Book Reviews

LAW AND JUSTICE IN SOUTH AFRICA, edited by John Hund, Institute for Public Interest Law and Research, Johannesburg, 1988, vii and 231 pp. (including an appendix and list of contributors). Reviewed by Paul Myburgh.*

Fifteen years ago, Albie Sachs wrote that "if the symbol of the administration of justice in South Africa is a two-edged sword, the edge that menaces the black population has become increasingly sharp while the edge that restrains white officials and police grows increasingly blunt".[1] *Law and Justice in South Africa* examines the menacing edge, and offers ample proof that it remains as biased and sharp as ever.

Law and Justice in South Africa is a collection of fourteen essays, most of which were first read as papers in 1984 at a conference on conflict accommodation and management in South Africa. The essays, as the reader is forewarned in the Preface, display an extreme diversity of style, method and opinion. However, for the purpose of this review, they may be divided into four broad categories on the basis of their contents, and the areas of law which they cover.

First, there are three essays in the collection which discuss "access to justice" issues. Budlender's two essays concentrate on the legal and paralegal needs of economically disadvantaged individuals and communities (in the context of apartheid South Africa, this is usually equivalent to black individuals and communities). He outlines the growing disenchantment with the traditional access to justice approach, and discusses developments in public interest litigation elsewhere. It must be said that Budlender's two contributions overlap a great deal, and the structure of the collection as a whole might have been improved if an expanded version of his first essay only had been included. Steytler's essay on access to justice focuses on South African legal aid to a greater extent, providing an analysis of the performance of the Legal Aid Board and some mention of the Hoexter Commission's recommendations on access to justice. Steytler's contribution further offers useful statistics and details of practice; however, it is somewhat marred by an insensitive use of the euphemism "African suburb"[2] to describe Mbekweni, one of thousands of black ghettoes, or "townships" created by the Group Areas Act, and a penchant for neologisms such as "proactive" and "neo-dependency".

Secondly, the collection contains four broad perspectives on the South African judicial administration. Boulle and Suttner contribute excellent essays on administrative justice, and the "loading" of (especially criminal law) procedures respectively. A shortcoming of the collection, however, is made evident by Pretorius' essay on industrial justice: as mentioned above, most of the essays were written in 1984, and none has been updated for publication. This has not affected the quality of most of the essays, but has diminished the usefulness of Pretorius' contribution, as many of the elements of current South

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1 Albie Sachs *Justice in South Africa* (Sussex University Press, London, 1973) 263. Sachs' writings are banned in South Africa.

2 At p 26.

African industrial relations are missing from his discussion: the rise of COSATU (the Congress of South African Trade Unions) and its opponent, UWUSA (the United Workers' Union of South Africa), the role played by black trade unions in organizing resistance to the State of Emergency, the Industrial Court's increased workload, and the mooted alteration of its status (from administrative tribunal to "fully-fledged court of law")[3] by amendment of the Industrial Relations Act. This might have been avoided by at least updating the footnotes of some, or of all of the contributions. The fourth essay in this category, Hund's, describes the structures of informal, or "township" justice which have arisen, and which flourish "in pockets of anarchy where the formal [South African] legal system has no reach or control".[4] Hund's discussion is based on a study of the *makgotla* (urban black courts set up by the inhabitants of townships themselves, as opposed to the "official" court structure) of Mamelodi and Crossroads, and is of particular interest, being one of very few studies of this kind to be published in South Africa.

Thirdly, the collection offers five more theoretical analyses of the roles of law, ideology and justice in South Africa. Suttner and Davis both contribute neo-Marxist perspectives on the South African legal system: the former concentrates on specific instances in which the judiciary have played a part in implementing, or legitimising the ideology of repression; the latter proposes a general post-instrumentalist theory of law based on the writings of Poulantzas. Adam examines the mechanisms which the South African authorities employ in their "management" of civil dissent, and compares the apartheid regime with the Orwellian police state. In his contribution, Sanders discusses alternatives to the traditional, European model of natural law, drawing on the ideological traditions of the various groups living in South Africa. From the opposite end of the political spectrum, Van Warmelo offers his views on human rights, the rule of law, and justice. He comes to the conclusion, inter alia, that "[t]he average intelligence of the members of most communities is probably that of a child of ten years of age. Since most people are not capable of thinking for themselves, it is obvious that the majority of persons will be led by an elite or by a fairly small minority which is sufficiently vociferous".[5] The rest of his essay is in much the same vein, and of the same standard. For example, his response to the trenchant and widespread academic criticism of the South African judiciary as being too "executive-minded", is: "Don't shoot the man at the piano, he's doing his best. I shudder to think what would happen if our judges, good, bad or indifferent, were to be replaced by our politician [sic] lawyers."[6] It is laudable that Hund attempts to include such diverse viewpoints in the collection, but it would appear to this reviewer that Van Warmelo abuses his forum by airing personal political views and offering unsubstantiated opinions, rather than restricting himself to a disinterested academic discussion. Apart from anything else, the uneven style and structure of his essay detract from the very high standard of most of the other contributions.

Fourthly, the collection contains two "case studies" of instances in which the impact of ideology on the administration of justice in South Africa has been apparent: Mntambo,

3 On the Industrial Court, see Ben Magwai Mabena "The Industrial Court from the Perspective of Black Trade-Unionists" (1986) 27(2) Codicillus 4.
4 At p 203.
5 At p 163.
6 At p 169.

in an excellent analysis of the *Sachs* and *Fellner* cases, discusses the interpretation by the South African Appellate Division of the state's prerogative to issue, withdraw, and refuse to renew passports;[7] while Motshekga's (at times not quite cogent) essay explores how Southern and Eastern African courts have resolved questions of *mens rea* in cases of killings inspired by belief in witchcraft.

Finally, the text of the Freedom Charter, which was adopted by the Congress of the People in Kliptown on 26 June, 1955, is reprinted in an appendix to the collection with a very useful and informative historical annotation by Sanders. It should be noted that the annotation only discusses developments that relate to the Charter up until 1984; the current restatement of the Freedom Charter by the ANC has not been included.

This collection of essays will be of interest and of value to teachers and students of law, political science and sociology. It can be recommended to all who are concerned about the denial of human rights, and the erosion of the rule of law in South Africa.

MISREPRESENTATION AND THE FAIR TRADING ACT, by Lindsay Trotman, Dunmore Press, Palmerston North, 1988. xviii +94pp. (including tables and index). Reviewed by D.W. McLauchlan*

Section 9 of the Fair Trading Act 1986 provides that "No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive". This section is supplemented by sections 10-14 which outlaw specific kinds of misleading conduct and misrepresentation. The civil consequences of contravention of the above provisions are spelled out in section 43. The courts are given a broad discretion to make a variety of orders where a person has suffered loss as a result of offending conduct, including an award of damages and avoidance or variation of contracts.

An unfortunate feature of the process leading to the enactment of this legislation is that no attempt was made to rationalise the new scheme of remedies for misleading conduct and misrepresentation with the reforms of the general law of misrepresentation effected by the Contractual Remedies Act 1979. It seems that no account at all was taken of the existence of that Act. Indeed it was probably overlooked completely in the rush to copy the Australian Trade Practices Act 1974. We are thus provided with yet another graphic example of the amateurish manner in which New Zealand has gone about reforming its commercial law over the past 15-20 years.

Readers may be interested to know that during the course of the Law Commission's *Contract Seminar* held on 27 May 1988 some participants (including Professor David Harland of Sydney University) urged a reconsideration of the remedies existing under the Fair Trading Act in relation to those provided for in the Contractual Remedies Act. They

7 Also cf *Boesak* v *Minister of Home Affairs* 1987 (3) SA 665 (C), and D J Nicholson "Review of the Prerogative to Withdraw Passports in South Africa" (1988) 47 Cambridge Law Journal 189.

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questioned whether the discrepancy was desirable. There seems little likelihood, however, of any reconsideration taking place in the immediate future.

In these circumstances Lindsay Trotman's short monograph on *Misrepresentation and the Fair Trading Act* is a most welcome addition to the law library. The book contains a valuable discussion of the new law of misrepresentation since the passing of the Fair Trading Act. The author's analysis is sound, well written and displays an excellent feel for both the general law of misrepresentation and the issues arising out of the new Act. This book is essential reading for all members of the legal profession seeking guidance on the impact of the Fair Trading Act on the law of misrepresentation and especially the interrelationship of that Act with the Contractual Remedies Act 1979.

There is only one aspect of the author's analysis which this reviewer would like to discuss. It concerns the curious decision by Parliament to delete from the Fair Trading Bill clause 36 which would have conferred a statutory *right* to damages for loss caused by, inter alia, misleading conduct or misrepresentation. The deletion means that damages claims under the Fair Trading Act must be made pursuant to section 43 which, as noted earlier, confers a *discretion* on the courts to award damages. The author suggests[1] that "the best explanation for the deletion of cl. 36 would appear to be simply the removal of undoubted overlap that existed between cl.36 and cl.38(2)(d)", now section 43(2)(d). Is this the best explanation? It is true that an overlap did exist, just as it did between the comparable provisions of the Australian Trade Practices Act 1974 on which our Bill was based. But the overlap did not render clause 36 superfluous because there is, in theory at least, a significant difference between damages as of right and damages at the discretion of the court. This writer's inquiries have revealed that the deletion of clause 36 was based on the following passage in Donald and Heydon's *Trade Practices Law* [2] concerning the Australian equivalents of clause 36 and section 43(2)(d), respectively sections 82 and 87(2)(d):

> We cannot see any relevant distinction between [s.87(2)(d)] and the right to recover damages under s.82, save that a short limitation period of three years applies under s.82.

This somewhat ambiguous statement was taken by the officials of the Department of Trade and Industry responsible for the Bill as meaning that clause 36 was superfluous because section 43(2)(d) covered the same ground, whereas the authors probably intended only to draw attention to the existence of overlap and the potential for precisely the same orders to be made pursuant to both provisions. The authors would, it is believed, be highly surprised to learn that their observation formed the basis for a decision in New Zealand to scrap the most important and mandatory civil sanction for misleading conduct. For these reasons it is suggested that the deletion of clause 36 was simply a mistake; it was a misguided attempt to simplify the Bill by striking out an "unnecessary" provision.

Whether the absence of a statutory right to damages will have a practical impact remains to be seen. It may be that the courts will invariably exercise their discretion in

1 At p11.
2 Law Book Co. Ltd, Sydney, 1978, vol 2, 853.

the representee's favour where damage resulting from the misrepresentation has been proved, which is the assumption made throughout Mr Trotman's book. But the fact remains that New Zealand claimants are theoretically in a weaker position than their Australian counterparts. One consequence of damage relief being discretionary may be that New Zealand claimants will be more amenable to compromise.