

BOOK REVIEW

INTRODUCTION TO THE LAW OF SOUTH AFRICA.
By C.G. van der Merwe and Jacques E. du Plessis (eds.). Kluwer 2004. 534 pp.

Reviewed by Vernon Valentine Palmer*

The South African legal system is a unique creature in many respects and occupies a special niche in the legal world. There are a number of singularities. On the one hand it is an uncodified “mixed” system that amalgamates Roman-Dutch law with English common law in various degrees or combinations. In this regard South Africa compares to Scotland, Louisiana, Quebec, and other jurisdictions where the private law rests on joint foundations of civil and common law. Yet South Africa’s system has a separate history, a specific identity, an individual dynamic that cannot be captured in facile comparisons with others. Furthermore South African private law is also a pluralist system in which African indigenous laws are, in the eyes of the constitution, on an equal footing with the common law and regarded as an authoritative source of law. Neglected in the past, custom must assume greater relevance because it functions as the ‘common law’ of the majority of black citizens. On the other hand, South Africa is a fledgling democracy which has recently broken with oppression, apartheid and racial discrimination. Its constitution is regarded as one of the world’s most advanced, and the new Constitutional Court has rapidly acquired prestige with the people. South African law has entered an era in which many new constitutional values, some of which are enshrined in a Bill of Rights, must be transposed and realized in many areas of the subsidiary law.

To present this unusually complex and interesting system in an intelligible way to the outside world is not an insignificant task. The sheer range of subjects and necessary expertise may well exceed the abilities of a single author. This is undoubtedly why the editors wisely entrusted the task to an array of noted authors and colleagues drawn from the universities and the bench and bar. Yet if the book were not to

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degenerate into a loosely connected set of essays, there was the editorial problem of controlling and coordinating the work of so many collaborators. A coherent work would minimize glaring differences of approach, style, coverage and emphasis and consistently aim at the level of its general audience. That, one surmises, was the approach which produced a work of this caliber. The editors deserve special plaudits, firstly, for assembling an exceptional team whose work is of such quality, and, secondly, for shaping that work into a book that could mistakenly be thought to have come from the pen of a single author. Consisting of a compact 534 pages, and subdivided into 15 chapters which flow coherently from public law down to the various divisions of private law, commercial law, criminal law and procedural law, this *Introduction* provides the reader with not only the type of work its title suggests, but one of considerable sophistication as well. A short review of the beginning chapters may convey my meaning more clearly.

Chapter 1 by Francois du Bois of the Cape Town faculty is entitled "Introduction: History, System and Sources," and he has written an elegant and perceptive overview of the legal system. Du Bois begins with the difficult and always nebulous subject of legal culture which in South Africa's case cannot be easily simplified. He argues that the prevailing culture among jurists is complex, mixed and closer to the common law tradition than any other. Incidentally, Du Bois seems to approach legal culture not merely as the preserve of the jurists, but as part of a wider culture possessed by society. Thus his description includes the high crime rate, high levels of imprisonment and resort to informal nonstate justice as evidence of the culture in South Africa. As to legal history, Du Bois begins with the "transplanted" Dutch colonial law, its transformation under British rule and the present efforts to reshape this law to the constitutional values enshrined in the 1996 constitution. This discussion considers the role judges should play in the reshaping and remaking of the system. This chapter also conveniently outlines for the otherwise unfamiliar reader much information about the structure of the courts, the legal profession and the various sources of law. In connection with the subject of sources he devotes a short section to African customary law and points to some fundamental differences between customary law and the common law: for example that the indigenous law covers only a narrow range of issues and has a different general ethos. The discussion is brief and abstract and entirely appropriate within an introductory chapter. Yet the reader may at this point notice that there will be no later chapter devoted to African custom nor any later systematic exposé of its substantive rules or procedures.

Professor du Bois's discussion therefore is only a tantalizing glimpse of a subject that could well be treated in greater depth in a later edition.

Chapters 2 and 3 cover the subjects of constitutional law and administrative law respectively. As already mentioned, understanding the dramatic changes in these areas and their vertical effects on the private law is clearly one of the book's central themes and indispensable to an appreciation of modern South Africa. These chapters are of a very high quality. They gracefully converge and form a coherent narrative of constitutional change. Chapter 2 by Johan de Waal first recounts the predemocratic history of South Africa. Here, in constitutional jargon, is essentially the tale of an omnipotent parliament, unrestrained by effective judicial checks and balances and unencumbered by an operative Bill of Rights, which effectively legalized oppression while keeping within the appearances of the rule of law. This illuminating prologue includes the rise of the apartheid state and various constitutional crises from the 1950s on. The juridical chasm the country would cross in 1994-1996 is difficult to understand without this backdrop. There is also valuable soul-searching discussion on the dilemma of the South African judge during the apartheid years. Were they right to continue to serve and mitigate injustice to the extent they could through restrictive interpretation, or should they have resigned rather than compromise with oppression and taint themselves in the process? The answer is not clear but the question is well argued and extraordinarily important, and not merely in South Africa. This chapter contains a clear, readable analysis of the 1996 Constitution and its revolutionary impact. For the first time it extended the franchise and civil rights to all without racial qualification, it ended the doctrine of parliamentary sovereignty, and radically dispersed and redistributed governmental powers. The discussion is (thankfully) not a section-by-section exegesis, but is written in a broad conceptual manner and organized around the themes of constitutional supremacy, separation of powers, the rule of law, democracy, accountability, responsiveness and openness. It closes with a twenty-page discussion of the Bill of Rights and leading cases by the Constitutional Court.

Chapter 3 on Administrative Law by Professor Cora Hoexter of Witswatersrand skillfully demonstrates the impact of the new constitution on administrative law. In sections entitled "Administrative Law—Past and Present" and "The Impact of the Constitution" Professor Hoexter details the "constitutionalisation" of administrative law. For the first time in history the ordinary judges (South Africa does not have separate or specialized administrative courts) have been armed as

guardians of administrative fairness. In the predemocratic era, she argues, there was no effective judicial check upon administrative oppression since the courts were restrained by the concept of parliamentary sovereignty and their effectiveness was in part frustrated by the inherited English style of administrative review. The legislature had the complete freedom to define lawfulness and could limit or even exclude judicial scrutiny of administrative decisions. There was no right of access to State-held information, no ombudsman worthy of the name, and government secrecy was “cultivated as a virtue.” As she points out, today the picture is very different. The Bill of Rights contains a protection seldom found in constitutions around the world—a fundamental right to just administrative action—and the protection is now codified in the Administrative Justice Act of 2000. According to some commentators this innovative “right to reasonable administrative action” is already eliminating the old methods of reviewing reasonableness (here referred to as “symptomatic unreasonableness”) and it may also be obliterating the distinction between appeal and review. The discussion also includes new nonjudicial protections, such as the requirement of public participation in rule making and the institution of ombudsmen to investigate improper conduct and financial integrity.

To this point I have mentioned themes within the first three chapters primarily to indicate the overall quality of the work and to suggest why it is of general interest. Reasons of space do not permit me to discuss the remaining chapters in the same way, but it is certainly not to be taken as an indication that they are any less interesting or scholarly. To the contrary there is consistency and quality throughout, but I will confine myself to remarks of a general nature about the individual chapters.

The treatment of private law is found in Chapters 4-9, and these cover Family Law (Brigite Clark), Successions (M.J. de Waal), Property (C.G. van der Merwe), Contract (Gerhard Lubbe, Jacques du Plessis), Delict (Max Loubser), and Commercial Law (Charl Hugo and Richard Stevens). Thereafter Chapters 10-15 cover Companies (Philip Sutherland), Labour Law (Christoph Garbers), Civil Procedure (HJ Erasmus), Criminal Law (Jonathan Burchell), Evidence (David Zeffert) and Criminal Procedure (Andrew Skeen).

Each of these chapters represents a succinct exposition of the subject, laid out at an intermediate level of detail appropriate to an introduction, and capable of standing on its own. The footnoting throughout is mercifully restrained and unpedantic, and the writing possesses a calm authority of its own. Stylistically speaking, the reader will find these chapters are a pleasure to read. Usually a chapter opens

with an historical or introductory overview which allows the reader to gain his bearings and see a wide picture of the subject before reaching into more technical levels. HJ Erasmus's important chapter on Civil Procedure, for instance, sets the scene by taking the reader through four periods of procedural development, from the old medieval romano-canonical system originally used by the Dutch to the latest innovations instituted under the rules of the Constitutional Court. Similarly Jonathan Burchell, prior to setting forth general principles of criminal liability, gives a bird's eye view of the creation of South Africa's hybrid or mixed system of criminal law in South Africa, the perversion of it during apartheid, the later German influence on development, and the current testing of criminal law under the norms and values of a justiciable Bill of Rights. Considering the dry, positivistic cast of so much contemporary legal writing, these historical perspectives make these areas particularly interesting and intelligible for the foreign reader.

Another reader-friendly trait lies in the book's implicit use of comparative method. The authors manage to keep the wide variety of South African legal sources and their continental or English background constantly in view. This seems essential if the unusual eclecticism within private law is to be sorted out by the general reader. The chapter on Property by Professor van der Merwe, for example, starts off the Law of Property with a masterly summary indicating how much the Roman law of property contributes to the modern law, what features are attributable to Roman-Dutch influence, and what is due to the (limited) English influence. Similar care in differentiating the sources is equally apparent in Max Loubser's chapter on Delict and HJ Erasmus's chapter on Civil Procedure. A further convenience is that each chapter ends with a "selected bibliography" which provides foreign scholars and librarians with a clear idea of the necessary works to consult or acquire.

The recent impact of the constitution on the subsidiary areas of law is also not neglected. It continues to resurface wherever relevant. The Roman-Dutch law which was once praised for its liberal and cosmopolitan spirit during the years of apartheid is now undergoing considerable restructuring to bring it into conformity with the post-1996 environment. This is nowhere more plainly revealed than in Brigitte Clark's chapter on Family Law where the Constitutional Court's rulings in such areas as homosexual parenting, the socio-economic rights of children, and the Court's recognition of the "permanent, same-sex life partnership" have greatly altered the old common law landscape. Clearly African customary law is not spared this constitutional realignment, and

the ramifications are detailed in the chapters on civil procedure, evidence, labor law, delict, contract, property and succession.

In concluding this review, it is important to ask to what extent it succeeds in providing unfamiliar foreign lawyers (or perhaps aspiring South African law students) with an articulate general overview while at the same time furnishing sufficient details to answer questions which specialists may wish to pursue. For this reviewer the book is a success in threading the mean. For example a reader (such as myself) who is interested in the field of Delict and more particularly in the recoverability of "pure economic loss" will not be disappointed by Professor Loubser's treatment in Chapter 8. Of course there is not an exhaustive discussion of the topic, nor a citation to all specialized literature or a compendious treatment of the case law. Nevertheless there are several pages delineating the general position, discussing the facts and holding of certain leading cases, and laying out various policy considerations which are believed to be influential with the judges. From this standpoint the book seems to fall somewhere between an overview and a manual of South African law. As Professor Zimmermann rightly states in his Foreword, "it provides legal scholars worldwide with a reliable overview as well as with a convenient starting point for more detailed comparative investigation."

It is a welcome addition to the Kluwer's series that should be read with great interest and benefit.