

# CHAPTER 1

## INTRODUCTION

### 1.1 NATURE AND SCOPE OF THESIS

This thesis explores how the discipline of legislative drafting can and should be applied, to delineate and control the exercise of administrative power in legislation in a constitutionally compliant manner. This inquiry is situated at the intersection of administrative law and legislative drafting.

Administrative law may be described as ‘regulating the activities of bodies that exercise public powers or perform public functions’.<sup>1</sup> The rule of law, which is the foundation of the constitutional order, requires that ‘the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred on them by law’.<sup>2</sup> Administrative power may be described as the exercise of public powers and the performance of public functions that are conferred by law. Administrative power is conferred primarily through legislation.<sup>3</sup> Bodies and functionaries who are exercising public powers and performing public functions ‘possess only so much power as is lawfully authorized, and every administrative act must be justified by reference to some lawful authority for that act’.<sup>4</sup>

A source of administrative power necessarily also provides constraints on the exercise of that power: the way the power is defined also determines the boundaries of the power.<sup>5</sup> A critical function of legislation is simultaneously to define and determine the boundaries of administrative power, and this function may be referred to as the ‘delineation of administrative power’. Legislation correctly delineates administrative power when powers are defined, and their scope is determined in a manner that is consistent with the Constitution of the Republic of South Africa, 1996 (‘the Constitution’), particularly the rights to just

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<sup>1</sup> Cora Hoexter *Administrative Law in South Africa* 2 ed (2012) 2. This definition includes the full range of entities, both public and private, that are constituted in a variety of forms, which are given responsibilities in terms of legislation to exercise public powers and perform public functions.

<sup>2</sup> *Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) para 58.

<sup>3</sup> Hoexter (note 1 above) 5.

<sup>4</sup> Lawrence Baxter *Administrative Law* (1984) 384.

<sup>5</sup> Hoexter (note 1 above) 30.

administrative action in s 33 ('the rights to just administrative action'). The delineation of administrative power commences with the Constitution. Legislation must be authorized by, and may not be inconsistent with, the Constitution.<sup>6</sup> Legislation must be aligned with s 33 of the Constitution, and must also be integrated with the Promotion of Administrative Justice Act 3 of 2000 ('the PAJA'), the legislation that Parliament was mandated to enact in terms of s 33(3). Legislation must be read in conjunction with the PAJA.<sup>7</sup> Where the PAJA is not applicable, or where it may be necessary or desirable for different procedures to be provided for than those which are provided in the PAJA, legislation may provide for measures to promote the exercise of administrative power in a manner that is lawful, reasonable, and procedurally fair.<sup>8</sup> Original legislation is legislation that is enacted by the legislature under its plenary legislative authority in terms of the Constitution. Original legislation delineates administrative power by specifying powers and their scope in legislative provisions. Empowering provisions in original legislation in turn delineate the scope of powers that may be provided for in terms of delegated legislation. Delegated legislation is legislation made by a delegate (most frequently a member of the Executive, but occasionally a regulatory body) who has been delegated legislative authority by the legislature in terms of an empowering provision in original legislation. Delegated legislation must be aligned with the original legislation in terms of which it is made. Administrative power is delineated both in terms of the provisions in a piece of legislation, as well as by the operation of the hierarchy of legislation.

The delineation of administrative power can best be achieved through the establishment of a coherent, consistent, comprehensive and integrated system of administrative law, that derives from the Constitution and the PAJA.<sup>9</sup> An integrated system of administrative law would provide for the control of administrative power and the accountability of Ministers and administrators through a variety of safeguards and procedures. The objective of this system would be to promote good administration and the exercise of administrative power in accordance with constitutional requirements. The components of an integrated system of administrative law would include judicial review, mechanisms for administrative reviews and

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<sup>6</sup> Ibid 31.

<sup>7</sup> See *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* 2007 (6) SA 4 (CC) para 37.

<sup>8</sup> This is contemplated in ss 3(5) and 5(5) of the PAJA.

<sup>9</sup> Hoexter (note 1 above) 58-62 has discussed the importance of and the challenges faced in developing an integrated system of administrative law.

appeals, legislative oversight and public participation.<sup>10</sup> The Constitution, the PAJA, and original and delegated legislation must all interrelate, for a coherent, consistent and integrated system of administrative law to be established. If there are inconsistencies, conflicts or gaps in the delineation of administrative power in terms of legislation that applies in an area of activity or sector, then administrative power will not be delineated in a coherent, consistent, and constitutionally compliant manner. The integrity of the system of administrative law needs to be maintained on an ongoing basis, as new legislation is enacted, and existing legislation is amended to address evolving needs and circumstances.

Legislative drafting is the applied legal discipline by which legislation is developed. The application of that discipline in the development of legislation, at the various stages of the process of legislative development and processing, is how administrative power may consistently be delineated in a constitutionally sound manner. The delineation of administrative power, therefore, must be a fundamental consideration when drafting all legislation.

This research seeks to develop the discipline of legislative drafting in a manner that will promote the consistent, constitutionally sound delineation of administrative power in all legislation, and the development and maintenance of an integrated system of administrative law.

## **1.2 SIGNIFICANCE AND ORIGINALITY OF RESEARCH**

This research is centred on the relationship between legislative drafting and administrative law. The important role of legislation as a primary source of administrative law has been recognized in the literature. However, the application of the discipline of legislative drafting and its role in the development of administrative law have not been considered, and that is the focus of this research.

The motivation for this research is to examine how legislative drafting can be applied to promote the development of legislation that realizes the transformational objective of the Constitution in respect of administrative law. To achieve this, legislation must provide for

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<sup>10</sup> Ibid 63-106.

the delineation of administrative power in a manner that is consistent with the rule of law, good governance and the right to just administrative action.<sup>11</sup> This application of legislative drafting has not previously been considered in the literature of administrative law, or of legislative drafting. This research also assesses how legislation may be drafted so that it is consistent with, and to the extent necessary, is incorporated within, an integrated system of administrative law.<sup>12</sup> This research seeks to promote an understanding of the importance of developing an integrated system of administrative law, and to provide insights for legislative drafters as to how legislative drafting can be applied to achieve that objective.

Insights are drawn from literature and case law which has considered the scope of administrative law; the impact of the Constitution and the PAJA on administrative law;<sup>13</sup> the sources and types of administrative power; the scope and types of administrative activities that are undertaken by administrators; the mechanisms by which the exercise of administrative power is controlled; and the rule of law and the principles of lawfulness, reasonableness, and procedural fairness.<sup>14</sup> The requirement for legislation to be consistent with the Constitution (and in particular, the right to just administrative action), to interrelate appropriately with the PAJA, and to provide for the exercise of administrative power in a manner that is lawful, reasonable, and procedurally fair, is explored. The challenges for drafters to develop legislation that is consistent with the Constitution and the PAJA are described. These considerations for the delineation of administrative power in legislation and the development of an integrated system of administrative law have not been extensively considered or significantly addressed in the literature.

This research considers comparative administrative-law literature, to assist in identifying matters that should be addressed in order to achieve the appropriate delineation of administrative power in legislation, and approaches that may be considered to address those

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<sup>11</sup> Cora Hoexter *The Transformation of South African Administrative Law since 1994 with Particular Reference to the Promotion of Administrative Justice Act 3 of 2000* PhD Thesis, University of the Witwatersrand (2009) 20-22.

<sup>12</sup> Hoexter (note 1 above) 58-62.

<sup>13</sup> Ian Currie 'What Difference does the Promotion of Administrative Justice Act Make to Administrative Law?' 2006 *Acta Juridica* 325.

<sup>14</sup> Some relevant sources in this regard are Yvonne Burns *Administrative Law* 4 ed (2013); Iain Currie *The Promotion of Administrative Justice Act: A Commentary* 2 ed (2007); (note 1 above) 58-62; T W Bennett, A Cockrell, R Jooste, R Keightley, C M Murray & Hugh Corder (eds) *Administrative Law Reform* Cape Town: Juta & Co, Ltd (1993).

issues in legislation.<sup>15</sup> The impact of globalisation and international standards on administrative law is also discussed, and the literature in the developing discipline of global administrative law is considered.<sup>16</sup> International standards are increasingly important for drafters to consider when developing legislation in various areas law. Domestic legislation is increasingly scrutinized by international standard-setting bodies for alignment with international standards. When developing legislation, the economic implications of administrative approaches that are proposed must also be considered.<sup>17</sup>

This research approaches legislative drafting from a unique perspective. Traditional books<sup>18</sup> and journal articles on legislative drafting have focused on the ‘nuts and bolts’ of legislative drafting and practical issues that arise, including the use of language (in particular, the importance of clarity and the use of plain-language drafting);<sup>19</sup> the drafting of common types of clauses; principles for the interpretation of legislation; the legislative process; research in legislative development; and the role of the legislative drafter.<sup>20</sup> These books, journal articles, and legislative drafting manuals are practical and useful tools for legislative drafters, and they form the foundation for training legislative drafters. The constitutional context within which legislation must be integrated has been briefly addressed in the literature, but there has not been an effort to provide a theoretical context for the application of legislative drafting in the South African constitutional dispensation.<sup>21</sup> This research examines the constitutional and administrative law context within which legislative drafting must be applied in South Africa, which has previously not been extensively considered.

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<sup>15</sup> Some examinations of comparative administrative law include Hugh Corder (ed) *Comparing Administrative Justice Across the Commonwealth* (2013); Susan Rose-Ackerman & Peter L Lindseth (eds) *Comparative Administrative Law* (2010); Gerhard Van der Schyff *Judicial Review of Legislation: A Comparative Study of the United Kingdom, the Netherlands and South Africa* (2010); Matthias Ruffert (ed) *Legitimacy in European Administrative Law: Reform and Reconstruction* (2011).

<sup>16</sup> See Hugh Corder (ed) *Global Administrative Law: Innovation and development* (2009).

<sup>17</sup> This aspect is considered in Susan Rose-Ackerman (ed) *Economics of Administrative Law* (2007).

<sup>18</sup> The *fons et origo* of legislative drafting books is the seminal work of the First Parliamentary Counsel (when that office was first established in 1871), Sir Henry Thring. Lord Thring *Practical Legislation, the Composition and Language of Acts of Parliament and Business Documents* (1877). An example from the American context is Reed Dickerson *Legislative Drafting* (1954).

<sup>19</sup> Frans Viljoen & Annelize Nienaber *Plain Legal Language for a New Democracy* (2001).

<sup>20</sup> Dorothy Johnstone ‘Role of the Administrator in the Preparation of United Kingdom Legislation’ 1980 *Statute Law Review* 67.

<sup>21</sup> Examples of this type of book on legislative drafting include Andrew J Burger *A Guide to Legislative Drafting in South Africa* (2001) (one of a limited number of South African legislative drafting books); Ian McLeod *Principles of Legislative and Regulatory Drafting* (2009).

This research draws upon more recent international literature that has considered, to some extent, the context within which legislative drafting takes place, the processes followed, and the role of legislative drafters.<sup>22</sup> The research will also consider comparative literature on legislative drafting.<sup>23</sup> Useful practices and approaches from both the traditional and current literature are identified that can be applied in order to produce legislation that correctly provides for the delineation of administrative power.

There has been insufficient appreciation in the legislative drafting literature of the importance of delegated legislation. In general, the drafting of delegated legislation is treated as being quite similar to the drafting of original legislation, and, with a few notable exceptions, the drafting of delegated legislation is frequently treated briefly in legislative drafting books.<sup>24</sup> This research specifically considers the delineation of administrative power in delegated legislation, and the essential role of delegated legislation in the establishment of an integrated system of administrative law.

Legislative drafting has not previously been considered in a theoretical context in South African literature. This research develops a theoretical framework that can be applied to assess whether legislation delineates administrative power in a manner that is constitutionally compliant. Theoretical approaches for the development of ‘effective’ and ‘quality’ legislation that have been developed by Xanthaki<sup>25</sup> and Mousmouti<sup>26</sup> are drawn

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<sup>22</sup> See Muhammad Majibar Rahman *Modern Legislative Drafting: A 21<sup>st</sup> Century Approach* (2013). Some internationally recognized recent books include Daniel Greenberg *Craies on Legislation* 9 ed (2008); Helen Xanthaki *Thornton's Legislative Drafting* 5 ed (2013); Francis Bennion *Understanding Common Law Legislation: Drafting and Interpretation* (2001). A contextual approach to legislative drafting is adopted in Constantin Stefanou & Helen Xanthaki (eds) *Drafting Legislation: A Modern Approach* (2008). A respected current Canadian authority is Paul Salembier *Legal and Legislative Drafting* (2009).

<sup>23</sup> Sir William Dale wrote a landmark book that introduced a comparative approach to legislative drafting. See Sir William Dale *Legislative Drafting: A New Approach – A Comparative Study of Methods in France, Germany, Sweden and the United Kingdom* (1977). Some recent books that consider legislative drafting from a comparative perspective are Nicola Lupo & Lucia Scaffardi (eds) *Comparative Law in Legislative drafting: The Increasing Importance of Dialogue Amongst Parliaments* (2014); Helen Xanthaki (ed) *Enhancing Legislative Drafting in the Commonwealth: A Wealth of Innovation* (2015); Ado Zammit Borda (ed) *Legislative Drafting* (2011).

<sup>24</sup> There are, fortunately, a few notable examinations of delegated legislation in Paul Salembier *Regulatory Law and Practice* 2 ed (2015); John Mark Keyes *Executive Legislation* 2 ed (2010). One of the very few in-depth considerations of the drafting of subordinate legislation in South Africa is Hendrina Christina Botha *Principles, Requirements and Techniques Relating to the Drafting of Delegated Legislation: A Legal Analysis* (unpublished LLD thesis, University of Johannesburg 2013). Her work is very relevant in that it has considered the drafting of delegated legislation, in the context of the Constitution, the PAJA, and the Promotion of Access to Information Act 2 of 2000.

<sup>25</sup> Helen Xanthaki *Drafting Legislation— Art and Technology of Rules for Regulation* (2014).

upon. Mousmouti's theoretical framework can be applied to assess the implementation of constitutional rights, which is relevant for assessing the implementation of the rights to just administrative action through legislation. The theoretical approach that is developed in chapter 3 is applicable to the delineation of administrative power in the South African constitutional context. The delineation of administrative power has also not previously been considered as an aspect of 'effective' and 'quality' of legislation, and this is a central component of the theoretical framework that is developed in this research.

The theoretical framework is also informed by the work of Ann and Robert Seidman and Nalin Abeysekere ('the Seidmans and Abeysekere') on the application of legislative drafting to produce legislation that promotes development.<sup>27</sup> The deliberations of conferences of the former European Association of Legislation, now called the International Association of Legislation, have contributed to the definition and assessment of the 'quality' and 'effectiveness' of legislation in the theoretical framework, and the aspects of legislative drafting and the legislative process that are incorporated in the framework.<sup>28</sup> Insights from the emerging 'legisprudence' literature<sup>29</sup> that examines legislation from the perspective of legal theory and the philosophy of law also inform the theoretical framework. Theoretical considerations of the rule of law;<sup>30</sup> approaches to regulation;<sup>31</sup> legislative techniques;<sup>32</sup> and the relationship between law and economics<sup>33</sup> are considered.

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<sup>26</sup> Maria Mousmouti *The 'Effectiveness Test' as a Measure of Legislative Quality: Equality in Law, Inequality in Practice, and Quality in Legislation* (unpublished PhD Thesis, Institute of Advanced Legal Studies, University of London 2013).

<sup>27</sup> Ann Seidman, Robert B Seidman & Nalin Abeysekere *Legislative Drafting for Democratic Social Change* (2001) ('The Seidmans & Abeysekere').

<sup>28</sup> See Luzius Mader & Sergey Kabyshev (eds) *Regulatory Reforms: Implementation and Compliance— Proceedings of the Tenth Congress of the International Association of Legislation (IAL) in Veliky Novgorod, June 28<sup>th</sup>-29<sup>th</sup>, 2012* Baden-Baden (2014); Luzius Mader & Chris Moll (eds) *The Learning Legislator— Proceedings of the 7<sup>th</sup> Congress of the European Association of Legislation (EAL), 31<sup>st</sup> May, 1<sup>st</sup> June 2006, The Hague, The Netherlands* (2009); Luzius Mader & Marta Tavares de Almeida (eds) *Quality of Legislation: Principles and Instruments— Proceedings of the Ninth Congress of the International Association of Legislation (IAL) in Lisbon, June 24<sup>th</sup>-25<sup>th</sup>, 2010* (2011); Ulrich Karpen *Legistics— Freshly Evaluated* 2 ed (2008); Ulrich Karpen (ed) *Evaluation of Legislation— Proceedings of the Fourth Congress of the European Association of Legislation (EAL) in Warsaw (Poland), June 15<sup>th</sup>-16<sup>th</sup>, 2000* (2002).

<sup>29</sup> See, for example, Luc J Wintgens (ed) *Legisprudence: A New Theoretical Approach to Legislation* (2002); Luc J Wintgens *Legisprudence: Practical Reason in Legislation* (2012); Mario G Losano 'Towards a Common Good: A Path to Utopia? From Philosophy through Legislation to the Dignified Life' (2004) 6 *European Journal of Law Reform* 323; Claudio Michelon 'Politics, Practical Reason and the Authority of Legislation' (2007) 1 *Legisprudence* 263; Pauline Westernman 'Governing by Goals: Governance as a Legal Style' (2007) 1 *Legisprudence* 51.

<sup>30</sup> Tatsuo Inoue 'The Rule of Law as the Law of Legislation' in Luc J Wintgens (ed) *Legislation in Context: Essays in Legisprudence* (2007) 55; Jeremy Waldron 'Legislation and the Rule of Law' (2007) 1 *Legisprudence* 91.

<sup>31</sup> Philippe Thion 'Questioning Alternatives to legal Regulation' in Wintgens (ed) (note 30 above) 95.

This research involves a synthesis of the traditional legislative drafting literature, more recent contextual and comparative literature, and current theoretical and philosophical perspectives to construct a theoretical framework for legislative drafting that can be applied to assess the delineation of administrative power in legislation. This research is one of relatively few instances in the literature generally, and the only instance in South African literature, where a theoretical framework is constructed and applied, in a specific context, to address an objective or concern of legislative drafting.<sup>34</sup>

### 1.3 RESEARCH QUESTION AND INQUIRY

The primary research question that is explored is how legislative drafting can be applied to achieve the objective of producing ‘effective’ or ‘quality’ legislation that delineates administrative power in a constitutionally compliant manner.

The first aspect of the inquiry is to examine the relationship that exists between legislative drafting and administrative law. This inquiry is necessary to understand how administrative power may be delineated in legislation. The role of legislation in realising the constitutional transformation of administrative law, the realisation of the right to just administrative action, and promoting development in the country, are considered.

The second aspect of the inquiry is to construct a theoretical framework that can be applied by legislative drafters to South African legislation, to assess the delineation of administrative power in legislation. The concepts of ‘effective’ and ‘quality’ legislation are refined to be applied in that context. The development of the framework proceeds from the premise that the delineation of administrative power in a constitutionally compliant manner is an integral component of ‘effective’ and ‘quality’ legislation.

The third aspect of the inquiry is to apply the theoretical framework to the drafting of original and delegated legislation. Aspects of legislative drafting that are relevant for

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<sup>32</sup> Peter Wahlgren ‘Legislative Techniques’ in Wintgens (ed) (note 30 above) 77.

<sup>33</sup> Bruce Anderson & Philip McShane ‘Grounding Behaviour in Law and Economics’ in Wintgens (ed) (note 30 above) 157.

<sup>34</sup> Tonye Clinton Jaja *Legislative Drafting— An Introduction to Theories and Principles* (2012), a published version of a PhD thesis, draws upon Xanthaki’s work and examines effectiveness in legislative drafting in the specific context of drafting oil and gas legislation in Nigeria. This is one of few examples of the application of a theoretical framework for assessing the effectiveness of legislation in a specific, practical context. See Tonye Clinton Jaja *Legislative Drafting— An Introduction to Theories and Principles* (2012).

producing ‘effective’ and ‘quality’ legislation that correctly delineates administrative power are highlighted.

#### **1.4 METHODOLOGY**

This research is confined to desktop research and the analysis of legislation. This research particularly considers the Constitution, the PAJA, original legislation that has been enacted by Parliament, and delegated legislation promulgated in terms of original legislation. Court judgments, especially those of the Constitutional Court and the Supreme Court of Appeal, are considered. Relevant cases are those where the constitutionality of legislative provisions has been assessed; where the right to just administrative action and the PAJA are interpreted; and where the rule of law and the principles of lawfulness, reasonableness, and procedural fairness are discussed. Books, academic treatises and journal articles dealing with administrative law and the theory and practice of legislative drafting are the foundations for this research. Other materials of relevance for drafters, including legislative drafting manuals; policy documents; reports; and books on the legislative process and the promotion of good legislative drafting in various jurisdictions are referred to. Records of parliamentary committee meetings and deliberations, legislative documents released for public comment, and media articles which discuss legislation are also utilized. Where international sources and materials on legislative drafting are referred to and discussed, the content and principles highlighted are applicable and relevant to legislative drafting not only in the jurisdiction in which the source or material originates, but more broadly, including in the South African context.

In addition to the analysis of examples of original and delegated legislation, this research draws upon the processes engaged in and issues encountered in developing and processing legislation in the financial sector, most notably the Financial Sector Regulation Act 9 2017 (‘the FSRA’). This experience has highlighted many practical legislative drafting issues and challenges that may be encountered when addressing the delineation of administrative power in legislation. While financial sector, exchange control, and tax legislation are referred to as examples in several instances in this research, the purpose for which the legislation and specific legislative provisions are referred to is applicable to the drafting of South African legislation generally, and not only to legislation relating to the

financial sector or tax law.

## 1.5 LEGISLATIVE DRAFTING AND ADMINISTRATIVE LAW

### *(a) Transformation and administrative law*

The Constitution is characterized as being fundamentally ‘transformative’. It seeks to provide the foundation for a thoroughgoing transformation of society, including a socio-economic transformation, and a transformation of the legal culture.<sup>35</sup> The advent of the constitutional dispensation has transformed administrative law.<sup>36</sup> Mureinik describes this transformation as a radical shift from a ‘culture of authority’ to a ‘culture of justification’.<sup>37</sup> Several provisions in the Constitution provide the foundation for the transformation of administrative law. Of importance to this research is s 33, which entrenches the right to just administrative action. Section 2 entrenches constitutional supremacy, which replaced the doctrine of parliamentary sovereignty.<sup>38</sup> In s 1, the ‘rule of law’ is listed as a founding value of the Constitution in s 1(c), and accountability, responsiveness, and openness are listed as founding values in s 1(d). Section 1 clearly enunciates the intention of the Constitution to establish a ‘culture of justification’ and ‘good governance’. The rule of law is given effect to through the entrenchment of aspects of the rule of law as rights in the Bill of Rights, including the right to equality in s 9 (which includes procedural and substantive equality), the right of access to information in s 32, the right to just administrative action in s 33, the right to have disputes settled in a court or another independent or impartial tribunal in s 34, and the rights of persons who have been arrested, detained or accused.<sup>39</sup> The rule of law, and the principle of legality as an important aspect of the rule of law, provides the foundation for the transformation of administrative law, and of the legal system generally.

Section 195 of the Constitution sets out basic values and principles that govern the public administration in all spheres of government, organs of state, and public enterprises. The ‘good governance’ values of impartiality, responsiveness, public participation, accountability and transparency are enumerated. This important provision of the Constitution

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<sup>35</sup> Hoexter (note 11 above) 20-22.

<sup>36</sup> Ibid 11.

<sup>37</sup> Etienne Mureinik ‘A Bridge to Where?: Introducing the Interim Bill of Rights’ (1994) 10 *SAJHR* 31.

<sup>38</sup> Hoexter (note 11 above) 26-27.

<sup>39</sup> Ibid 16-19.

is often not given sufficient attention, because it does not provide any directly enforceable rights.<sup>40</sup> There have, however, been instances where the courts have referred to and have emphasized the principles contained in s 195.<sup>41</sup> The potential of s 195 to promote the development of an integrated system of administrative law, which fulfils the rights to just administrative action in s 33 of the Constitution, has unfortunately not been realized. Possible approaches to achieve that potential are considered in chapter 4.

The Constitutional drafters, in s 33(3) of the Constitution, stipulated that legislation must be enacted to give effect to the right to just administrative action (which is the PAJA). The Constitution, the principle of legality as an aspect of the rule of law and the PAJA now form the foundation of administrative law, and the basis for the delineation of administrative power. The imperative for drafters now is to ensure that all other legislation delineates administrative power in a manner that is constituent with the Constitution and legality as an aspect of the rule of law. Legislation must also be integrated with the PAJA, and be aligned with and, where appropriate, contribute to an integrated system of administrative law. The integrated system of administrative law emanates from the Constitution (and the application of the principle of legality as an aspect of the rule of law) and the PAJA. In this way, the transformative vision of the Constitution for administrative law may be realized.

Davis<sup>42</sup> identifies that a key challenge for South Africa is to seek effective mechanisms to address the vast disparities in South Africa and enable all South Africans to enjoy both political and economic citizenship. To address these disparities, and to realise socio-economic rights, requires the existence of administrative agencies. Administrative agencies require mechanisms of accountability to operate properly.<sup>43</sup> Administrative justice, with increased participation by members of society, and accountability of administrative agencies, is necessary to promote transformation that enables full political and economic citizenship.<sup>44</sup> The vast disparities and the lack of economic citizenship for many South Africans persist, 25

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<sup>40</sup> See *Chirwa v Transnet Ltd* 2008 (4) SA 367 (CC) para 75; *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO)* 2005 (3) SA 280 (CC) para 21.

<sup>41</sup> Hoexter (note 1 above) 19. See *Johannesburg Municipal Pension Fund v City of Johannesburg* 2005 (6) SA 273 (W) para 17; *Nxele v Chief Deputy Commissioner, Corporate Services, Department of Correctional Services* (2006) 27 ILJ 2127 (LC) para 47; *Union of Refugee Women v Director: Private Security Industry Regulatory Authority* 2007 (4) SA 395 (CC) para 83; *Arbruster v Minister of Finance* 2007 (6) SA 550 (CC) para 81; *Joseph v City of Johannesburg* 2010 (4) SA 55 (CC) paras 43-47; *Koyabe v Minister of Home Affairs* 2010 (4) SA 327 (CC) para 46; *Van der Merwe v Taylor NO* 2008 (1) SA 1 (CC) para 71 and n81.

<sup>42</sup> Dennis Davis 'Administrative Law in a Democratic South Africa' in TW Bennett, A Cockrell, R Jooste, R Keightley & CM Murray (eds) *Administrative Law Reform* (1993) 21.

<sup>43</sup> *Ibid* 21-22.

<sup>44</sup> *Ibid* 30-32.

years after Davis made these prescient observations. There are many administrative agencies which are failing to fulfil the objective of effectively promoting transformation. This research considers how legislative drafting may be applied to develop legislation that enhances the accountability of administrative agencies and facilitates transformation and the realisation of socio-economic rights.

Klaaren describes three ‘waves’ of transformation in administrative justice that have occurred in South Africa. The first wave is changes to the legal system responding to the advent of the Constitution. The second wave involves the specific institutions, other than the judiciary, that seek to promote compliance within government with administrative law. These include the Public Protector, the Auditor General, and legal drafting offices. The third, more diffuse wave of transformation includes the implementation of the Public Finance Management Act 1 of 1999 (‘the PFMA’), the adoption of Regulatory Impact Assessments by Cabinet, and the implementation of the regulation of public procurement and supply chain management.<sup>45</sup>

This research relates to all three ‘waves’ of administrative justice transformation. It is concerned with how legislative drafting can be applied to promote the development of an integrated system of administrative justice, so that new legislation can be integrated with the Constitution and the PAJA, which are the core of the transformation of the legal system. It seeks to capacitate legislative drafters in the various drafting offices in government to fulfil their mandate of prompting administrative justice transformation. It is considered in chapter 4 how strengthening the empowering legislation of these institutions might assist to address some challenges that they face. The importance of impact assessments in promoting the effectiveness of legislation, and the necessity of examining as a core element of impact assessments the realisation of the rights to just administrative action is discussed in chapters 3 and 4.

The research is also concerned with the third wave of transformation. In chapter 4, shortcomings with the PFMA are considered and how they might be rectified, and it is considered how legislative drafting might be applied to strengthen legislation to address corruption and maladministration. Legislative drafting can play a role in strengthening and addressing weaknesses in the current legal framework and institutions, and facilitate and

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<sup>45</sup> Jonathan Klaaren ‘Three Waves of Administrative Justice in South Africa’ in Hugh Corder (ed) *Comparing Administrative Justice Across the Commonwealth* (2009) 370 at 370-371.

promote the implementation of new approaches and initiatives to promote administrative justice as they evolve.

Quinot advocates the reform of legal education in South Africa, as a crucial ingredient of constitutional transformation grounded in law.<sup>46</sup> This research aligns with that sentiment, and seeks to situate the realisation of the rights to just administrative action as a key objective of the application of the discipline of legislative drafting in South Africa.

Liebenberg examines transformation and the realisation of socio-economic rights, how socio-economic rights should be understood, jurisprudence relating to the realisation of socio-economic rights, and reasonableness review.<sup>47</sup> This research considers how legislation may be drafted to promote administrative action that is lawful, reasonable and procedurally fair, which would contribute to government fulfilling its obligations to realize socio-economic rights. The socio-economic rights jurisprudence is helpful for gaining an understanding of the content of socio-economic rights and reasonable administrative action, so that potentially legislation might be crafted that would promote the realisation of those rights.

***(b) The relationship between legislation and administrative law and the importance of the delineation of administrative power in legislation***

A series of judgments by the Constitutional Court has highlighted the relationship between legislation and administrative law, and has considered the delineation of administrative power in legislation.

In *Dawood*, the Constitutional Court stated that the legislature must ‘take care when legislation is drafted to limit the risk of an unconstitutional exercise of the discretionary power it confers’.<sup>48</sup> The legislature has a duty to take steps, in the legislation that it enacts, to reduce the risk of possible abuses of power, in particular by ensuring that the legislation provides for the delineation of administrative power in a constitutionally consistent manner. The legislature also has a duty to provide guidance in legislation as to when the limitation of rights may be justifiable. Thus, the court stated:

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<sup>46</sup> Geo Quinot ‘Transformative Legal Education’ 2012 129 *SALJ* 411.

<sup>47</sup> Sandra Liebenberg ‘The Value of Human Dignity in Interpreting Socio-Economic Rights’ (2005) 21 *SAJHR* 1; Sandra Liebenberg & Beth Goldblatt ‘The Interrelationship between Equality and Socio-Economic Rights Under South Africa’s Transformative Constitution’ (2007) 23 *SAJHR* 335.

<sup>48</sup> *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) para 48.

‘Guidance will often be required to ensure that the Constitution takes root in the daily practice of governance. Where necessary, such guidance must be given. Guidance could be provided either in the legislation itself or, where appropriate, by a legislative requirement that delegated legislation be properly enacted by a competent authority.’<sup>49</sup>

In *Janse van Rensburg*,<sup>50</sup> the court held that the power granted to the Minister of Trade and Industry in terms of the Consumer Affairs (Unfair Business Practices) Act 71 of 1988 to suspend a business and attach or freeze its assets during an investigation was a discretion that was ‘unfettered and unguided’, and this absence of guidance contributed to the power being an unjustifiable limitation on the right to procedurally fair administrative action.<sup>51</sup>

In *Walele*,<sup>52</sup> the Constitutional Court emphasized the importance of legislation, and especially empowering provisions in legislation, for providing the context within which administrative action is taken. The analysis of the empowering provisions is the starting point in an application for judicial review of administrative action.<sup>53</sup> How legislation as a whole, and how empowering provisions are drafted, is essential for delineating and providing the context for the exercise of administrative power that is consistent with the Constitution.

*Dawood*, *Janse van Rensburg*, and *Walele* highlight the importance of the appropriate delineation of the scope of administrative power in legislation. The quality of the guidance for the exercise of administrative power that is provided in legislation strongly influences the administrative action that is ultimately taken under the legislation.

The court’s judgment in *Dawood* has been subsequently considered in other judgments such as *Affordable Medicines*<sup>54</sup> and *Justice Alliance*.<sup>55</sup> The appropriate scope of discretion that should be provided to administrators, and the extent of guidance that must be provided in legislation for the exercise of discretion, are important ongoing considerations for the courts.

In *Shuttleworth*,<sup>56</sup> s 9 of the Currency and Exchanges Act 9 of 1933 and the Exchange Control Regulations in terms of that Act<sup>57</sup> were in the spotlight. The Currency and

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<sup>49</sup> Ibid para 54.

<sup>50</sup> *Janse van Rensburg NO v Minister of Trade and Industry NO* 2001 (1) SA 29 (CC).

<sup>51</sup> Ibid para 25.

<sup>52</sup> *Walele v City of Cape Town* 2008 (6) SA 129 (CC).

<sup>53</sup> Ibid para 82.

<sup>54</sup> *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC).

<sup>55</sup> *Justice Alliance of South Africa v President of Republic of South Africa* 2011 (5) SA 388 (CC).

<sup>56</sup> *South African Reserve Bank v Shuttleworth* 2015 (5) SA 146 (CC) (*Shuttleworth*).

<sup>57</sup> Promulgated by Government Notice R 1111 of 1 December 1961, as amended.

Exchanges Act and the Exchange Control Regulations provide an extreme example of a legislative framework where the content of the original legislation is absolutely minimal (the Act contains only a few substantive provisions), and a substantial regulatory regime has been developed almost entirely through delegated legislation with almost no restriction on the scope of the delegated powers that are granted in terms of the primary legislation. Extremely broad administrative powers have been granted in terms of the Exchange Control Regulations. While the majority of the Constitutional Court dismissed the application, and did not consider it necessary, based on how the application to the Constitutional Court was framed, to consider the constitutionality of s 9(1) of the Currency and Exchanges Act and reg 10(1)(c) of the Exchange Control Regulations, the Constitutional Court stated:

‘Let it suffice to remark that the specific provisions targeted by Mr Shuttleworth are well and truly archaic and may very well be at odds with the tenets of our Constitution. The state parties are nudged to take appropriate steps to review the provisions in issue.’<sup>58</sup>

The case is very interesting for the approach that Moseneke DCJ for the majority of the Constitutional Court took, referring to the judgment of the Court in *Dawood*, to the argument presented to the Court impugning s 9(1) of the Currency and Exchanges Act and reg 10(1)(c) of the Exchange Control Regulations,<sup>59</sup> and for the contrasting analysis provided and conclusion reached by Froneman J in his dissenting judgment.<sup>60</sup>

The jurisprudence of the Constitutional Court has emphasized the importance of the delineation of administrative power in legislation. The careful consideration of the extent to which powers may be delegated by the legislature to the executive and administrators, and the degree of discretion which is appropriate to grant to administrators are key considerations for the courts. The jurisprudence, however, does not provide detailed guidance for legislative drafters to determine the scope of powers that may permissibly be delegated in terms of legislation, the scope of discretion that may be provided to administrators, and the degree of guidance that must be provided to guide the exercise of discretionary powers. This is a challenge for legislative drafters, and these issues and the jurisprudence that has discussed them is examined in this research.

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<sup>58</sup> *Shuttleworth* (note 56 above) para 77.

<sup>59</sup> *Ibid* para 79.

<sup>60</sup> *Ibid* paras 110-111, 114.

**(c) *Legislative drafting, development and transformation***

In their work, the Seidmans and Abeysekere have focused on how law can promote social development, and how legislative drafting can be applied to produce the legislation that will promote development. Their manual for legislative drafters, *Legislative Drafting for Democratic Social Change*,<sup>61</sup> describes how legislative drafting techniques can be applied to produce legislation that promotes social development. These authors discuss practical legislative drafting skills within a theoretical and methodological framework that seeks to facilitate the translation of policy into laws that will facilitate intended transformation and development.

There is a symbiotic relationship between good governance and development. For development to be promoted, the government must effectively implement policies, through legislation, which are designed to facilitate development. If government decisions are arbitrary, this will not produce an environment that will facilitate development. If the rule of law, accountability, transparency, and public participation are not present, government decision-making will become arbitrary. State power may be used by officials to advance their own interests, and not the general welfare of the people. If the government does not implement changes that advance the well-being of the people, good governance may disintegrate, as worsening poverty may breed political instability, and development will not result in those conditions.<sup>62</sup>

The key components of ‘good governance’, as described by the Seidmans and Abeysekere, are effective government and non-arbitrary decision making. The rule of law is essential to ensure non-arbitrary decision making. One element of the rule of law that is highlighted by the Seidmans and Abeysekere is ‘governance by rule’, in which decision-makers decide, according to agreed norms based upon reason and experience. A second element is ‘accountability’, where decision-makers are required to justify their decisions publicly, and their decisions are subjected to review by recognized higher authorities and the electorate. A third element is ‘transparency’, in terms of which government business is conducted openly by officials, so its details are available, and may be debated. A fourth element is ‘participation’, where persons affected by a potential decision have the opportunity, to the greatest possible extent, to provide inputs and take part in decisions. These

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<sup>61</sup> The Seidmans & Abeysekere (note 27 above).

<sup>62</sup> Ibid 8-10.

elements together promote predictability of government action.<sup>63</sup>

The Seidmans' and Abeyesekere's framework and methodology is drawn upon in the development of the refined theoretical framework that is then applied to the delineation of administrative power in legislation.<sup>64</sup> The promotion of good governance and development, and the transformation of administrative law and the legal order generally are the fundamental objects of the Constitution, and of the legislation that has been developed in South Africa since the advent of the constitutional dispensation. A significant proportion of legislation that has been enacted since 1993 has replaced pre-1993 legislation and aligned all remaining legislation to the Constitution. New legislation has been enacted to promote socio-economic development and transformation. Legislation which is developed and submitted to Parliament by the executive currently, in terms of a Cabinet decision, must be accompanied by a Socio-Economic Impact Assessment that indicates how the proposed legislation is clearly aimed at addressing the transformation and development objectives of government as set out in the National Development Plan.<sup>65</sup>

Drafters have an important and challenging role to develop legislation that promotes good governance, socio-economic transformation and development. To encourage the necessary change in behaviour that will result in good governance and development and realize the transformational objectives of the Constitution, the constitutionally consistent delineation of administrative power must be provided for in all legislation, and an integrated system of administrative law must be developed. The development and application of a theoretical and methodological approach that will achieve these objectives is the focus of this research.<sup>66</sup>

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<sup>63</sup> Ibid 8.

<sup>64</sup> The Seidmans & Abeyesekere (note 27 above); Ann Seidman, Robert B Seidman, Pumzo Mbanja & Hanson Hu Li (eds) *Africa's Challenge: Using Law for Good Governance and Development* (2007); Ann Seidman, Robert B Seidman & Thomas W Wade (eds) *Making Development Work: Legislative Reform for Institutional Transformation and Good Governance* (1999); Ann Seidman, Robert B Seidman & Janice Payne (eds) *Legislative Drafting for Market Reform—Some Lessons from China* (1997).

<sup>65</sup> On 18 February 2015, Cabinet approved the implementation of a Socio-Economic Impact Assessment System (SEIAS) as a tool for the assessment of regulations and legislation with a view to ensuring alignment with national priorities. In terms of that system, which is now being consistently implemented, all memoranda seeking Cabinet approval for a new policy, legislation or regulations must be accompanied by a Socio-Economic Impact Assessment.

<sup>66</sup> Also relevant for this discussion is Michael J Trebilcock & Marina Mota Prado (eds) *Advanced Introduction to Law and Development* (2014).

*(d) Effectiveness and quality of legislation*

Only relatively recently have theoretical approaches to guide the discipline of legislative drafting been developed. Drafters traditionally approached their work as involving an *ad hoc* application of technical skills to develop legislation as briefed in legislative proposals. It is said that legislative drafters seek to produce ‘quality’ or ‘effective’ legislation, but how is the ‘quality’ or ‘effectiveness’ of legislation defined and assessed? What processes may be followed and what tests may be applied to produce ‘quality’ legislation?

Xanthaki examines legislation as a tool of regulation, and has developed a framework to describe how legislation contributes to effective regulation. The goal that is sought to be achieved by regulation is ‘efficacy’, which is the extent to which regulators achieve the regulatory goal. To assess ‘efficacy’, the performance of legislation is assessed against the objectives that were sought to be achieved.<sup>67</sup> In order to achieve ‘efficacy’, legislative drafters seek to produce legislation that is ‘effective’. An ‘effective’ piece of legislation foresees the main outcomes that are sought to be achieved, and focuses upon those outcomes during the process of drafting the legislation. Effective legislation clearly states its objectives and purposes. Necessary and appropriate means are provided in the legislation to achieve those objectives and purpose. Effective enforcement measures are provided for to ensure compliance with the legislation.<sup>68</sup>

Two sets of tools may be utilized to promote the development of effective legislation. One important tool is to seek efficiency, which involves choosing the most financially appropriate solution to achieve the objective. This is, understandably, an important consideration for government. It may also be important to those who will be subject to the legislation, and who may be required, for example, to pay fees, levies or taxes to fund certain regulatory functions. Another set of tools is characteristics of the drafting of the legislation: clarity, precision, and unambiguity. Clear legislation is easily perceived and understood. Precision emphasizes exactness of expression and providing detail in legislative provisions. Unambiguity refers to provisions having a certain or exact meaning. Together, clarity, precision and unambiguity promote predictability in the law. Predictability is necessary for legislation to be effective, and is essential for the rule of law to be applied. Clarity, precision and unambiguity minimize the need for a subjective interpretation to be applied by a user of

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<sup>67</sup> Xanthaki (note 25 above) 7.

<sup>68</sup> *Ibid* 8.

legislation when reading and seeking to understand legislation. The more clear, precise, and unambiguous legislation is, the less likely that users of legislation, including administrators, will misunderstand or misinterpret legislation, and unintentionally not comply with legislation.<sup>69</sup> These three tools in legislation are not absolutes, and sometimes there may be tension between achieving clarity, precision and unambiguity. When drafting a provision, it may be possible to be more precise by adding detail to cover all possible situations, but this may be at the expense of clarity or unambiguity. However, in general, drafters should use language that is clear, precise and unambiguous.

The techniques of plain language and the use of gender-neutral language are tools that assist in drafting provisions which are clear, unambiguous and precise. Plain-language drafting involves using clear, simple, economical and direct language, that is understandable by the audience. The layout and structure of the legislation is accessible. The use of gender-neutral language also promotes accuracy in legislative provisions.<sup>70</sup> Xanthaki considers and assesses the drafting process, and the drafting of common and important types legislative provisions, in terms of this framework. She highlights matters in relation to the legislative drafting process and the drafting of specific types of provisions that may contribute to or detract from the development of effective legislation.

Mousmouti, too, considers ‘effectiveness’ in legislation. For Mousmouti, ‘effectiveness’ describes ‘the extent to which legislation is capable of guiding the attitudes and behaviours of target populations to those prescribed by the legislator’.<sup>71</sup> Effectiveness may also be understood as ‘a measure of the causal relations between the law and its effects’, and an effective law is ‘one that is respected or implemented, provided that the observable degree of respect can be attributed to the norm’.<sup>72</sup>

Mousmouti’s conception of ‘effectiveness’ focuses on the ability of legislation to guide attitudes and behaviours and produce observable effects, as well as the extent to which legislation is respected and implemented. Mousmouti’s conception of ‘effectiveness’ includes both what Xanthaki describes as ‘effective’ legislation (identifying intended outcomes and focusing on those outcomes in the drafting process) as well as ‘efficacy’,

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<sup>69</sup> Ibid 8-9.

<sup>70</sup> Ibid 9-10.

<sup>71</sup> Mousmouti (note 26 above) 14.

<sup>72</sup> Maria Mousmouti ‘Operationalising Quality of Legislation Through the Effectiveness Test’ (2012) 6 *Legisprudence* 191at 200.

(assessing the achievement of regulatory goals).

Mousmouti examines ‘effectiveness’ by considering four aspects of all legislation: the overall structure of the legislation; the purpose or object of the legislation; the substantive content of the legislation; and the results that are actually produced by the legislation.<sup>73</sup> An ‘effectiveness test’ can be applied to assess the effectiveness of specific legislation. The pillars of this ‘effectiveness test’ are that effectiveness is promoted by appropriately considering the overarching structure of the legislation during the drafting process; the legislation contains a clear and substantive definition of the purpose of the legislation; the substance of the legislation and how the substance is expressed in the legislation is chosen in a consistent manner, based on evidence; and the legislation includes requirements for the evaluation of the legislation that will provide appropriate information on and allow the assessment of the actual effects of the legislation.<sup>74</sup>

Mousmouti’s conception of ‘quality’ in legislation is useful for this research, because it encompasses important constitutional principles such as legality, effectiveness and legal certainty, which are aspects of ‘legislative quality’, as well as ‘regulatory quality,’ which includes concepts of efficiency, legitimacy, and efficacy.<sup>75</sup> Quality is influenced by a variety of factors, including the form of the legislation (the design, drafting and presentation of the texts), the substance of the legislation (including conformity with principles of good legislation and other principles and values that guide drafting), and the consideration and assessment of outcomes.<sup>76</sup> Consideration of ‘quality’ occurs at two stages in the legislative process: during the development of legislation, and also during the implementation of legislation, where there must be an assessment of the outcomes and impacts of the legislation. During the legislative development stage, quality is assessed in terms of rationality, and quality is sought to be achieved by applying principles, procedures and processes. When assessing quality in the implementation stage, quality is assessed by considering the effectiveness of legislation.

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<sup>73</sup>Mousmouti (note 26 above) 3.

<sup>74</sup> Ibid 14.

<sup>75</sup> Ibid 10.

<sup>76</sup> Ibid 10-11.

The models of Xanthaki and Mousmouti, as well as other contributions to the discourse on ‘quality’ and ‘effectiveness’ in legislation,<sup>77</sup> form the basis of the theoretical framework that is developed to assess the delineation of administrative power in legislation.

## 1.6 CHAPTER OUTLINE

This thesis is divided into six chapters, as outlined below.

### (a) *Chapter 1: Introduction*

This chapter sets out the background of the thesis, and the nature and scope of the thesis. It addresses the first aspect of the inquiry that is undertaken, which is to examine the relationship that exists between legislative drafting and administrative law.

### (b) *Chapter 2: The context for the delimitation of administrative power*

In the second chapter, the context within which administrative power in South Africa is exercised, and how it is defined and delimited in legislation, is described. This is context within which the second aspect of the inquiry is undertaken in the third Chapter, where a theoretical framework is constructed to guide the drafting of ‘effective’ and ‘quality’ legislation that appropriately delineates administrative power.

As legislation should be aligned with and contribute to an integrated system of administrative law, it is necessary to understand the scope and principles of administrative law.<sup>78</sup> Baxter describes ‘general’ principles of administrative law which apply to regulation generally, as well as ‘specific’ principles which are applicable to a particular area of administration.<sup>79</sup> Legislative drafters must be aware of both the general and the applicable specific administrative law principles when developing legislation.

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<sup>77</sup> Luca di Donato, for example, has analysed various definitions and efforts to assess the ‘quality’ of regulation, and assessed effectiveness in the context of regulatory reform and competitiveness in Europe in the wake of the financial crisis. See Luca di Donato ‘Which Direction Is the Regulatory Quality Pendulum Taking?’ (2015) 17 *European Journal of Law Reform* 1.

<sup>78</sup> Cases which are relevant for the consideration of the scope of administrative law include *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC); *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* 2007 (1) SA 343 (CC); *Calibre Clinical Consultants (Pty) Ltd v National Bargaining Council for the Road Freight Industry* 2010 (5) SA 457 (SCA); *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC). A relevant journal article is Cynthia Farina ‘Administrative law as Regulation: The Paradox of Attempting to Control and Inspire the Use of Public Power’ (2004) 19 *SA Public Law* 489.

<sup>79</sup> Baxter (note 4 above) 2-3.

The consideration of the administrative-law framework focuses on the sources of administrative power and the delineation of administrative power;<sup>80</sup> the constitutional foundation for the transformation of administrative law;<sup>81</sup> and the importance and impact of the incorporation of the right to just administrative action in the Constitution and the advent of the PAJA. Challenges for drafters to create legislation that is aligned and integrated with the Constitution and the PAJA are discussed. The role of original and delegated legislation and the separation of powers are considered. The principles of administrative law that must be incorporated in and given effect to in legislation are examined, which are rationality as an aspect of the rule of law and the principles of lawfulness, reasonableness, and procedural fairness.

**(c) Chapter 3: A theoretical framework**

The third chapter addresses the second aspect of the inquiry, which is to construct a theoretical framework that can be applied to develop legislation that delineates administrative power in a constitutionally compliant manner. The application of the theoretical framework to the drafting of original and delegated legislation is discussed in the fourth and fifth chapters. Aspects of legislative drafting that are relevant for the development of ‘quality’ and ‘effective’ legislation, and in particular for drafting legislative provisions that provide for the delineation of administrative power are identified.<sup>82</sup>

The manner in which powers are expressed in legislation, and have been interpreted by the courts are considered, including express and ancillary implied powers,<sup>83</sup> discretionary

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<sup>80</sup> See Hoexter (note 1 above) 29-33, 35-37.

<sup>81</sup> Relevant cases for the consideration of the transformation of the foundation of administrative law include *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 (CC); *United Democratic Movement v President of the Republic of South Africa (No 2)* 2003 (1) SA 495 (CC). See also Cora Hoexter ‘The Principle of Legality in South African Administrative Law’ (2004) 4 *Macquarie Law Journal* 165.

<sup>82</sup> Some perspectives on legislative drafting and the development of ‘effective’ and ‘quality’ legislation are provided by Reed Dickerson ‘The Diseases of Legislative Language’ (1964) 1 *Harvard Journal on Legislation* 5; Geoffrey Kolts ‘Observations on the Proposed New Approach to Legislative Drafting in Common Law Countries’ (1980) *Statute Law Review* 144; H H Marshall ‘The Drafting of Statutes: The Commonwealth Experience’ (1980) *Statute Law Review* 135; Eammon Moran ‘Legislative Drafting Without Borders’ (2012) 1 *International Journal of Legislative Drafting and Law Reform* 169; Paul Salembier ‘Is Bad Grammar Good Policy? Legislative Use of the Singular “They”’ (2015) 36 *Statute Law Review* 175; J A Clarence Smith ‘Legislative Drafting: English and Continental’ (1980) *Statute Law Review* 14.

<sup>83</sup> Some cases where express and ancillary implied administrative powers have been interpreted are *Johannesburg Consolidated Investment Co v Marshalls Township Syndicate Ltd* 1917 AD 662; *Lekhari v Johannesburg City Council* 1956 (1) SA 552 (A); *Middleburg Municipality v Gertzen* 1914 AD 544; *Johannesburg Municipality v Davies* 1925 AD 395 at 402; *Bloemfontein Town Council v Richter* 1938 AD 195; *Winckler v Minister of Correctional Services* 2001 (2) SA 747 (C); *Nouwens Carpets (Pty) Ltd v National Union*

and mechanical powers;<sup>84</sup> and mandatory and directory provisions.<sup>85</sup> Other matters that are considered include the range and types of administrative activities that are undertaken by administrators;<sup>86</sup> comparative considerations of administrative law;<sup>87</sup> international administrative law principles that are being developed in the discipline of global administrative law;<sup>88</sup> the impact of regulatory principles and approaches developed by international organisations;<sup>89</sup> and the range of mechanisms that may be provided for in legislation to control the exercise of administrative power. Those mechanisms include judicial review; the oversight and scrutiny of legislation by the legislature;<sup>90</sup> reporting requirements for responsible Ministers and regulators to the legislature; the legislative

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*of Textile Workers* 1989 (2) SA 363 (N); *MEC for Local Government, Housing and Traditional Affairs v Utrecht Municipal Council* 2007 (3) SA 436 (N); *City of Cape Town v Real People Housing (Pty) Ltd* 2010 (5) SA 196 (SCA); *Mokoena v Commissioner of Prisons* 1985 (1) SA 368 (W); *R v Williams* 1914 AD 460; *Lipschitz NO v South African Pharmacy Board* 1985 (2) SA 702 (C); *Diepsloot Residents' & Landowners Association v Administrator, Transvaal* 1994 (3) SA 336 (A); *City of Cape Town v AD Outpost (Pty) Ltd* 2000 (2) SA 733 (C).

<sup>84</sup> Some cases that have considered discretionary and mechanical powers are *Media Workers Association of South Africa v Press Corporation of South Africa Ltd ('Perskor')* 1992 (4) SA 791 (A); *Bookworks (Pty) Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (4) SA 799 (W); *Thint (Pty) Ltd v National Director of Public Prosecutions* 2009 (1) SA 1 (CC).

<sup>85</sup> See Hoexter (note 1 above) 48-50. Some cases that have considered mandatory and directory legislative provisions are *Giant Concerts CC v Minister of Local Government, Housing and Traditional Affairs, KwaZulu Natal* 2011 (4) SA 164 (KZP); *Nkirimane v Santam Insurance Co Ltd* 1978 (2) SA 430 (A); *Sutter v Scheepers* 1932 AD 165; *Simelane v Minister of Justice and Constitutional Development* 2009 (5) SA 485 (C); *Minister of Environmental Affairs and Tourism v Pepper Bay Fishing (Pty) Ltd* 2004 (1) SA 308 (SCA); *Bula v Minister of Home Affairs* 2012 (4) SA 560 (SCA); *Veriava v President, SA Medical and Dental Council* 1985 (2) SA 293 (T); *Van Rooyen v the State* 2002 (5) SA 246 (CC); *Police Service v Public Servants Association* 2007 (3) SA 521 (CC); *Samuel Thomas Myers v Pretorius* 1944 OPD 144; *R v Sopete* 1950 (3) SA 769 (E); *Intertrade Two v MEC for Roads and Public Works, Eastern Cape* 2007 (6) SA 442 (Ck).

<sup>86</sup> Some relevant cases in this regard include *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC); *Fedsure* (note 2 above).

<sup>87</sup> Some comparative examinations of administrative law are Paul Craig & Adam Tomkins (eds) *The Executive and Public Law: Power and Accountability in Comparative Perspective* (2006); Paul Craig & Richard Rawlings (eds) *Law and Administration in Europe: Essays in Honour of Carol Harlow* (2003); Corder (note 15 above).

<sup>88</sup> See Corder (note 16 above).

<sup>89</sup> Some considerations of the principles of regulation, and the regulation of the financial sector are Mads Andenas & Iris H-Y Chiu *The Foundations and Future of Financial Regulation: Governance for Responsibility* (2014); Kern Alexander & Niamh Moloney (eds) *Law Reform and Financial Markets* (2011); Kern Alexander, Rahul Dhumale & John Eatwell *Global Governance of Financial Systems: The International Regulation of Systemic Risk* (2006); Kern Alexander & Rahul Dhumale (eds) *Research Handbook on International Financial Regulation* (2012); Nicholas Dorn *Democracy and Diversity in Financial Market Regulation* (2015); Robert Baldwin, Martin Cave & Martin Lodge *The Oxford Handbook of Regulation* (2010); Robert Baldwin, Martin Cave & Martin Lodge *Understanding Regulation: Theory, Strategy, and Practice* 2 ed (2012); Imad Moosa *Good Regulation, Bad Regulation: The Anatomy of Financial Regulation* (2015); Niamh Moloney, Eilís Ferran & Jennifer Payne (eds) *The Oxford Handbook of Financial Regulation* (2015).

<sup>90</sup> Useful considerations of legislative oversight include Hugh Corder, Saras Jagwanath & Fred Soltau *Report on Parliamentary Oversight and Accountability* (1999), last accessed from <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/oversight&account.htm> on 7 August 2018; Oversight and Accountability Task Team of the Parliament of the Republic of South Africa *Oversight and Accountability Model: Asserting Parliament's Oversight Role in Enhancing Democracy* (2008), last accessed from <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/080319oversightmodel.pdf> on 7 August 2018.

process and public participation in the development of policy and legislation;<sup>91</sup> and the establishment of an internal appeal or review mechanism.<sup>92</sup>

**(d) Chapter 4: Original legislation**

The fourth chapter commences the third aspect of the inquiry, which is to apply the theoretical framework developed in chapter 3 to the drafting of original legislation. Aspects of legislative drafting are identified that promote the development of ‘effective’ and ‘quality’ original legislation that delineates administrative power in a constitutionally compliant manner.

Matters that are considered include processes for the scrutiny of legislation; means by which consistent standards for the drafting of legislation may be promoted; initiatives to promote the quality of legislation; the role of public consultation processes, the parliamentary process, and socio-economic impact assessments; the relevance of the Interpretation Act 33 of 1957 (which is in dire need of replacement);<sup>93</sup> measures for the review of original legislation subsequent to enactment; the necessity for alignment and integration between the Constitution, the PAJA, and original legislation;<sup>94</sup> the importance of ensuring clarity about

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<sup>91</sup> Relevant considerations of the legislative process and public participation include Daniel Greenberg *Laying Down the Law: A Discussion of the People, Processes and Problems that Shape Acts of Parliament* (2011); Luzius Mader & Ulrich Karpen (eds) *The Participation of Civil Society in the Legislative Process—Proceedings of the Sixth Congress of the European Association of Legislation (EAL) in Bern (Switzerland), May 13<sup>th</sup>-14<sup>th</sup>, 2004* (2005); Susan Rose-Ackerman, Stefanie Egidy & James Fowkes *Due Process of Lawmaking: The United States, South Africa, Germany and the European Community* (2015); Michael Zander *The Law-Making Process* 6 ed (2004); Alex Brazier, Susanna Kalitowski, Gemma Rosenblatt & Matt Korris *Law in the Making: Influence and Change in the Legislative Process* (2008); Ruth Fox & Matt Korris *Making Better Law: Reform of the Legislative Process from Policy to Act* (2010). Relevant cases include *Matatiele Municipality v President of the Republic of South Africa (No 2)* 2007 (6) SA 477(CC); *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC).

<sup>92</sup> See Hoexter (note 1 above) 65-70. Some cases which have considered administrative appeals are *Tetra Mobile Ration (Pty) Ltd v MEC, Department of Works* 2008 (1) SA 438 (SCA); *Kate v MEC for the Department of Welfare, Eastern Cape* 2005 (1) SA (SE); *Earthlife Arica (Cape Town) v Director-General: Department of Environmental Affairs and Tourism* 2005 (3) SA 156 (C); *Tikly v Johannes* NO 1963 (2) SA 588 (T); *Rand Ropes (Pty) Ltd v Commissioner for Inland Revenue* 1944 142 at 150; *CIR v Da Costa* 1985 (3) SA 768 (A); *Health Professions Council of SA v De Bruin* [2004] 4 All SA 392 (SCA); *Tantoush v Refugee Appeal Board* 2008 (1) SA 232 (T); *Caledonian Airways Ltd v Transnet Ltd t/a South African Airways* 1997 (1) SA 466 (T); *Nichol v Registrar of Pension Funds* 2008 (1) SA 383 (SCA); *Groenewald NO v M5 Developments (Cape) (Pty) Ltd* 2010 (5) SA 82 (SCA).

<sup>93</sup> See South African Law Reform Commission Discussion Paper 112 (Project 25) *Statutory Revision: Review of the Interpretation Act 33 of 1957* (2006), last accessed from [http://www.justice.gov.za/salrc/dpapers/dp112\\_interpretation.pdf](http://www.justice.gov.za/salrc/dpapers/dp112_interpretation.pdf) on 7 August 2018.

<sup>94</sup> An example highlighting the necessity of alignment is provisions relating to remedies, and the duty to exhaust internal remedies, which has been considered in cases such as *Koyabe v Minister of Home Affairs* (note 41 above) and *Ntame v MEC for Social Development, Eastern Cape and Two Similar cases* 2005 (6) SA 248 (E).

whether a matter constitutes ‘administrative action’ and must be dealt with in terms of the PAJA, or whether the matter may be dealt with under an alternative process set out in other legislation;<sup>95</sup> addressing, and hopefully avoiding, issues that may arise when more than one regulator has jurisdiction or more than one piece of legislation may apply in a particular situation;<sup>96</sup> and the provision of inspection, investigation<sup>97</sup> and other enforcement powers<sup>98</sup> to regulators.

**(e) Chapter 5- Delegated legislation**

The fifth chapter continues the third aspect of the inquiry, by applying the theoretical framework developed in chapter 3 to the drafting of delegated legislation. Aspects specific to the drafting of delegated legislation are identified that are important for producing ‘effective’ and ‘quality’ legislation that delineates administrative power in accordance with the Constitution.

Matters that are discussed include the role of delegated legislation in the delineation of administrative power; how the constitutionally sound delineation of the scope of administrative power may be promoted or impeded through the manner in which delegated legislative provisions are crafted; the necessity for delegated legislation to be aligned with the empowering original legislation, the PAJA and the Constitution; the importance of carefully crafting the empowering provision in the original legislation to delineate the scope of delegated legislation; the extent to which legislative power may be delegated, and the

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Another example is remedies which may be available to an applicant, including statutory review and appeal, which has been considered in cases such as *Fuel Retailers Association of SA v Director-General: Environmental Management, Department of Agriculture, Mpumalanga* 2007 (6) SA 4 (CC); *Minister of Health and Welfare v Woodcarb (Pty) Ltd* 1996(3) SA 155 (N); *Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration* 2007 (1) SA 576 (SCA); *Sidumo v Rustenburg Platinum Mines Ltd* 2008 (2) SA 24 (CC).

<sup>95</sup> With reference to the example of the different procedure set out in the Labour Relations Act 66 of 1995, and whether the procedure in the LRA or the PAJA should apply, see *Gcaba v Minister for Safety and Security* 2010 (1) BCLR 35 (CC); *Chirwa v Transnet Limited* note 40 above); and *Fredericks v MEC for Education and Training, Eastern Cape* 2002 (2) BCLR 113 (CC).

<sup>96</sup> In the case of *Competition Commission of SA v Telkom SA Ltd and Another* [2010] 2 All SA 433 (SCA), an issue arose whether the Competition Commission or ICASA had jurisdiction to consider the dispute in the matter.

<sup>97</sup> Inspections provisions in the Financial Intelligence Centre Act 38 of 2001 were successfully challenged in *Estate Agency Affairs Board v Auction Alliance (Pty) Ltd and Others* 2014 (3) SA 106 (CC).

<sup>98</sup> Challenges to enforcement powers of the Enforcement Committee of the Financial Services Board have been made, for example, in *Pather and Another v Financial Services Board* [2014] 3 All SA 208 (GP).

potential for regulators to be granted powers to make delegated legislation;<sup>99</sup> mechanisms for promoting consistency and ensuring appropriate standards in delegated legislation, including parliamentary oversight;<sup>100</sup> and the role and impact of public consultation processes and socio-economic impact assessments on the development of delegated legislation.

**(f) Chapter 6: Recommendations and conclusion**

In the final chapter, in the context of the analysis of original and delegated legislation in chapters 4 and 5 in terms of the theoretical framework constructed in chapter 3, recommendations are provided to facilitate the development of ‘quality’ and ‘effective’ original and delegated legislation that delineates administrative power in a constitutionally compliant manner.

The objective for drafters is to develop ‘quality’, ‘effective’ legislation that delineates administrative power in a manner that is consistent with the Constitution and the PAJA. The application of legislative drafting to achieve this objective may promote the development and maintenance of an integrated framework of administrative law that realizes the Constitution’s objective to transform administrative law.

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<sup>99</sup> Relevant cases addressing the important aspect of delegation of powers are *Minister of Health v New Clicks South Africa (Pty) Ltd* (note 86 above); *Bezuidenhout v Road Accident Fund* 2003 (6) SA 61 (SCA); *Executive Council, Western Cape Legislature v President of the Republic of South Africa* 1995 (4) SA 877 (CC); *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd* 2001 (4) SA 501 (SCA); *Minister of Education v Harris* 2001 (4) SA 1297 (CC); *Permanent Secretary, Department of Education and Welfare, Eastern Cape v Ed-U-College PE (Section 21) Inc* 2001 (2) SA 1 (CC).

<sup>100</sup> Joint Subcommittee on Delegated Legislation of the Parliament of the Republic of South Africa *Interim Report of the Joint Subcommittee on Delegated Legislation on Scrutiny of Delegated legislation* (2002), last accessed from <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/2005/050525delegatedlegreport.htm> on 26 August 2018.