

The New Constitutional and Administrative Law. Volume II: Administrative Law.
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Anyone reflecting on the level of activity in constitutional law in South Africa over the past 15 years or so would have been startled to hear a prominent judge comment rather plaintively just three years ago on the dearth of incisive and critical academic writing in the field. Surely the extraordinary achievements of the recent past would have been unattainable had there not been a considerable body of scholarship feeding the creative processes, not only on the Bench?

Academic lawyers from this country were naturally deeply involved in conceiving, advising on and drafting the interim and 1996 Constitutions (Acts 200 of 1993 and 108 of 1996) and all manner of statute law, both primary

and secondary, so at first glance the judicial lament appears misdirected. Yet it was perhaps precisely the extent of that practical involvement which deprived those academics of the opportunity for measured and critical reflection on their own work and that of others, such that some of the commentaries published in the first years of our constitutional democracy were too hurried and insufficiently rigorous. In addition, the increasing demands on academic lawyers arising from shifting practices and financial stringency in higher education severely limit the opportunity to research, and contrast starkly with the research capacity available to justices of the Constitutional Court since 1994. As a result, one could have *expected* a substantial degree of erudition to have emanated from the highest ranks of the judiciary, and we have not been disappointed.

Nevertheless, it is now clear that the academy is reasserting its role as influential commentator on matters constitutional through the more traditional means of writing books. Besides the leading commentaries on the Constitution and the Bill of Rights (such as Matthew Chaskalson et al (eds) *Constitutional Law of South Africa* (1996) and Halton Cheadle, Dennis Davis & Nicholas Haysom *South African Constitutional Law: The Bill of Rights* (2002)), there is a host of publications, including many articles, which focus more narrowly (such as AJ van der Walt *The Constitutional Property Clause* (1999)).

The book under review contributes strikingly to this academic scholarship. Students and teachers of the law will recall with pleasure the clarity brought to the study of the general field of constitutional law by the publication in 1989 of Laurence Boulle, Bede Harris and Cora Hoexter's *Constitutional and Administrative Law: Basic Principles*. The book achieved what it set out to do, to introduce the subject to the vast majority of students encountering it for the first time, typically in a single course which combined the study of both constitutional and administrative law. For most such students this was both the beginning and the end of their focus — the deleterious effects of both the tricameral Constitution (Act 110 of 1983) and the state of emergency provided compelling reasons not to take the detail of the South African Constitution too seriously, except as an example of what should be avoided. Yet *Boulle, Harris & Hoexter*, as the book became known, contained valuable treatments of many of the theoretical issues and comparative models which assisted those who negotiated and drafted the new Constitutions.

As we read in the preface to the volume under review (at v), plans were made as early as 1994 to produce a second edition of *Boulle, Harris & Hoexter*. But the changing personal circumstances of the intending authors and not least the changing constitutional text delayed the enterprise, in my view considerably for the better. We now have, in this and its companion first volume (*Constitutional Law* by Iain Currie and Johan de Waal, published in 2001), a remarkably comprehensive, comprehensible, contemporary and critical review of the whole of South Africa's constitutional and administrative law, not likely to be undermined by substantial shifts in its legislative base and structure.

So to an assessment of Volume II: *Administrative Law*, which is largely the work of Cora Hoexter, although the contributions of Rosemary Lyster and Iain Currie, as well as traces of *Boullé, Harris & Hoexter*, should be acknowledged at the outset. It is a measure of the growth in the prominence of and scholarship in administrative law over the past 15 years that a separate and substantial volume is now required, so that this is much more than a second edition of part of *Boullé, Harris & Hoexter*. It is, indeed, a book that stands and deserves to be treated in its own right, for it marks an outstanding contribution to a critical understanding of South African administrative law.

The chapter headings tersely isolate the chief features of the modern system: 'Introduction to administrative law', 'Judicial review', 'Lawfulness', 'Reasonableness', 'Procedural fairness', 'Reasons', 'Standing', and 'Remedies and procedures'. Details of the constitutional and statutory texts pertinent to administrative law are appended, and there is a useful index and a full table of cases. But these bare bones in no way reflect the wealth of description and analysis contained in the book, a hint of which can be seen in the detailed contents pages which head each chapter.

Chapter 1 ('Introduction to administrative law') serves as a good example of the approach. While the traditional issues (such as the interrelationship with constitutional law, the scope of administrative law and the sources and types of administrative power) are admirably dealt with, the point is made at the outset (at 4) that administrative law is about more than judicial review. Much of this chapter then discusses alternative means of 'controlling — and improving — the exercise of administrative power' (at 32), including public participation, ombudsmen and access to information. When the text moves to a discussion of the current legal regime, Hoexter achieves a superb blending of exposition with critical commentary, which benefits immensely from her long familiarity with the subject, and particularly her membership in 1999 of the Law Commission's Project Committee which prepared a draft of the Promotion of Administrative Justice Act 3 of 2000 (the PAJA). The theme throughout is the achievement of administrative justice in the exercise of all forms of public power, tempered by the constraints of limited resources and efficiencies in a developing democracy.

Administrative law has been notoriously casuistic in its common-law form, and those who have been responsible for teaching and studying it have often found it very challenging. The advent of a constitutional right to administrative justice in 1994 (s 24 of the interim Constitution) brought about an uneasy cohabitation of constitutional and common law into which the PAJA was inserted, as a sort of statutory sandwich, in early 2000. Many judges seemed uncertain of how to proceed in the area of administrative review, a situation exacerbated by the jurisdictional spat between the Appellate Division / Supreme Court of Appeal and the Constitutional Court until the latter laid down the line in *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC). Any treatment of administrative law must then accept the challenge of

explaining the competing claims of Constitution, statute and common law and describing a coherent way forward.

In my view, Hoexter meets this challenge with consummate skill, clarifying (without necessarily simplifying) an extremely complex set of legal rules and often confused and contrasting judicial pronouncements and approaches. She writes logically and clearly, and pulls a few punches without minimizing the continuing problems, yet suggesting imaginative solutions to many of them. Where relevant, comparative experience is referred to, and there are many reminders of the ghastly past in this part of our law.

One finishes reading this eminently readable text with a great degree of understanding of the subject and a sense of excitement that so much progress has been made in lending a degree of system and sensitivity to it, yet conscious of the many inconsistencies and challenges which remain.

This book is an ideal text for use in teaching students in all curricula in which administrative law has the prominence it deserves. The central chapters on lawfulness, reasonableness and procedural fairness will also serve as more than an adequate guide for practitioners, who will be further assisted by the treatment of standing and remedies and procedures. At first glance the separate and brief treatment of 'Reasons' appears slightly idiosyncratic, but the giving of reasons is such a novelty and so central to the success of this developing area of the law that this may well prove justified. The presentation of the text is generally good, although a number of obvious typographical errors were noticed — one or two parts appear to have been less well checked than the bulk of the work.

Administrative law has only relatively recently escaped from its Dicey-induced Cinderella status in our law, and governmental initiatives in privatizing public authority have ensured that it will not come to dominate all legal relationships, rather throwing the challenges of adaptation to changed circumstances in the direction of the law of contract and delict and corporations law. Much of the doctrinal development of our administrative law is due to two pioneering academic works: Marinus Wiecher's *Administratiefreg* (1973) and Lawrence Baxter's magisterial *Administrative Law* (1984). While Baxter is likely to remain the authoritative although dated statement of the common law, I venture to suggest that Cora Hoexter's *Administrative Law* is set to assume a similar position for the post-1994 period, as the work most frequently referred to in study and practice. Its publication marks a definitive moment in the continuous process of reforming South African administrative law.

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