

## ESSAY REVIEW

### LIMITATIONS OF LEGAL PUBLICATIONS IN ZIMBABWE

WHEN LAST REVIEWING legal publications in this country (*ante* (1977), V, 98-9), I felt obliged to comment on the narrow, static approach employed by legal authors in Rhodesia. Five years later in Zimbabwe, little has altered fundamentally in this respect but there have been some changes for the better.

Two of the books now under review are new editions of books originally reviewed five years ago and there are signs of improvement. The second edition of Skeet's book on income tax, for example, has been co-authored by Professor Christie and his hand is visible in the improved lucidity of the text and in the exegesis of the law.<sup>1</sup> A tentative chapter on the new Capital Gains Tax has been included, and the many simple examples on tax calculations will be a help to students. As a ready index of the relevant legislation, case law and practice, the book will also be useful to all concerned with rendering income tax returns in Zimbabwe. The book, however, still restricts itself unfortunately to the technicalities of law and accounting despite its title. Income tax law and its technicalities would be placed in a more helpful perspective for both student and practitioner alike if there were some discussion of the role of income tax in raising revenue for the state, directing the economy and effecting social change. Without a discussion of these issues, it is difficult for the authors to present any context—and hence meaning—for the law in this field; nor are they able to offer assistance in bringing coherence to the subject or in resolving the frequent ambiguities in the rules.

Similarly, the second edition of *Zimbabwe Company Law* is an improvement in some respects upon the first edition.<sup>2</sup> The Tables of cross reference from the Zimbabwe Act to South African and British legislation have been recast and brought up to date. The discussion of a number of topics has been amplified and amended, e.g. directors' duties. But the style of presentation remains that of a student's crammer, complete with checklists of points and potted case summaries. The authors state in the preface that the book has been written 'with the specific needs of students in mind' and that 'an attempt has been made to produce a book which will be of some use to practitioners as well'. I doubt that students using this book alone could acquire much grasp of company law. There is no attempt to elucidate the need for companies or what role for them the law seeks to provide. The result is something like studying anatomy without knowing that legs are used for locomotion, or ribs for breathing. There is also no attempt to adjust the emphasis in the book to conditions in Zimbabwe. Thus in the discussion of directors' duties of good faith there is no mention of the far-reaching provisions as to disclosure in the Prevention of Corruption Act (Chapter 2). The exposition of the provisions added to the Companies Act in 1977 for co-operatives is largely a repetition of the relevant sections and there is no discussion on applying these provisions to the

<sup>1</sup>E. E. Skeet and R. H. Christie, *Income Tax in Zimbabwe* (Salisbury, Chartered Accountants of Zimbabwe Education Trust, 2nd edn, 1982), 162 pp., Z\$12.00.

<sup>2</sup>M. Tett and N. Chadwick with P. Volpe, *Zimbabwe Company Law* (Salisbury, The Zimbabwe Law Journal, 2nd edn, 1981), 282 pp., Z\$32.00 (p/b Z\$20.00).

increasing number and variety of co-operatives emerging in Zimbabwe. The comparative tables of equivalent provisions in the South African and British legislation are useful, as is the index to the Companies Act, Table A, and table of offences. However, for a grasp of the principles of company law the student would be better advised to turn to Gower (Fourth Edition); it would also be easier on his pocket.

Of the new books the best is undoubtedly Christie's successor to Wessels's *The Law of Contract in South Africa*, a work which in its day had a considerable influence on the development of contract law in South Africa and in Zimbabwe.<sup>3</sup> When Wessels wrote some 45 years ago the foundations of contract law in South Africa were not secure. A confusion of principle between English and Roman Dutch law was apparent and much remained obscure in Roman Dutch law itself. Wessels's aim was to contribute towards the erection of coherent principles of the law of contract in accord with the social ideas of his time.

Christie's assumption in his book is that a coherent and principled law of contract now exists. His task, as he sees it, is to expound its principles and rules and draw attention to areas in which it still needs tinkering with. The biggest drawback to this approach is that it takes a view of the law as static and largely removed from any socio-economic setting. This creates practical problems for the practitioner and student. Within months of the appearance of a work like Christie's, the law reports and even the statute book will show new departures and new pre-occupations. Take Christie's exposition on the law governing the right to damages by one party who has relied upon an untrue statement made by the other party in entering a contract. Although he surveys the leading cases, starting with the English case of *Derry v Peek* in 1889, Christie makes no attempt to explain why there has been judicial reluctance to allow a claim where the untrue statement was made negligently as opposed to fraudulently. Why have judges said you can sue only if you can prove you were wilfully lied to? Of even more interest, why have judges increasingly declared themselves unhappy with this rule? Fraud is difficult to prove against someone since it involves proving knowledge that what was said was untrue. It is often difficult enough to prove that the statement was untrue, let alone that the maker of the statement knew it was untrue. It is in this area relating to the bargaining process that new rules and principles are required. Ideas about the limits to be placed on the bargaining process are changing—even in the world of judges. Capitalism may here have an 'unacceptable face'. If Christie could have offered some insight into what is happening in this area of the law it would make his book more interesting and more useful. The task of the textbook-writer is to illuminate the law. It is not enough to say as does Christie in his introduction:

I prefer to get on with the job of stating the law as I see it, remembering that the judges write the law while the academics write about it. So I direct the reader's attention to the cases, and if he wants a second opinion he will gain more from reading them in the original than my imperfect representation of them.

<sup>3</sup>R.H. Christie, *The Law of Contract in South Africa* (Durban, Butterworths, 1981), 575 pp., R58.95.

Such an observation may apply to last year's law but will not apply to next year's law. Since the publication of Christie's book, the pressure for change has found expression in the field of negligent misstatement inducing a contract. In *Kern Trust (Edms) Bpk v Hurter* 1981 (3) SALR 607, two judges in the Cape have recognized that there can be a claim for damages where only negligence without any element of fraud is proved. It is enough to prove what the maker of the untrue statement ought to have known without proving what was actually in his mind. The judgment in this contains a useful survey of developments in the field in a number of countries, including legislative action in Britain to bring reluctant judges into line, a survey absent from Christie's book.

There are also many areas ignored by Christie. No attention is given to customary law, the rules governing its interaction with Roman Dutch law, and its development. The title he gives to his book after all is *The Law of Contract in South Africa*, but in the section on capacity to contract, for instance, there is no reference to the complex of rules governing the contractual capacity of African women. Is this omission because the matter is not discussed in the Roman Dutch authorities, the English Law Reports and only rarely in the South African Law Reports? Perhaps there are other reasons, for we find that problems in other areas also are ignored. The abuses of standard form contracts are discussed perfunctorily. The myth of 'freedom of contract' and the realities of bargaining power are not discussed at all.

Nevertheless, Christie has a lucid and very readable style. Within the confines of his approach he is able to introduce into his text a great number of references to decided cases without detracting from the flow of his presentation. He not only defines terms, but explains them and his explanations are concise and helpful.

A new book on Contract by Volpe aims to be a 'crammer' for law students who have no access to law reports.<sup>4</sup> It is printed on newsprint with a standard typewriter face. There are no footnotes and no index. It is not an easy book to read and I should think even more difficult to learn from. The law is presented as a list of rules. These are then elaborated in point form and illustrated with brief examples from decided cases. There is little attempt to offer explanations of terms employed. No attempt is made to give any account of the development of the law, of problems in the field, or even to suggest that the law plays a part in social life. Like Christie, Volpe makes no reference to customary law, in particular ignoring the capacity of African women to contract. Is this not part of the law of Zimbabwe? Also the text is sometimes muddled. At page 108, the duties of disclosure by directors in a company are confused with the duty of disclosure in contract in general. At page 9 the rule should be that silence amounts to acceptance only if in law there is no duty to speak.

A new introductory text on the legislation of Zimbabwe by Redgment is aimed at first-year law students.<sup>5</sup> The author writes in a chatty style and succeeds in presenting an outline for beginners of the formal structure and concepts in the existing legal system in Zimbabwe and the terms currently used by lawyers to

<sup>4</sup>P. Volpe, *The Commercial Law of Zimbabwe: Contract* (Salisbury, Zimbabwe Law Journal, 1980), 221 pp., Z\$10.00.

<sup>5</sup>J. Redgment, *Introduction to the Legal System of Zimbabwe* (Salisbury, The Author, 2nd edn, 1981), 81 pp., Z\$8.00.

describe it. Redgment attempts nothing penetrating, but his readers will not be misled into concluding that the law in Zimbabwe is cut and dried. There are frequent hints at problems and conflicting approaches. Sometimes, however, his style becomes silly. In the opening paragraph, law is equated to a mother telling her child not to touch a hot stove. Apparently the sanction is a spanking. This is slightly more interesting as an attitude towards child-rearing practices and rather less helpful as a hint at the nature of law. Students will find this book more helpful to read before deciding to study law rather than in preparing for examinations.

Storry's book on criminal practice is designed as a handbook for legal practitioners who do not have ready recourse to a library, or even to other textbooks, the statutes or law reports.<sup>6</sup> The idea is a good one, and the book covers a surprisingly comprehensive field and has been carefully prepared. The major drawback is that in the field of criminal practice, the details of the law change frequently at the instance both of the legislature and of the courts. The practitioner who relies on a work designed to replace use of the relevant statutes and law reports will soon find himself out of date. What would meet this difficulty would be a loose leaf edition and a page replacement service to cover the inevitable changes in practice and procedures that arise. In this form the book would be very useful to practitioners.

Whatever the limitations of all these books, by legal practitioners in Zimbabwe, the only book under review written and published outside the country is infinitely worse. Mittlebeeler's *African Custom and Western Law* has little to say about African Custom or Western Law.<sup>7</sup> It is anecdotal in its approach: the principal sources being a seemingly random selection of court reports. These are summarized, often unclearly, with little attempt to extract any principle. It is not surprising that the author makes no attempt to construct any thesis from these anecdotes. All this is a pity because it would be not only interesting but of use to the policy makers to have a clear exposition of the crucial differences and foundations of those differences between customary and Western law in Zimbabwe and how the areas of conflict between them have emerged and with what result. Mittlebeeler's book suggests little in the field other than a few sources that might be tapped by other researchers.

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<sup>6</sup>J.G. Storry, *Rhodesian Criminal Practice* (Salisbury, Rhodesian Law Journal, 1978), 446 pp., Z\$22.50.

<sup>7</sup>E.V. Mittlebeeler, *African Custom and Western Law: The Development of the Rhodesian Criminal Law for Africans* (New York, Africana Publishing, 1976), 248 pp., US\$25.50.