucidate the relationship between law and political action. He might well find that the two societies did not present starkly opposing models of relationships between law and power, but rather differed in degree. As has been pointed out, Hamnett himself, acknowledges this at the end of his book. One wonders whether his concept of executive law was really required. Some might consider that he is

in danger of succumbing to the jurisprudential ideologies of his own society. He does in fact, at an earlier point, raise the issue of the role of the jurisprudential myth in our own political order. It is a pity he did not pursue this theoretical problem. He might then have used his Lesotho data to greater effect to illuminate further the problems created by the jurisprudential bias in the anthropology of law.