

# Reviews/Resensies

## Constitutional Law of South Africa

by Matthew Chaskalson, Janet Kentridge, Jonathan Klaaren, Gilbert Marcus, Derek Spitz, Stuart Woolman (eds)

Juta & Co (1996)

Looseleaf

R350,00 (VAT incl)

THEY'RE getting bigger, and they're getting better. First came Cachalia *et al*, *Fundamental Rights in the New Constitution*, a book by six authors, running to 232 pages. Then came Van Wyk *et al* (eds), *Rights and Constitutionalism: The New South African Legal Order*: four editors, 21 authors, 720 pages. Now we have Chaskalson *et al* (eds), *Constitutional Law of South Africa*: six editors, 27 authors. Being a looseleaf, the number of its pages requires calculation which seemed not worth doing. But it weighs in at over 2 kg; the text already stands 45 mm high, and allowance has been made in the binder for a further 40 mm of text.

The looseleaf constitutes a variation on a theme. "Constitutional law" is packaged as a whole range of discreet topics, with different authors dealing with these topics to the best of their various abilities. The result, inevitably, is a grab-bag. The editors do not pretend that it is anything else. In the Preface they acknowledge candidly their failure to present a single approach to constitutional theory and practice, "to advance a unified theory". What comes to mind is the endeavour of theoretical physics to discover a so-called "grand unified theory", a quantum theory of gravity. Laurence Tribe, trained as a physicist, sought with his great tome to impose a pattern upon the whole of American constitutional legal history which would make sense of all its variety.

If the South African Tribe has been born, he is not to my knowledge working in the field of constitutional law. Quite correctly, therefore, the editors eschew a unified theory and rely rather on the strength of individual chapters, or parts of individual chapters, to sustain the work in its entirety. They have

drawn not on the endeavours of physicists, but on the achievements of the creators of cult plays and cult films.

In a famous essay on *Hamlet*, TS Eliot wrote of the play as "an artistic failure", Shakespeare having "left in it superfluous and inconsistent scenes which even hasty revision should have noticed". It is this feature of the cult play, the essential unconnectedness of its yet brilliant scenes, which permitted Tom Stoppard to write a play with two of *Hamlet's* attendant lords in the lead roles, and to have Guildenstern say at the beginning, "Then what are we doing here, I ask myself", and Rosencrantz ask at the end, "What was it all about? When did it begin?"

Umberto Eco has written about *Casablanca* as cult movie, emphasising its "ramshackle, rickety, unhinged" nature. In part this was the result of the history of its making, for the storyline had not yet been completed by the time filming commenced. Ingrid Bergman as Ilse therefore "seems so fascinatingly mysterious" because she genuinely had no idea whether she would in the end choose Rick or Victor. "I think," says Eco, "that in order to transform a work into a cult object one must be able to break, dislocate, unhinge it so that one can remember only parts of it, irrespective of their original relationship with the whole." Where the work is a book, it is considerably easier to unhinge if it is published in looseleaf format.

The book is divided into five parts, the short titles of which are reflected on the grey plastic dividers as being Introduction, Government Institutions, Court Powers and Rules, Operational Provisions and Specific Protections. The last part, at 24 mm and weighing in at approximately 1 kg, makes up the bulk of the book.

The Introduction consists of an introduction proper by the six editors and a constitutional history of South Africa. Both are workmanlike.

Government Institutions includes chapters on national government, provincial government and federalism. This is an intelligent division of what might be termed

the separation of powers on the vertical axis. The first two chapters deal in a textual manner with the constitutional competencies of the national and provincial governments respectively, while the third chapter considers the all important question of the relationship between these governments. Two gaps are immediately apparent. There is no chapter on local government, and there is no chapter devoted to the relationship of powers on the horizontal axis: between legislature, executive and judiciary. These issues are merely touched upon in passing. It might be worth including them as fully-fledged topics, for local government, in particular, will become a very important topic under the final Constitution.

An extremely useful part is Court Powers and Rules. It perhaps contains too many subdivisions, but on the assumption that the looseleaf format tends to be aimed at practitioners (academics cannot afford the revision services), and having already seen so many Constitutional Court judgments commence with a lengthy discussion of the appropriate referral procedure, its importance is obvious. I would commend this part in particular for the following aspects: the discussion of four important rules of the Constitutional Court which have until now been more or less unknown in our procedure (7.3); the overview of standing, ripeness and mootness, and in particular the consideration of their interrelatedness; and the section on the range of constitutional remedies which might be available to the practitioner (9.3).

The last two parts of the book concern the Bill of Rights. Specific Protections is concerned with individual rights, everything from access to information to voting rights. Operational Provisions contains, in addition to John Dugard's knowledgeable chapter on private international law, lengthy discussions of the three questions which will almost invariably crop up in any fundamental rights case: application, interpretation and limitation.

The chapter on application is the one which would most readily lend support to the contention that the book is premature.

In the first place, judgment on the issue of horizontality was handed down by the Constitutional Court in *Du Plessis v De Klerk*, after publication of the book. It is dealt with in the first revision service of the book (one of the advantages of being tardy in writing a review of a looseleaf is that one gets to see the revision service) – but as a ‘cover note’, with Stuart Woolman acknowledging that “constitutional law in South Africa is developing so rapidly that there is not always time to integrate seamlessly the new doctrine into the existing chapter”. In the second place, a fair amount of what is said about application will become redundant as lawyers try to make sense of the confusing provisions in the final Constitution. Against this, one can say only that there is never a right time to buy a computer – it will always be out of date eighteen months hence.

The chapter on interpretation serves to highlight the fact that constitutional interpretation in South Africa at present is all about whiffing through a tulgey wood, with practitioners being well-advised to burble about underlying values and iniquitous literalism and how different constitutional interpretation is from statutory interpretation in order to persuade the court to ignore the text of the Constitution in favour of some nebulous overall purpose. Janet Kentridge and Derek Spitz put it a little more delicately by suggesting that “the contours of a purposive approach to the interpretation of the interim Constitution remain to be fully elaborated”.

I do not propose to deal with the fundamental rights part of the book, of which there is a great deal, in any detail. Much of it is very good. The aspect to concentrate on here is the looseleaf format. The principal advantage of the looseleaf to the practitioner must surely be its ability to keep one up to date, through its revision service, with what has occurred in especially the case law during the previous six months or so. This advantage, as we all know, does not come cheap. It is, however, worth paying for where the law is developing rapidly, which Woolman, correctly in the context of the operative provisions, says is happening. But fundamental rights are a little different. They are formulated for the most part in language that is deliberately vague: the philosophical questions they raise are deep, and the learning surrounding those questions voluminous.

They do not have a biannual turnover time.

The looseleaf format is therefore entirely suitable for the first four parts of the book. As regards the Specific Protections part, however, the format merely obliges the authors to come up with superficial surveys. No matter how excellently these are done, they really are of extremely limited use. For lawyers who wish to practise in the area of human rights, a good bibliography on each of the rights would have served their purposes better.

Working within the constraints of the format, the editors and authors are to be praised for the consistently high standard of work produced. So, too, are the publishers to be commended for so quickly having made available to South African lawyers a range of books on what is essentially a completely new area of practice. For its sections on court powers and rules and on the operational provisions in particular, *Constitutional Law of South Africa* promises to become as indispensable a part of any lawyer’s office library as is *Hamlet* of her library at home.

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#### **Delictual liability in motor law**

by WE Cooper

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Hard cover R399,50 (VAT incl)

This book is a revamped edition of Volume II of *Motor Law* by the same author. The new title is due to the very considerable revision to which the work has been subjected. Not only has it been brought up to date by the inclusion of references to the Road Traffic Act 29 of 1989 and 1990 (Consolidated) Road Traffic Regulations, where relevant, and case law up to and including SALR 1996 (1), but the text has been considerably rearranged and expanded.

The rearrangement of the text is particularly satisfying from a dogmatic point of view. The piecemeal treatment of the concepts of the act, wrongfulness/unlawfulness and accountability in chapters scattered about in the book, which characterised the previous edition, has now been replaced by

the consolidation of these elements in Parts Two and Three of the new edition. Part Four of the new edition, dealing with the concept of Fault, is particularly satisfying. Previously there was a single marathon chapter dealing with the concept of negligence, but it confined the treatment of many of the manifestations of negligent conduct on the road to voluminous footnotes containing numerous references to decided cases. The subject is now divided into ten separate chapters. In Chapter 5 attention is devoted to the concept of negligence *per se*. Chapters 6 to 14 deal with specific instances of negligent conduct such as the driver’s elementary duties and specific driving manoeuvres. Purists might carp that the chapter on causation should have followed upon the treatment of the act or “handling”, but in view of the favour which the foreseeability theory now enjoys, it is submitted that its location in Part Five, after the concept of a fault, is justified.

Amongst the more recent decisions which receive detailed and critical treatment by the author are *Price v Minister of Law and Order* 1987 (4) SA 231 (E); *Daniels v General Accident Insurance* 1992 (1) SA 757 (C) and *Moni v Mutual and Federal Versekeringsmaatskappy* 1992 (2) SA 600 (T), in relation to the concept of wrongfulness/unlawfulness; *Smit v Abrahams* 1994 (4) SA 1 (A), in relation to causation, and *Labuschagne v Cloete* 1987 (3) SA 638 (T), in relation contributory negligence. It is also noteworthy that, presumably on the strength of *Stacey v Kent* 1995 (3) SA 334 (E) or possibly *Msutu v Protea Assurance Company* 1991 (1) SA 583 (C), the learned author no longer regards sudden emergency as being no more than “an unexpected situation ... which negatives an inference of negligence” (see page 169 of the first edition), but has now included this concept in Part Seven of the new edition as a defence in its own right, deserving of a separate chapter.

The first edition of this book has already withstood the test of time. The appearance of this new edition, incorporating as it does the new national road traffic legislation and recent case law, is to be heartily welcomed.

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