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JURIDICAL ASPECTS OF
EDUCATION, SCHOOL AND
CLASSROOM MANAGEMENT

W. Bray

UNIVERSITY OF SOUTH AFRICA
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PREFACE

This study covers a wide area of South African law but focuses mainly on the legal position of the “education manager” in the public-education system. The concept “education manager” has in fact a wide scope and every teacher involved in public education could therefore be seen as an education manager in his/her own right. In this sense the study may serve to clarify the legal position of all teachers in the public-education sphere.

The juridical aspect of education management will be of interest to the teacher as well as the jurist. The object of this study is to accommodate both these groups and therefore a particular style has been followed to introduce this legal field of education to the reader who has no legal background. Because the field is so wide and, as yet, largely uncharted, the proposed format and systematic arrangement need to be explained.

SECTION A contains a general introduction to the law. The place of the law of education in the South African legal system and its legal sources are discussed next. Because this work focuses primarily on the legal aspects of administration and management in the public-education hierarchy, the emphasis will naturally be on the administrative-law aspects of the law of education. The legal relationship between the teacher – especially the principal as education manager – and the education administration is explained. The teacher derives a particular legal status from this relationship.

Within the public-education structure, the principal is essentially the education manager in the school substructure. The legal aspects of the different administrative acts performed by the principal in the daily school situation are discussed in detail. These administrative acts must comply with certain legal requirements and

are controlled internally by various forms of internal control. Apart from the powerful structure of internal control, the civil courts may, as a last resort, exercise external control over these administrative acts.

In the final part of this section, the term “state liability” and its implications for the teacher/principal acting in his capacity as a teacher in public education, is discussed.

In **SECTION B** a separate field of the law, namely, interpretation of statutes is dealt with. As statutory law (legislation) constitutes the most important source of the law of education, it is necessary that teachers should have some knowledge of the rules of statutory interpretation. The different theoretical approaches, rules of and aids to interpretation, are thus covered in **Part One** of this section. In **Part Two** a step-by-step approach to the practical process of interpretation is offered; internal education legislation is used as an example.

Drafting of legislation, also a specialist field, is discussed very informally in **SECTION C**. Although this section is aimed primarily at the drafting of formal legislation, certain guidelines are proposed which may help the principal and other education managers in their task of drafting internal education measures, such as school policy and school rules.

A **BIBLIOGRAPHY** is supplied at the end of each section. As certain parts of the study could not be discussed in detail, it would be useful to consult the bibliography for additional literature. It may also be consulted if more extensive background material is required on a particular topic.

FOOTNOTES serve a particular purpose in this study. Because of the complex nature of this field of education and the fact that it is still largely uncharted and therefore strange to the reader, footnotes have had to be used to explain the legal content of the text, where possible, by means of practical examples. In this way the theoretical or abstract legal position is elucidated by means of reference to the relevant practical education situation. Therefore, in most cases, footnotes must be regarded as the practical application of the contents of the text, and for this reason must be read with the text throughout this study.

In order to assist the reader with references to general legal concepts, an **INDEX** is supplied at the end of the book.

Heartfelt appreciation goes to my colleagues, family and friends for their unstinting guidance and support.

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In this discussion the **administrative-law** aspects of education management are emphasised. The first part deals with the **nature and scope** of administrative law in education, with special reference to the position of the **principal** of a school as manager within the **school sub-structure**. The various administrative acts performed by the principal, internal and external control over these acts and the liability of the state for these acts, are also discussed.

The contents are presented simply with additional literature listed in the bibliography.

1. INTRODUCTION

The education system, naturally, does not function within a sphere that is **free of the law**: each action within this sphere, whether it is of a management or a didactic nature, has a **legal** basis. For example, the various ministers and directors of education and other education bodies have powers regarding the formulation of and control over education policy; the school principal may in terms of his authoritative position, delegate certain management and didactical duties to his staff; the principal and teachers have certain rights, powers and duties towards parents and pupils.

An outstanding feature of the **law** is the creation of **harmony within society**: in the educational field it harmonises the educational situation, the legal foundation of which is found in **the law of education**. To put it more crisply, **legal classification** within the education system is furnished through the law of education. Education law therefore represents that branch of the South African legal system which applies to education in all its facets.

2. THE LAW OF EDUCATION IN THE SOUTH AFRICAN LEGAL SYSTEM

The law of education (as applicable to public education) is classified under the South African **public-law system**: public law regulates the activities, powers and organisation of the state.¹ Two of the spheres which fall within the public-law system are constitutional law and criminal law. Constitutional law embraces the powers and procedures of Parliament, the central executive and the judiciary. Briefly, constitutional law deals with the activities and relationships of the central authoritative organs of the state. In the wider sense, constitutional law also encompasses administrative law and it is particularly within this sphere of the public law that education law is to be found. This study will concentrate mainly on the law of education as part of **administrative law**.

SOUTH AFRICAN LEGAL SYSTEM

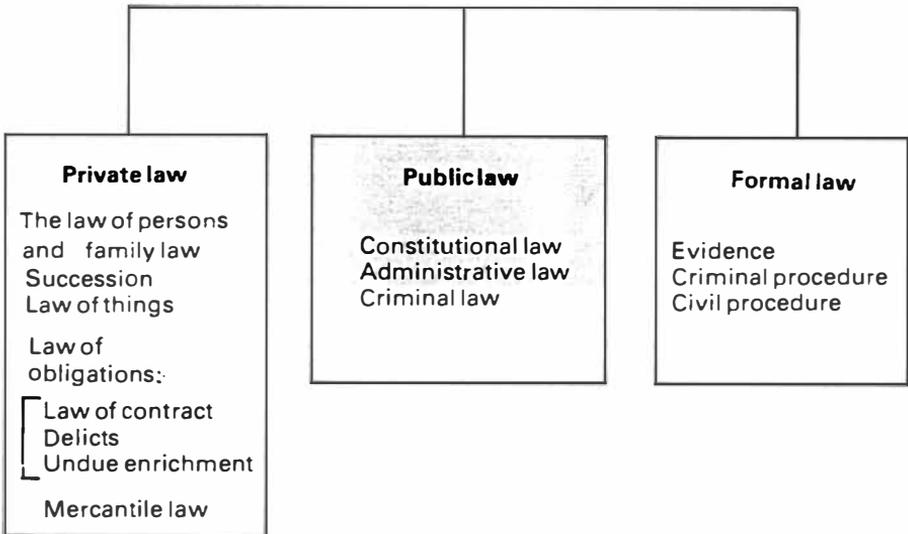


Fig. 1. *The South African legal system*

¹ On the other hand, the South African **private-law system** controls equal, voluntary legal relationships and regulates individual or private interests. In the modern state with its extensive and complicated state administration, the application of private law has in many cases been influenced by public law, with the result that sensitive **border-line areas** have developed – particularly in the administrative-law field.

2.1. The law of education forms part of administrative law

Although no basic or clear distinction exists between constitutional law and administrative law, one may say that constitutional law relates mainly to the highest or **central authority of the state** whilst administrative law governs the **day-to-day business of government** lower down in the **traditional executive hierarchy**. Administrative law therefore regulates the actions, capacity and organisation of the **state administration**, namely, the activities of the departments of education (including the provincial edu-

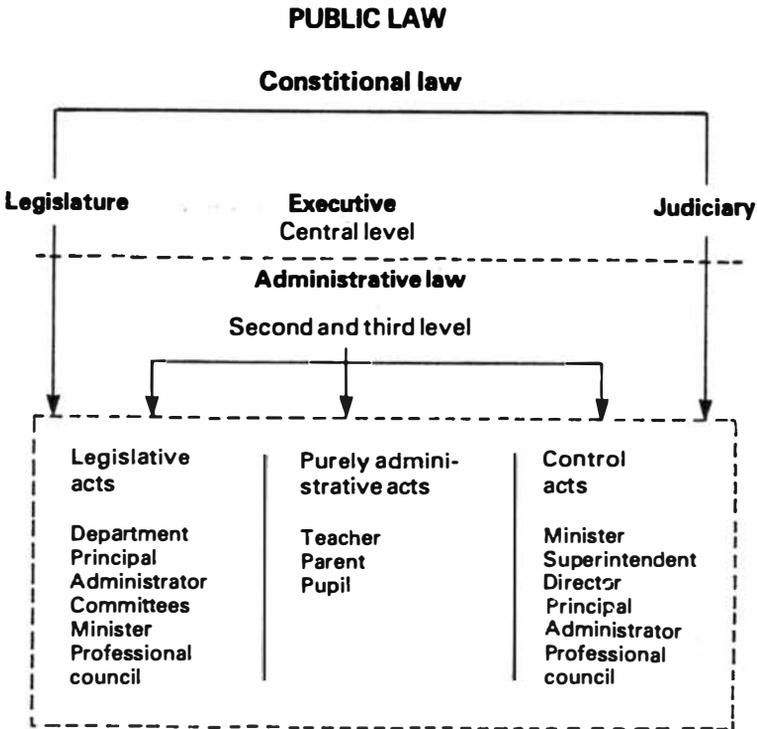


Fig. 2. Public law

cation departments), the professional teachers' councils, education committees, regional school boards and schools.²

3. SOURCES OF THE LAW OF EDUCATION IN SOUTH AFRICA

As has been mentioned above, the domain of the law of education is found mainly under administrative law. The education system is, however, a **complex** structure with contacts over a **wide-ranging legal field**. In the public-law sphere, certain criminal-law provisions, namely those relating to statutory and common-law crimes, will find application in the law of education. Certain branches of the private-law system may also apply: the legal relationship between the parent/custodian and the child, as well as the rules governing the delegation of parental authority, are clear examples from the law of persons and family law.

The person who is confronted with a problem in the law of education, must consult the sources of the law of education. The formal sources may be categorised as legislation, judicial precedent (case law), and common law.

3.1. Legislation

The law of education may be regarded as a fairly modern phenomenon which was developed mainly through legislative intervention: this field is controlled and demarcated by statutory rules and regulations. The organisation, powers and activities of the state administration are regulated by statute – in this instance one may mention Parliament, the State President,

² The position regarding private schools must be mentioned here. Most private schools receive subsidies from the state and must comply with certain prescribed legislative rules governing education. Teachers with approved teaching qualifications employed at these schools must, like other teachers, be registered with the official professional teachers' council. (Up to the present a council for White teachers only has been officially instituted.) The service contract concluded between the employer and employee, is regulated by the law of contract under private law: the teacher enters into the agreement on a **voluntary** basis because no **compulsory** state authority is present here. The operation and application of the service contract are, however, regulated by rules of administrative law, in the sense that a relationship of authority is created whereby the management body or proprietor of the school is vested with authority. (See *infra* under administrative-law relationships.) Therefore, although private schools cannot be regarded as organs of the state and do not form part of the state administration, their contractual relationships are governed by administrative-law rules.

the judiciary and the executive (with further divisions such as the education departments, professional teachers' councils, school boards, schools and teachers). These bodies derive their powers mainly from statutory legislation. For this reason, legislation is the most significant source consulted in solving education disputes.

Legislation, the most important source of the law of education, is promulgated at **different levels** by **various legislative bodies**. A distinction may be made between parliamentary (central) and subordinate (second and third level) legislation.

3.1.1. Parliamentary legislation

The South African Parliament has **supreme (sovereign) legislative power** and no court of law may therefore express itself on the validity of legislation **duly (properly)** passed by Parliament. This also explains Parliament's power to pass legislation which institutes the judiciary (the civil court structure) and demarcates its area of jurisdiction. Parliament, as the supreme lawmaker, may even pass legislation which invalidates the decisions of our highest court.³

In terms of the 1983 Constitution, Parliament consists of three **Houses**, namely, the House of Assembly, the House of Representatives and the House of Delegates. Although the State President does not form part of Parliament, he still forms part of the legislature: he has to approve and sign all parliamentary laws and has a final say on the demarcation of "**own**" and "**general**" affairs in terms of the 1983 Constitution.

Parliament adopts central legislation: in the case of **general-affairs legislation** all three Houses must approve the legislation whereas in the event of **own-affairs legislation**, only the House of the particular population

³ In terms of section 34 of the Republic of South Africa Constitution Act 110 of 1983 (the 1983 Constitution) the courts have acquired wider testing powers than before. The courts may test whether all legislation in terms of the 1983 Constitution has been **duly passed** by Parliament. This means that the courts may examine the legislative process and in cases where these procedures have not been followed, may invalidate the legislation on the ground of the procedural defect. The courts may, however, neither examine nor invalidate legislation on the basis of merit. For example, the State President must decide on the "general" and "own" affairs in education. Special **procedures regarding consultation and advice** must be followed although the **final decision** in this regard vests in the State President: the courts may test whether the State President has indeed adhered to the prescribed procedures but may not interfere with his final decision. In the case of a procedural shortcoming, the court may invalidate the legislation on that particular ground.

group is involved. The 1983 Constitution sets out the classification of "own" and "general" affairs in education and this division forms the **basic point of departure and kingpin** of all education matters under the new constitutional dispensation.⁴

The most significant education legislation for general affairs is the 1983 Constitution (a general-affairs Act) and the National Policy for General Education Affairs Act 76 of 1984. The guidelines for a national education policy had been proposed much earlier in the report of the HSRC on **Provision of Education in the RSA** (1981 De Lange report).

As is mentioned above, the 1983 Constitution provides the basic division of education matters into "own" and "general" affairs: "**general**" education matters constitute the **overriding** (national) policy, norms and standards, whereas "**own**" affairs relate to the **own education** of a particular population group. The National Policy for General Education Affairs Act *supra*, institutes and formulates this national policy by means of equal education norms, standards and opportunities for all population groups. This law, together with the 1983 Constitution as the corner-stone, may be regarded as part of the network of **overriding central education legislation**.

With regard to **central education legislation on own affairs**, the National Education Policy Amendment Act (House of Assembly) 103 of 1986, passed by the House of Assembly, may be mentioned. The Coloured Persons Education Act 47 of 1963 represents own-affairs legislation in the House of Representatives (Coloured House) while the House of Delegates (Indian House) is responsible for the implementation of the Indians Education Act 61 of 1965.⁵ Education legislation on own affairs aims to provide for the **specific educational needs** of each population group within the parameters of national (general-affairs) education policy.

Statutory professional teachers' councils will eventually be instituted for all population groups at the central level. These councils will serve as

⁴ In terms of sections 14 and 15 of the 1983 Constitution, "general" affairs are matters which are not the own affairs of a particular population group and therefore apply to all population groups. "Own" affairs are indicative of the own lifestyle or unique needs of a particular population group. In terms of Schedule 1 item 2, educational matters may be regarded as "own" as well as "general" affairs, depending on the circumstances.

⁵ The Coloureds and Indians have inherited these laws from the erstwhile House of Assembly under the Republic of South Africa Constitution Act 32 of 1961 (1961 Constitution). The Coloured Persons Education Amendment Act (House of Representatives) 76 of 1985 and the Education Amendment Act (House of Delegates) 100 of 1986 have in the meantime been passed by the respective Houses.

advisory bodies to Parliament (all three Houses in the case of general affairs) and the individual Houses (where own-affairs education is concerned). The councils will also draft legislative rules for the teaching profession, for example, professional codes. These codes of conduct and other rules relating to special service conditions are embodied in **central and subordinate legislation**. The code of conduct, drafted by the Teachers' Federal Council (TFC) – previously the SATC – has been issued as a regulation in terms of the National Education Policy Act 39 of 1967 (as amended by Act 103 of 1986) and forms part of education legislation on **own affairs** for Whites. Similar professional teachers' councils have not yet been instituted for teachers of the other population groups.

Under the new constitutional dispensation, Blacks have not yet obtained direct representation and responsibility at the central level of government. Consequently, education legislation at this level is adopted for Blacks by the three Houses of Parliament. **Education legislation for Blacks** at this level, may thus be regarded as **general-affairs legislation**. (Educational matters for Blacks in the National States are excluded here.) An example of education legislation (general affairs) for Blacks is the Education and Training Act 90 of 1979.⁶

Résumé

One may say that parliamentary laws on education institute administrative educational bodies and determine their powers. Existing bodies' powers and functions may also be amended and extended by these laws. Subordinate or delegated legislation, as issued by the State President and administrators (proclamations), the ministers (regulations) and various other regional and local legislative bodies (by-laws, regulations, circulars, rules), supplement parliamentary laws and create the sphere and operational area of the various executive bodies which constitute the state administration. In other words, Parliament institutes these administrative bodies and determines the scope of their powers, functions and activities while the executive (with its various legislative education bodies) is empowered by means of subordinate legislation, to describe (define) these powers and activities within the structure of central legislation. Within the executive sphere there are also education bodies which **apply and enforce these rules** in order to ensure effective education administration.

⁶ This law does not serve as a good example of "general" education legislation (adopted by all three Houses) as it was also inherited from the previous House of Assembly under the 1961 Constitution.

3.1.2. Subordinate legislation

All **delegated** legislation is subordinate to parliamentary laws. The parliamentary law is called the **enabling** law because it has superior legal force and transfers **limited** legislative powers to the subordinate legislative body. Within the education structure subordinate legislation is passed at second level (provincial and regional level) and third level (local level).⁷

Second level

The second-level structure of government is presently in a **transitional period** as the previous provincial councils, which served as legislative bodies of the provinces, were abolished in terms of the new Provincial Government Act 69 of 1986 and have been replaced by the various administrators and their executive committees. Under the new system of provincial government, **provincial proclamations** will be issued although the old provincial ordinances will in general, remain in force and be transferred to the Department of Education and Culture (Whites). This means that education ordinances will, in general, remain operative as education legislation for own affairs (Whites).

The administrator of a province will, in future, fill a **key position** as he is endowed with wide legislative and executive powers. He is the direct **representative** of the **State President** and the **central government**: in this capacity he may issue proclamations for education on general affairs (which, of course, includes Black education) and own affairs (which includes Coloured and Indian education).

The State President may also issue **proclamations** regarding education – here proclamations in respect of Black education outside the National States come to mind. The ministers in charge of the different education departments of own and general affairs, and directors of education will issue **regulations** on education. Professional teachers' councils, education committees and regional boards may, via professional codes and other rules, also be regarded as subordinate legislative bodies: with the approval of the minister concerned, some of these rules are embodied in **regulations**.

⁷ On the **second tier** the State President issues proclamations; the respective provincial administrators issue proclamations; various ministers issue regulations concerning education; education councils and departments issue operational rules and instructions. The professional teachers' council's professional code is, for instance, embodied in regulations. At the **third level** there are various legislative bodies such as, schools, management councils and voluntary non-statutory parent-teachers' associations which are concerned mainly with internal rules and instructions.

The **organisation and administration** within the different **education departments** rest on various forms of **subordinate legislation**, namely, departmental orders, circulars, manuals and other rules.

Bear in mind that subordinate legislation must always fall within the ambit of the enabling (authoritative) parliamentary enactment. Subordinate legislative bodies have only **limited** legislative powers. If the professional code, drafted by the TFC (previously SATC) and applied to all registered White teachers, proved to be in conflict with national policy as set out in Act 76 of 1984, the code would be **invalid** as it would fall outside the prescribed legislative powers of the TFC. The rules and instructions applying to the various education councils (the old provincial education departments) are also territorially bound as they operate within a specific geographical area (province or region).

From the above discussion, one may deduce that certain legislative measures (at central level) are applicable to particular population groups only,

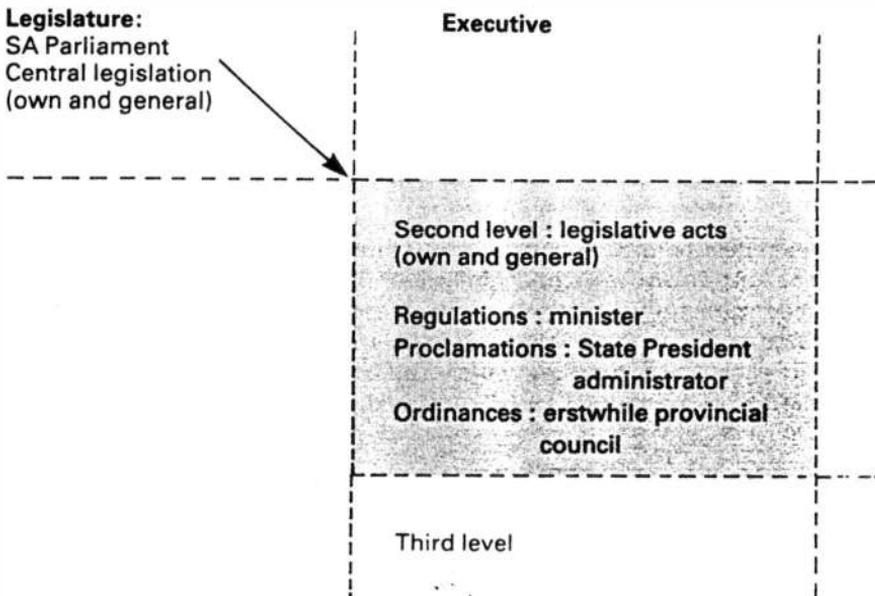


Fig. 3. Second-level legislation

or to specific groups within a population group, for example, White teachers. Within the education structure one also finds subordinate legislation with **general** or **internal** operation only. Regulations issued by the different education ministers or directors have general (external) operation as they do not only apply internally – within the education hierarchy. In other words, they are not applicable to education bodies and officials only, but apply to the subject or individual who is not a government official, too: for example, parents and pupils. Regulations governing the duties of parents – compulsory school funds – come to mind. The professional code would be subordinate legislation with purely internal operation, as it applies to registered teachers only. Other internal departmental orders, manuals, circulars and rules which in general, regulate the internal administration of the department, could also serve as an example.⁸

Third level

The most important legislative bodies at this level are schools, management councils and other non-statutory associations, like parent-teachers' associations. **School policy** is implemented by means of school rules which are issued by the principal in co-operation with his staff. School policy could embody educational and didactic as well as management matters. Individual **classroom policy and rules** also form part of school policy.⁹ The management council of a school has important legislative powers with regard to managerial matters of the school, for example, **financial and social management**, which has no direct bearing on formal education.

School and classroom rules must be instituted within the **parameters of the education policy** (own and general affairs). These rules will obviously be enforced internally, within the school environment. The management policy instituted by the management council has internal application within the school and must fall within the framework of the enabling law which instituted the council and determined the ambit of its powers.

⁸ The status and legal force of legislative rules with **internal** operation only must not be underestimated, as the total structure of education policy and administration is built on these.

⁹ It is true that certain school or classroom rules which have no direct bearing on education policy, cannot be regarded as legislative rules in the strict sense. These rules may be seen as geared merely to **convenience**, for example, pupil traffic during the changing of classrooms, rules of procedure during meetings of the school management council.

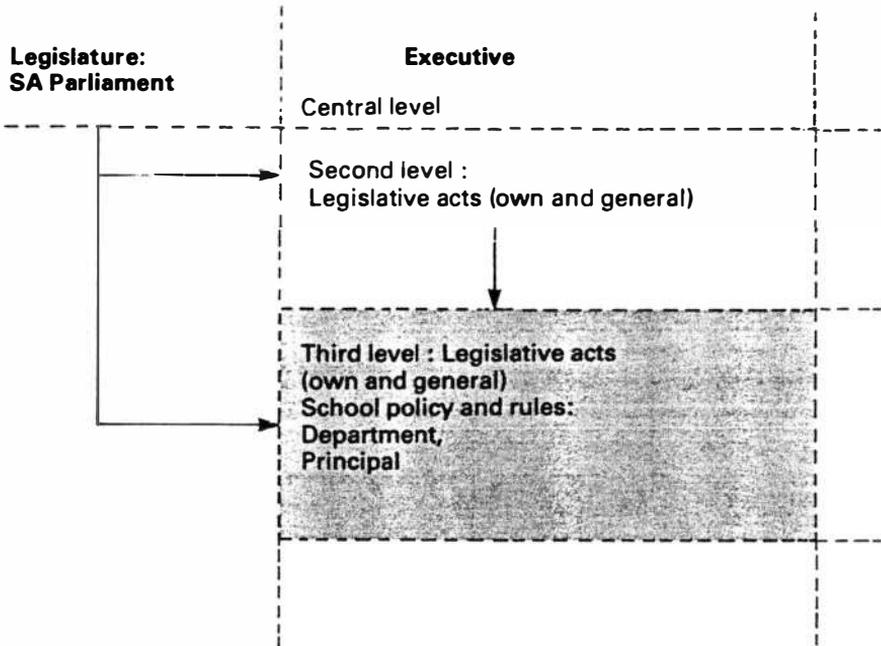


Fig. 4. *Third-level legislation*

3.1.3. National States – legislative assemblies

The various **self-governing territories** like KaNgwane, KwaNdebele, KwaZulu and Gazankulu all have their own legislative assemblies which are vested with **original (plenary) legislative powers on educational matters**. Although they have original and complete powers, education legislation will still be **subordinate** to the enabling parliamentary law, the National States Constitution Act 21 of 1971, which determine the legal status and powers of these legislative assemblies. These bodies may, however, pass education laws which are in **conflict** with education legislation of the South African Parliament which, of course, applies outside these territories. The legislative assembly may be regarded as the “supreme” law-maker of the territory with regard to educational matters.

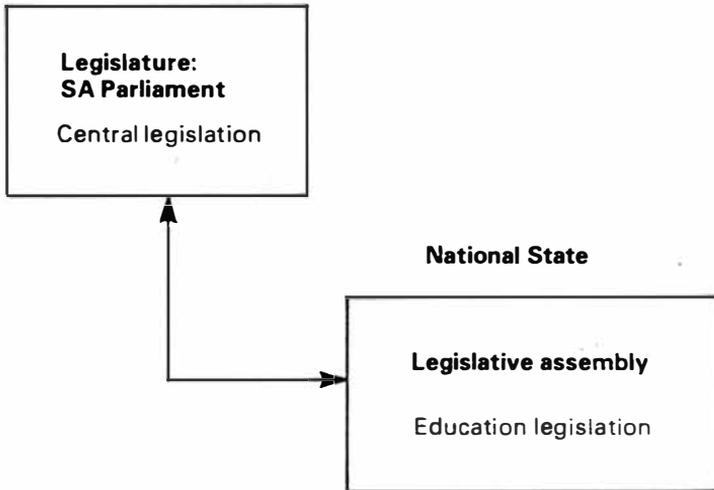


Fig. 5. Legislation : National State

3.1.4. Impure legislation

The educational system has certain forms of impure (quasi) legislation, which may also be regarded as a source of the law of education. Although these sources do not have all the characteristics of formal legislation, they are also regarded as **statutes** because they are controlled by the administrative-law provisions of the law of education. An outstanding feature of quasi legislation is that it is based on **agreement** which influences its operation and application: the professional code and other rules geared to the teaching profession could serve as examples. Although most of these rules are embodied in legislation, they have their origins in the teacher's agree-

ment with his professional teachers' council. This source has **contractual** as well as **legislative** characteristics.¹⁰

Résumé

There are different forms of education legislation: these are adopted at the different levels of government by competent legislative bodies. The operation and legal force of these sources may differ. As a general rule, all legislation must be **announced or published** before it obtains legal force.

The subordinate or delegated legislative body and its legislative powers are linked to an enabling law (usually parliamentary or erstwhile provincial legislation) which institutes this body and determines its powers. Subordinate legislation must be **intra vires** which means that it must fall within the ambit of the powers expressly conferred on it. If it proves to be **ultra vires**, the courts may invalidate it.

In keeping with the stated aims of the new constitutional dispensation, namely, devolution and decentralisation, the education structure embodies a network of legislative bodies right down to the local level of government. Through the principle of **devolution**, authority has been delegated down to local level and more powers are vested in these bodies to ensure effective administration – although they remain subject to higher enabling provisions. In terms of the **decentralisation** principle, more extensive powers must be given to different organs and bodies at the various horizontal levels of government: the promotion of parent and community participation in an “education partnership”, and involvement of the private sector could be mentioned in this regard.

Legislation for Black education in the National States is passed **in toto** by the respective responsible legislative assemblies. Outside these territories, legislation at central and second level, is mainly adopted by legislative bodies of the other population groups for Blacks. The responsible department is the Department of Education and Training. Certain legislative functions regarding Black education may also devolve upon the provincial administrators. Furthermore, the State President may issue proclamations in this regard. More opportunities exist for Blacks at the third level of government, where they may share in the formulation of school and management policy through their local education associations.

¹⁰ For more information see **infra** under administrative legislative acts.

As legislation forms the main source of the law of education, it is imperative that the teacher should understand the legislative content of statutory measures. The **rules governing the interpretation of statutes** may be found in legislation, the common law and case law and every teacher should acquire some knowledge of it.¹¹

3.2. Common law

In order to explain the common law as a legal source, one may say that the South African common law consists of that part of our law which has developed from **Roman-Dutch law** and **English law**. Furthermore, it may be regarded as that part of our law which is **non-statutory** and is found in the works of the old legal writers and also in case law (especially in the case of English law).

South African common law has, however, obtained an **indigenous character** over the years because much of our inheritance from Roman-Dutch law and English law, is no longer recognised in its original form. An example is to be found in the disciplinary powers (corporal punishment) of the **paterfamilias** (parent/custodian), or, the teacher who acts in **loco parentis** in the teaching situation. These principles of Roman-Dutch law have been developed and regulated by legislation to suit our modern education environment. However, the original common-law principle remains intact and the courts will be extremely reluctant to accept that it has been amended or repealed by legislation. A **legal presumption** (which also originated in the common law) applies in the interpretation of statutes in terms of which the common law may be amended or repealed by legislation only when this is **necessary**.

Our system of **executive authority** (which involves the operation and organisation of the state administration – including education departments) is mainly of **English-law** origin. Other English-law principles which have been received by us are the royal prerogatives exercised by the State President (like the British monarch) in his capacity as head of state; the **ultra vires** doctrine (which determines whether the organ/body has exceeded the ambit of its statutory powers); the classification of the different administrative acts; certain rules relating to state liability.

¹¹ The application of the rules of interpretation is discussed *infra* under Section B.

From **Roman-Dutch** common law we have inherited the following principles: the presumptions of statutory interpretation (which is also found in English law) and the **res iudicata** principle (which applies when the act is of a judicial nature and may only be amended or repealed by a higher judicial body).

There are many other common-law rules which are also applicable to education, for example, the rules of natural justice (generally known as the **audi alteram partem** rule, which means that the other party must also be afforded an opportunity to state his case); common-law crimes such as assault and rape; the courts' common law power of review of administrative acts relating to education; concepts like "intent" (opset) and "negligence" (nalatigheid).

3.3. Case law (judicial precedent)

Over the years a substantial body of substantive administrative law has been developed through **court decisions**. Among these decisions there are many having a direct bearing on education.¹² As is mentioned above, the Supreme Court has a general **common-law power** to review all administrative acts. The **stare decisis** principle also finds application within the judicial structure: in short this means that the decisions of the higher (superior) courts, for example, the provincial divisions of the Supreme Court and the highest Court of Appeal, are binding on the lower courts, for example, magistrates' courts. These **authoritative and final** decisions by our higher courts constitute our case law.

One cannot assume that our courts merely **state** (interpret) the law and do not **create** law.¹³ According to such a viewpoint, the legislature's task

¹² See for example **Van Coller v. Administrator Transvaal** 1960 1 SA 110 (T); **Gumede v. Mapumulo Bantu School Board** 1961 4 SA 639 (N); **Cape Teachers Professional Association v. Minister of Education** 1986 4 SA 412 (C); **Swart and Others v. Minister of Education and Culture : House of Representatives** 1986 3 SA 331 (C); **Ngubane v. Minister of Education and Culture Ulundi, and Others** 1985 3 SA 160 (D); **Mathale and Another v. Secretary for Education Gazankulu and Another** 1986 4 SA 427 (T).

¹³ This view developed from the traditional doctrine of separation of powers. According to this doctrine the three authoritative organs of state, namely, the legislature, the executive and the judiciary, each has its own unique powers which may not be usurped by the other. Consequently, the legislature formulates and passes legislation, the executive implements legislation and the judiciary restores equilibrium where provisions of legislation have been transgressed. The doctrine *iudicis est ius dicere sed non dare* may also be applicable, and means literally that the judge (court) must speak (interpret) the law but not create law.

would be to formulate legislation while the courts (judiciary) could only interpret it without making any creative contribution during the interpretation process. In many cases, particularly in the field of education, the courts have indeed **created law** which illustrates the dynamic nature of case law as a source of the law of education.

One could mention a few clear examples of judicial creativity in the educational field: the development and application of the rules of natural justice; the establishment of legal requirements for valid administrative acts; the rules governing the scope and implication of the courts' power of review – especially in those cases where this power is excluded by legislation.¹⁴

3.4. Administrative practice

Before educational **practice** can be regarded as a source of the law of education, the education practice must have developed into **custom** through **regular use** by a community who acknowledges its significance. Because education law is governed so minutely by statutes and regulations, very little scope is left for the development of independent usages or custom. Administrative practice may, however, create a very important **internal** source: for example, rules and procedures followed at departmental meetings, or rules of convenience at schools may be used as internal forms of control when similar acts are later contested/reviewed. Whether administrative practice can be seen as a **legal source**, however, remains doubtful. In practice administrative usage will seldom lead to litigation unless it is placed directly in issue.

4. THE ADMINISTRATIVE-LAW RELATIONSHIP IN THE LAW OF EDUCATION

It has been mentioned that the law of education (as discussed in this study), constitutes a major part of administrative law under the public-law system.

¹⁴ In the Van Coller case *supra*, the requirements for the validity of an administrative act were discussed: the Administrator should have applied the rules of natural justice during a disciplinary enquiry against a school principal. Furthermore, the Administrator was not allowed to use unauthorised procedures (which proved to be easier and less cumbersome) during the hearing, even though an authorised purpose was eventually achieved via the irregular procedure. In the Swart and Mathale cases *supra*, the application of the rules of natural justice was also in question.

Administrative law forms part of constitutional law and relates to the powers and activities of the state administration in its day-to-day governmental activities – in other words, the state in motion.

4.1. The unequal relationship of authority (subordination)

When an administrative act is performed within the field of education, an **administrative relationship** is created between the parties involved – the parties are the **legal subjects** involved in the act. This relationship creates **reciprocal rights, duties and liberties** for the subjects. One of the legal subjects in this relationship is an **authoritative administrative body** clothed with authority. The authoritative education body usually derives its authority from legislation and holds a unique position in the education hierarchy. For example, the Department of Education and Culture; Department of Education and Training; Department of National Education; TFC; directors of education, school principals and teachers.

It is clear that it is not only education bodies which are clothed with authority, but also **individuals or groups of individuals**, for example, a director, a superintendent, school principals and teachers who by virtue of their **status as officials**, act as **representatives** of the education administration under these circumstances.¹⁵

If one of the parties to the administrative-law relationship is an authoritative body vested with state authority, it follows that the other party (parties) cannot hold an authoritative position but one of **subordination**. For example, the parent or pupil (private legal subjects) may enter into a legal relationship with the director of education, TFC or the school principal. In these cases the parent or pupil – **subject** (“onderdaan”) – will be in the subordinate position as he does not form part of the administrative structure in the educational sphere.¹⁶ The administrative act which emanates from this unequal legal relationship, bears **external application** as it applies outside the education hierarchy. Private subjects, and not only officials, are therefore involved.

¹⁵ Whenever the minister, director, principal or teacher performs an administrative act vis-à-vis the pupil or the parent, he will **not** do so in his **personal capacity** but as an authoritative official vested with special status in terms of his **status agreement**. More on the status agreement *infra*.

¹⁶ The private subject within the administrative-law relationship must, however, not be seen as the passive partner. In terms of his “education partnership” with the state, he is vested with certain rights, duties and privileges. More on this point *infra* under the status of private subjects.

This unequal legal relationship will also exist where both parties are state administrative bodies or organs. Under these circumstances these bodies act *inter se* (between themselves) and the administrative act performed by them would have **internal** application. In other words, the action is performed within the education hierarchy: for example, within the Department of Education and Culture, the Department of Education and Training, the TFC, the education councils and the other internal management functions within the education departments.¹⁷ Under these circumstances both (or all) parties could, strictly speaking, be regarded as authoritative persons or bodies as they all act by virtue of their status as officials, and as such, form part of the education administration of the state. If the legal relationship within this administrative act had been based on equality (not one of subordination), one would have returned to the private-law sphere where relationships between individuals or groups of individuals are equal and the different acts are also performed on an equal basis.¹⁸ Within the sphere of the law of education (public law), however, this administrative act is recognised by its **unequal legal relationship** and one of the subjects (parties) will still occupy the authoritative position. The reason for this is that the education body, which is clothed with **higher authority** (the superior organ), has the power to compel the inferior organ to act: this **obligatory** act is usually performed in the **public interest**. For example, the director, provincial administrator or the TFC may take disciplinary steps against a school principal or teacher.¹⁹ Obligatory powers are usually derived from **legislation** while the object of the act, to act in the public interest, is regarded as a basic tenet of public law: **public interest** would, in this case, supersede individual interest.

Résumé

One may conclude that one of the legal subjects in the administrative-law relationship in the educational sphere, must always be a state administra-

¹⁷ In this case the director of an education department may act *vis-à-vis* the superintendent or school principal, or, *vis-à-vis* groups of officials; the school principal acts *vis-à-vis* the teacher; the TFC acts *vis-à-vis* the principal or a teacher.

¹⁸ The distinction between private-law and public-law characteristics has been discussed *supra*.

¹⁹ In the *Van Coller* cases *supra* the principal, Van Coller, approached the court because the Administrator (who acted as the spokesman for other senior officials who were also involved in the enquiry) allegedly acted in an irregular manner during the disciplinary proceedings.

tive body while the other subject(s) could be either an administrative body, or a private subject (“onderdaan”) outside the education administration of the state.

The legal relationship on which the administrative act is based, bears a subordinate character because one of the legal subjects (usually the administrative body) holds an authoritative position. The administrative act may have internal or external application or both.

4.2. Individual and general legal relationships

Individual (subjective) and general (objective) administrative relationships may develop in the law of education. Persons may enter **individually** into a relationship **vis-à-vis** the administration, for example, when the parent of a mentally handicapped pupil approaches the director-general of the education department concerned; when the teacher or principal, in the case of disciplinary action against him, approaches a higher authority – the director, administrator or minister concerned. Under these circumstances **individual legal relationships** exist between the particular person (or official) and the administrative education body.

In the case of a general relationship a **group** of private subjects (or officials) acts **vis-à-vis** the education administration: the community of parents acts through their parents’ association **vis-à-vis** the director or minister; the community of teachers acts through their teachers’ association **vis-à-vis** the administrator or minister.

The **general relationship** is usually created by **legislation** (legal rules) which, in general, is deemed to affect the **future** only. These rules apply **non-specifically and impersonally**: in this sense, all parents (the parent community) through their parents’ association, are treated equally in terms of the same legal rules. At the same time legislation also provides that specific teachers’ organisations (spokesmen of the teaching corps) will have equal legal status and, therefore, equal powers too.²⁰ The **individual relationship** originates from the **general relationship** and the legislation that governs it. In the individual relationship the general application of the legal rules obtains a **particular and individual** character through

²⁰ In other words, legislation does not provide for the individual parent, pupil or teacher but generally, for all parents, pupils and teachers – naturally, within the operational field of the legislation. For example, provincial ordinances will apply territorially to all parents, pupils and teachers within the particular province or region.

concretisation: only through concretisation will these rules apply to particular relationships. The **special** nature of these individual relationships means that they vary from case to case: the acts performed by the legal subjects vary and require individual attention and treatment. On the other hand, the **general relationship** and the legal subjects involved, enjoy **similar attention/treatment**.²¹

Furthermore, the fact that **general relationships** are not only **created** but also **amended and terminated** by legislation, has some practical significance. For example, the responsible legislative body itself must amend or terminate the general relationship by means of similar legislation.²² To illustrate this point, if the general conditions of service of teachers are amended by the competent legislative body, it usually means that these amendments will apply to the **future teachers corps in general**. Individual teachers or groups of teachers who do not comply with the new conditions, will not automatically lose their jobs: **individual legal relationships** have been created between these **individual teachers** (or the group) and the education administration. The education administration usually devotes individual attention to these cases, for example, by mailing letters to the teachers involved in which the position is discussed.²³

Bear in mind that **individual legal relationships** are controlled within the ambit of general relationships, by **resolutions, decrees and prohibitions**. The **resolution** by the director with regard to the position of the mentally handicapped pupil (as mentioned), will govern the position of that child from that time on. The **resolution or decree** by the education

²¹ When the parent of a mentally handicapped child approaches the education administration individually, individual attention must be given to the matter; where the principal has been involved in a disciplinary enquiry, special and individual attention of his case is also required.

²² Legislation amending or terminating a relationship must have the **same legal force and status** as the original legislation. The conditions of service of teachers which are formulated in parliamentary legislation cannot be amended by internal circulars or orders by the heads of education departments.

²³ A recent important court decision, *Tshabalala and Others v. Minister of Health and Others* 1987 1 SA 513 (W), may apply here. It was held that although legislation places a general prohibition on strikes in the nursing profession, the strike by nurses at the Baragwanath hospital required individual attention from the superintendent of the hospital. In other words, he could not dismiss the nurses participating in the strike forthwith, but should have heard each one's individual case before he could take a fair decision.

administration regarding the qualifications of certain teachers (as mentioned), will henceforth govern their positions.²⁴

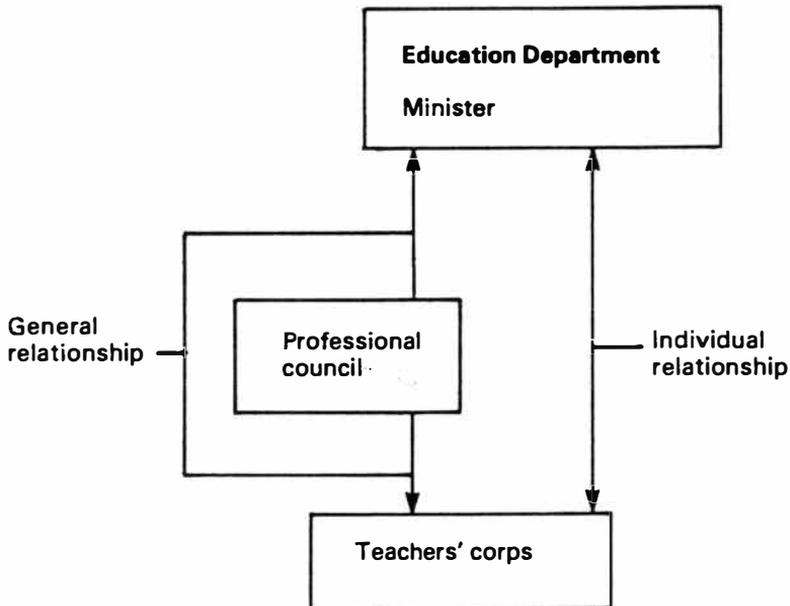


Fig. 6. Individual and general relationship

Résumé

The original relationship of subordination in the law of education is divided into individual and general relationships.

²⁴ The rights, duties and privileges accruing to the mentally handicapped pupil in terms of the individual resolution by the minister/director, will remain in force even if they conflict with the general provisions of the legislation concerned. The same will apply even in the case where the legislation is amended or repealed. Before the legislative body will be deemed to have varied or altered the individual relationship, there must be a clear indication to that effect.

General relationships are similar in nature and are usually governed by legislation: legal rules are normally generally applicable. Administrative education acts with internal or external application (or both), develop from within the general legal relationship.

General legal relationships are concretised by individual relationships which develop a special, individual character that is easily identified. The individual relationship is governed by resolutions, decrees and prohibitions and the administrative act which develops from within this relationship, may have internal or external application (or both).

Various finer differences exist between general and individual legal relationships. Refer to the bibliography for additional information on this point.

5. THE PARTICULAR LEGAL RELATIONSHIP BETWEEN THE TEACHER AND THE EDUCATION ADMINISTRATION

An **official service agreement** exists between the state administration and its official (servant). The basic legal principles of this agreement are embodied, *inter alia*, in the Public Service Act 111 of 1984 and the State Liability Act 20 of 1957. Teachers employed by government schools (public education), are **officials** who by virtue of a service contract, enter into a legal relationship with the education administration.²⁵ The teacher, as a member of a **particular professional group**, also has a **particular relationship** with his **profession** and the **community** (public) at large and is therefore clothed with distinct **public status**.

5.1. The administrative status agreement

The official service contract between the state administration (employer) and the servant (employee), is, in the case of the teacher, essentially a **status agreement**: the agreement is governed by **public law** because a

²⁵ Generally the service contract which exists between the teacher and the private school, is governed by the **law of contract** under our private-law system. The application of these contractual principles is, however, based on administrative law. See *supra*.

public education service is rendered.²⁶ The particular branch of the public law involved here, is **administrative law**: the teacher enters into a particular but **unequal relationship** with the education administration. (The education departments form part of the **state administration** which operates in the administrative-law field of public law.)

Administrative-law agreements are thus entered into where the interests of a **specific group or class of people** are affected and where **public interest** requires that these agreements should have a **general and obligatory** effect. The agreement is based on a relationship of subordination because the education administration occupies a position of authority. The teacher, however, enjoys a **particular status** from which he derives certain **rights, duties and privileges** that must be acknowledged and upheld. In terms of his special status, the teacher **himself** will, in some of these relationships of subordination, occupy the authoritative position and act as representative of the administration for example, when the principal acts **vis-à-vis** the pupil or a teacher.

5.1.1. Rights, powers, duties and privileges

Rights and duties develop from a position of status and are mainly embodied in legislation which is supplemented by common law and case law.²⁷ By virtue of his status, the teacher may claim damages for unlawful dismissal or when his service benefits are withheld. He may also claim for a restitution to his former status whenever his suspension or dismissal proves to be invalid.²⁸

²⁶ Other professional groups which also render public service in terms of their particular professional status are medical doctors, nurses, dentists and engineers.

²⁷ Legislation embodies the rights and duties of the teacher **vis-à-vis** the education administration but also contains rules which form the basis of the legal relationship between the teacher and his professional council – also an administrative organ. Various professional councils may be instituted at the central level. They are responsible for the drafting of professional codes and service conditions which are then embodied in central and subordinate legislation. These councils are also advisory bodies and their prime object is to promote and improve the image of the teaching profession in general.

²⁸ In **Muzondo v. University of Zimbabwe** 1981 4 SA 755 (Z) the Zimbabwean court rules that in the case of a “dismissal” of a lecturer, disciplinary proceedings must have been instituted against him. In a disciplinary action the rules of natural justice must be observed. Although the lecturer’s service had been terminated and he was paid in advance, his termination of service remained a “dismissal” which required disciplinary proceedings. The administrative status agreement passes through many phases of ratification but usually becomes established at the probationary period of service by the teacher. In **Somers v. Director of Indian Education** 1979 4 SA 713 (D) the court was prepared to grant the protection of official status to a teacher who served in a temporary capacity only.

As is mentioned above, the teacher acquires certain rights, powers, duties and privileges by virtue of his status and the official's contract. Whenever the teacher has a **right**, the education administration has a **duty** to acknowledge this right and act accordingly. This **right** may also be enforced in a court of law. On the other hand, where the teacher has a **privilege**, there is no corresponding duty on the part of the education administration. It would, however, from a legal point of view, be wrong to say that the teacher is totally dependent on the benevolence of the administration in regard to these privileges. A privilege in terms of the official's contract, is always coupled with a **concession** which may be described as a **right to be heard** in respect of matters which are governed by the official's contract. The teacher's leave benefits may be regarded as privileges: if a disciplinary action against the teacher affects his privilege regarding study leave, he may insist on a **lawful consideration** of his plea for study leave.²⁹

In the cases mentioned above, **internal relationships** were formed between the teacher (official) and the education administration. These administrative acts have **internal operation** as they apply within the education administration without involving private individuals. In each case the teacher must be afforded the opportunity to take his case to a higher authority within the administrative structure: **internal appeal**.

5.1.2. Control of administrative acts

A powerful system of **internal control** exists within the structure of the education administration. The teacher may appeal to a higher authoritative body, such as the director or the minister, to reconsider the case that was originally heard by an inferior body. The superior body will undertake a **total reconsideration** of the case and will usually make a final resolution on the matter.³⁰

Internal acts of the education administration which reveal disputes or uncertainties that affect the rights, duties and privileges of the teacher are usually settled **internally**: in these cases legislation usually provides that the decision/resolution of the higher organ, the minister or director, will be

²⁹ In practice **lawful consideration** should mean that the rules of natural justice have to apply. Through this application the teacher is afforded an opportunity to explain his case and only when his evidence has been considered, can one regard it as a **lawful consideration**. See more on these rules *infra*, under the validity requirements for administrative acts.

³⁰ See *infra* on internal appeal and control.

“final” or “conclusive”. This means that these internal matters will not be settled in the ordinary **courts of law**: it is generally accepted that the administrative bodies are indeed the most competent bodies for settling these cases. These matters also constitute part of the **practical education policy** and the courts are very reluctant to interfere in policy matters.³¹

As has been mentioned previously, the teacher, in terms of his status position, enters into a legal relationship with the education administration, as well as a **unique relationship** with the **community**. The question which now arises is whether the so-called internal action against the teacher in his official capacity, does not also have **external** operation as a result of his particular status in the community. If disciplinary action is taken against the teacher and due punishment meted out, the rights, duties and privileges of the pupils may have been affected as a result of the action. For example, the pupils receive no education as their teacher, who has been transferred (demoted), has not been replaced by another suitable teacher. The internal act may under such circumstances also have **external** consequences, in which case it will go on **internal appeal**, or the courts may exercise their **power of review** in exceptional cases.³²

The professional code which is issued in terms of the National Education Policy Amendment Act (House of Assembly) 103 of 1986, provides for an extensive procedure during provisional disciplinary enquiries. The resolution by the committee of enquiry is in actual fact scrutinised/controlled and ratified by the disciplinary committee of the TFC. In terms of Act 116 of 1976 (repealed) provision was made that, in the case of a refusal or termination of registration by the former SATC, the teacher could approach the courts for judicial control: the teacher thus had a right of appeal to the provincial division of the Supreme Court.³³

³¹ Judicial control of administrative acts exists side-by-side with internal control. See *infra* for more information.

³² In many cases it could be quite difficult to make a distinction between the internal and external operation of administrative acts. In case of doubt, the acts must be individually examined and reviewed. It is also not a hard and fast rule that internal acts are excluded from judicial control. The nature of the various administrative acts is discussed *infra*. In the **Van Collier** case *supra* the principal could indeed approach the Supreme Court to review his case: the Administrator followed an irregular procedure in that he did not apply the rules of natural justice.

³³ Some of the reasons put forward for the absence of express provision for judicial control in the new legislation, are that the TFC and its various committees of enquiry have obtained a substantially representative character and that the internal structure of control has been extended considerably.

5.2. Status of subjects (private individuals)

In accordance with the wide conception and application of “education partners” in the new public-education structure, parents and members of the private sector are becoming increasingly involved in education management and administration.³⁴

As is mentioned above, the private individual (subject) is not a passive partner in the administrative-law relationship in education. His **legal status** confers certain rights, powers, duties and privileges on him and these must be acknowledged and upheld by the education administration. In this vein the pupil (his parent/custodian will act on his behalf because he is still a minor) will have a **right** to education because the administration imposes on him a **duty** to attend school – **compulsory** education. (Compulsory education does not, however, apply without qualification: not all Black children are as yet compelled to attend school.) It must be borne in mind that the private subject in his **public-law relationship** with the education administration – in which the **public interest** is of prime importance – must still be regarded as a **member of the community** (who also serves the public interest). In this capacity he also has an **interest in public education** which confers on him the **right** of equal opportunity in the education system, and the right to have his public-education interests satisfied. (There is still no unanimity amongst the legal fraternity on these public-law claims by the private subject.)

Whenever these private subjects serve as representatives on administrative education bodies, they also obtain a particular **administrative-law status** as a result of a **status agreement**. Parents and other private individuals serving on management councils, parent-teachers’ associations, regional boards, regional councils and professional teachers’ councils come to mind here.

In terms of this agreement, there are certain conditions for appointment to these positions. Usually these provisions are of a **peremptory** (compulsory) nature and members who do not qualify, forfeit their membership.

³⁴ Take note of the special recognition, in terms of Act 76 of 1983 and Act 103 of 1986, of the **organised parent community** in the new education system. The participation and representation of the parent community on education bodies such as the TFC, education councils and the committee of heads of education, serve as examples.

Disciplinary action against a member may lead to his suspension or dismissal.³⁵

Résumé

The official's contract between the teacher and the education administration is essentially a status agreement based mainly on the nature of the teacher's profession and his unique relationship with the community.

Certain rights, duties and privileges emanate from the status agreement and provide the teacher with an authoritative position in the education hierarchy: in some cases the teacher will be in the "superior" authoritative position, while in others, he will occupy an "inferior" authoritative position.

The distinction between the external and internal operation of acts between the teacher and the education administration is not always clear. Matters of a substantially internal nature, are settled internally. External (judicial) control does, however, exist alongside internal control, with the result that the aggrieved party will always have access to the courts. The education administration, on the other hand, has a powerful and effective system of internal control: this may be seen from the fact that disciplinary actions have in fact reached the courts only in very exceptional circumstances.

The **private subject** ("onderdaan") in the administrative legal relationship has, in terms of his particular status, a type of "partnership relationship" with the education administration. His individual as well as public education interests must be acknowledged and upheld.

A private subject who serves on a public-education body, obtains a particular status via his membership and this places him in a particular relationship

³⁵ As an illustration, the members of the management council of the Menlo Park High School had to have certain qualifications, for example, they had to be members and representatives of the parent community of the school. As a result of allegations that the members did not comply with these qualifications, the action committee of the school (also regarded as a representative body of the school) could use the **internal system of control** to approach the Minister of Education and Culture on the possible dissolution of the council. The Minister reconsidered the case but was not prepared to dissolve the council. He requested them to solve the matter domestically. After this, members of the council resigned of their own accord. If the Minister (the **highest body for internal control**) had dissolved the council irregularly, an appeal could have been lodged with the Supreme Court for **external judicial control**. The court would probably have given a final decision on the matter. (Whether the council was indeed representative of the parent community, proved to be a bone of contention for many parents. The relevant legislation had to be examined on this point.)

with the education administration. He may act as a “representative” of the education administration in matters relating to education.

6. DELEGATION OF AUTHORITY WITHIN THE EDUCATION STRUCTURE

As the public education body in the administrative relationship is always clothed with authority, it follows that an extensive and complex structure of **delegation of authority** exists within the educational structure. The aim is mainly to achieve a **division of labour**: a single body or official cannot cope with all the activities. Ultimately this means that, through the delegation of authority, the organisation of education is governed, extensive activities performed and powers exercised **independently and effectively**.

The **structures of authority** within the modern education system are extremely complex and form an extensive network – at times almost invisible – over a wide-ranging educational field. Whenever difficulty arises in the identification of a certain form of delegation, the enabling **legislation** should be analysed and used as a **basic guideline** in order to grasp the **pattern of delegation**. In some cases, however, where for example, the delegation of implied powers is concerned, even legislation cannot offer solutions. It must be determined from the **rules of statutory interpretation**, for example, whether the teacher had the power to delegate his powers to a junior teacher under the particular circumstances, whether the junior teacher was the competent official and what the delegation actually entailed.³⁶

³⁶ A simple example would be: the minister delegates some of his powers to the director and the director subdelegates to the school principal. Within the school unit, the principal may delegate some of these powers to certain teachers. Questions which may arise higher up in the “authority chain” and within the school situation, are whether the director, or the principal, should not have exercised the power **personally**; if they were empowered to delegate, should it not have been to other **particular** officers, for example, the superintendent (inspector) or the senior subject teacher respectively. If the power to delegate exists, it must be examined whether the principal **himself** has to take a **decision** on the matter instructing/requesting the senior subject teacher to **execute** (a matter of practical implementation) it, or may the principal delegate the power **in toto**, in other words, may he delegate the **decision-making** as well as its **execution**? A practical example is when the principal himself decides on corporal punishment for boys, but requests the deputy to mete out punishment. Punishment could have serious implications for the pupil. To eradicate possible irregularities, the principal (or his delegate) should be **present** when the punishment is given, or clear guidelines should be laid down: for example, where the principal is a woman who cannot mete out the punishment personally. This discussion can serve only as a general guideline, as legislation dealing with corporal punishment varies considerably from province to province.

6.1. Delegation of discretionary powers and functions

As has been observed above, powers and functions must be delegated in a particular way. In the modern **complex structure** of education, teachers are in most cases clothed with **discretionary powers**: the principal has a **choice** whether to delegate a power to his senior subject teacher; the superintendent/principal has a **choice** regarding the evaluation of a teacher for a merit award; the disciplinary committee of the TFC has a **discretion** regarding the disciplinary measures meted out to the teacher.³⁷

The **scope** of discretionary powers may, of course, vary: the principal may sometimes have to choose from a variety of possibilities whereas in other cases, only two options may exist. The fact, however, remains that in most cases (especially where the principal and his senior teachers are involved), there will be an **exercise of discretionary power**.

A **discretionary power is a legal competence** enabling the holder to make a choice within a particular **area of law**. As the education system does not operate outside the sphere of law, one cannot refer to a “free” or “unfettered” discretion as any discretion must always be exercised within **legal limits**.³⁸

Discretionary powers and functions must therefore be exercised **legally correctly** and must comply with the legal requirements for valid administrative education acts.³⁹ A defective or irregular exercise of a discretion may be declared invalid within the internal education system of control, or by the ordinary courts of law.

6.2. Forms of delegation

As is mentioned above, the **structure of authority** extends over a wide-ranging area, from central level to local level of government. Within this

³⁷ Discretionary powers are usually phrased in the following terms in legislation: the minister “may”; after “consideration” of the facts the administrator “may”; in the “opinion” of the principal; according to the director’s “view”; in “consultation with”; on the “advice” of.

³⁸ To refer to an “administrative” discretion is also incorrect. The nature of the discretion exercised by the principal in his management act, will not differ from that exercised in his “didactic” act. In both instances the choice-making has its origin in the law and must be tested in terms of legal requirements.

³⁹ The requirements for valid administrative education acts are discussed *infra*.

structure is found a complicated pattern of delegation, of which the finer nuances are not discussed here. However, three basic forms of delegation may be used as **guidelines**: bear in mind that each form may also reveal its own variations.

6.2.1. The simple mandate or instruction

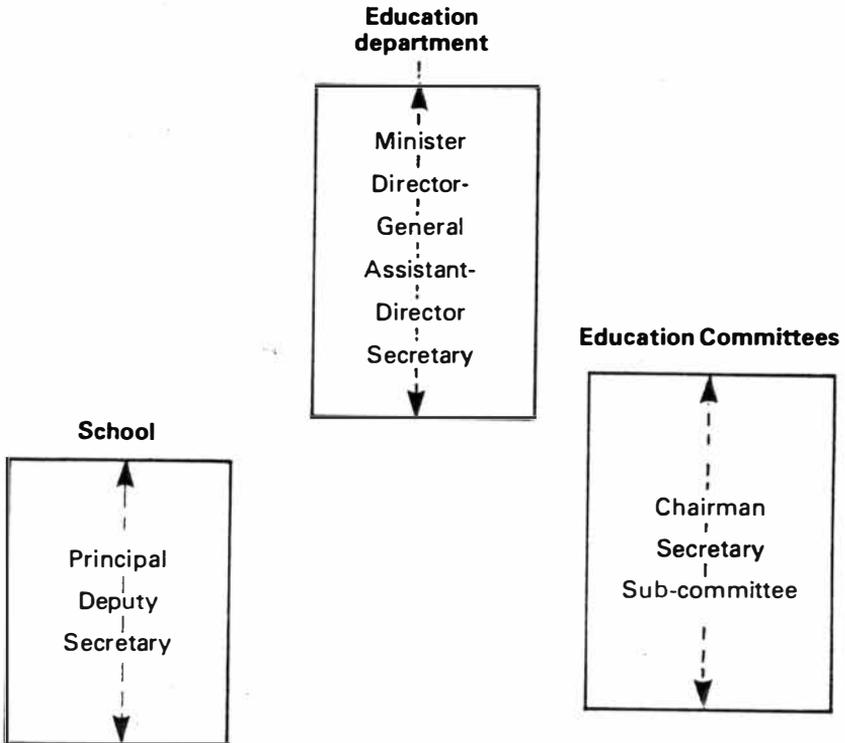


Fig. 7. *Mandate or instruction: different levels*

This is the simplest form of administrative delegation and is found in the usual **vertical line of authority**. These lines exist in the different **substructures** and at different levels of **education**: for example, in the education department, the professional teachers' council, the school, the management council and the teachers' association. The higher authority decides on the matter and **requests/instructs** the inferior body on the **practical implementation** of the decision. Strictly speaking, no subdelegation has taken place as the **decision-making power** (the power to exer-

cise the discretion) is not transferred but only its **implementation**.⁴⁰ If the higher authority were to delegate the **exercise** of the discretion to an inferior body, the higher body would act **ultra vires** (beyond the scope of its powers). The act would consequently, be invalid.

The mandate or instruction to the inferior body takes the form of a clearly circumscribed task which requires no **independent discretion** on the part of the mandatory (the inferior body in this case). No delegation or subdelegation (which includes the delegation of **discretionary decision-making powers**) takes place and the implementation of the instruction by the mandatory, may rather be seen as a **mechanical** act: the mandator (the higher authority in this case) could in actual fact, have requested any other official to implement this particular instruction.

With reference to the above-mentioned discussion, it must be borne in mind that the mandator is the **authoritative body** within this **internal** relationship and, consequently, would also be held **responsible** for this act.⁴¹ The inferior body therefore, does not act **independently** and must be seen only as the agent of the higher body.

6.2.2. Deconcentration

The relationships of deconcentration and decentralisation **infra**, must be distinguished. A relationship of deconcentration exists within the different **levels** of internal education administration. It does **not** necessarily develop in the **vertical** line of authority but may be found in a **network** within the education department, the school or professional council. In this relationship, specialised tasks which require **expertise** are delegated to **specific**

⁴⁰ The rule *delegatus delegare non potest* means that the person to whom a power is delegated may not subdelegate it to another. This rule, as will be discussed *infra*, applies in cases where the delegate must have special qualifications or expertise which render him suitable for the job. Under these circumstances subdelegation cannot take place. It is, however, clear that this rule does not apply in the case of the mandate.

⁴¹ The implementation of simple tasks within the school substructure, for which the principal eventually takes responsibility, may be mentioned here: the principal sets the examination timetable while the teachers announce and distribute it; the principal sets the date for the annual parents' evening while the secretary organises and distributes the notices. Within the structure of the TFC, the chairman of the provisional committee of enquiry will instruct the executive official to notify the teacher of the proposed disciplinary action against him. Within the education department (inspection section) the chief superintendent instructs another superintendent (or the secretary) to announce the fixed dates for school inspection.

bodies. The delegation of **discretionary powers** thus plays an important role as the object of this form of delegation is mainly an **effective division of work** within the particular hierarchy.

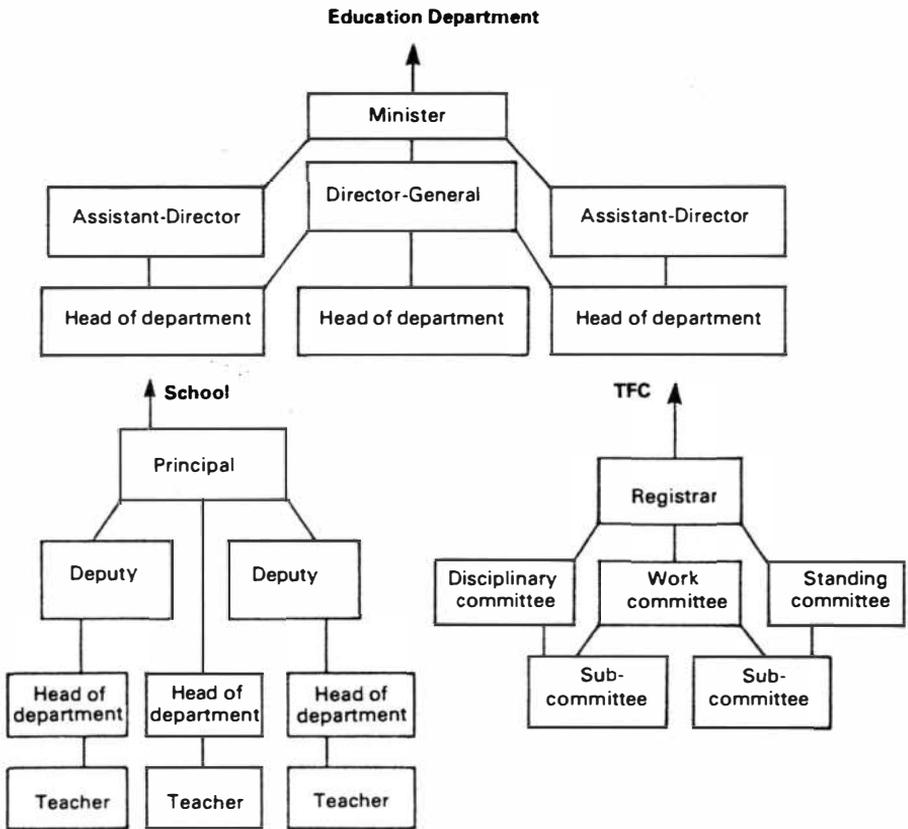


Fig. 8. Deconcentration: different levels

The **higher administrative body** in the particular **internal hierarchy** remains the **authoritative body** who bears **responsibility** for the act. In

other words, although wide discretionary powers may be delegated, they are still exercised in the name of, for example, the director of education, the principal or the professional council.⁴² As was the case in the previous relationship of delegation, the principle of **solidarity** within the hierarchy remains unaffected and, consequently, it is assumed that the higher authority remains the competent body. The inferior body will act on his behalf.

Certain **additional requirements** apply to this form of delegation: for example, the **delegans** (the higher authority) may withdraw the execution of the act or may issue instructions for its execution; he may decide to exercise the power himself; he may exercise control in various ways such as via submission of reports; the inferior body may be dismissed if its power is not exercised satisfactorily.⁴³

6.2.3. Decentralisation

The relationship of decentralisation may be seen as a type of “**overarching**” relationship of authority as it **links** the various substructures of the different levels of public education. This relationship of authority ultimately involves the whole of the education structure and rounds it off. It is found **outside** the **vertical lines of authority** (forms a network of lines) and structures the public education system.

Extensive discretionary powers are delegated to various **administrative bodies** and organs who perform these functions **independently** and the various education departments, education councils, education committees and the school.

⁴² Within the school substructure the principal may delegate certain discretionary powers relating to school management, to senior members of his staff. Powers relating to corporal punishment, educational tours and merit awards leave a wide range of **choice-making** to the principal. Although these powers may be delegated to his deputy, a head of department or a senior subject teacher, they are still exercised on behalf of the principal and subject to his control. The principal thus bears the responsibility for the performance of these acts and may eventually be held liable. Within the auxiliary services section of the education departments, the school clinic operates as a specialist body. Acts relating to medical examinations (physical, psychological and behavioural defects) and which obviously contain wide discretionary powers, are delegated to these clinics by the various directors of education. These acts are, however, performed in the name of the director concerned and he is also held responsible. He may, however, withdraw these powers and may even set aside the decision by the clinic and make his own final decision on the matter. (Such conduct by the director is, however, highly improbable in practice.)

⁴³ Whenever the act is **completed** by the delegate, the **delegans** cannot rescind or withdraw it. The **delegans** may, however, rescind the delegated power.

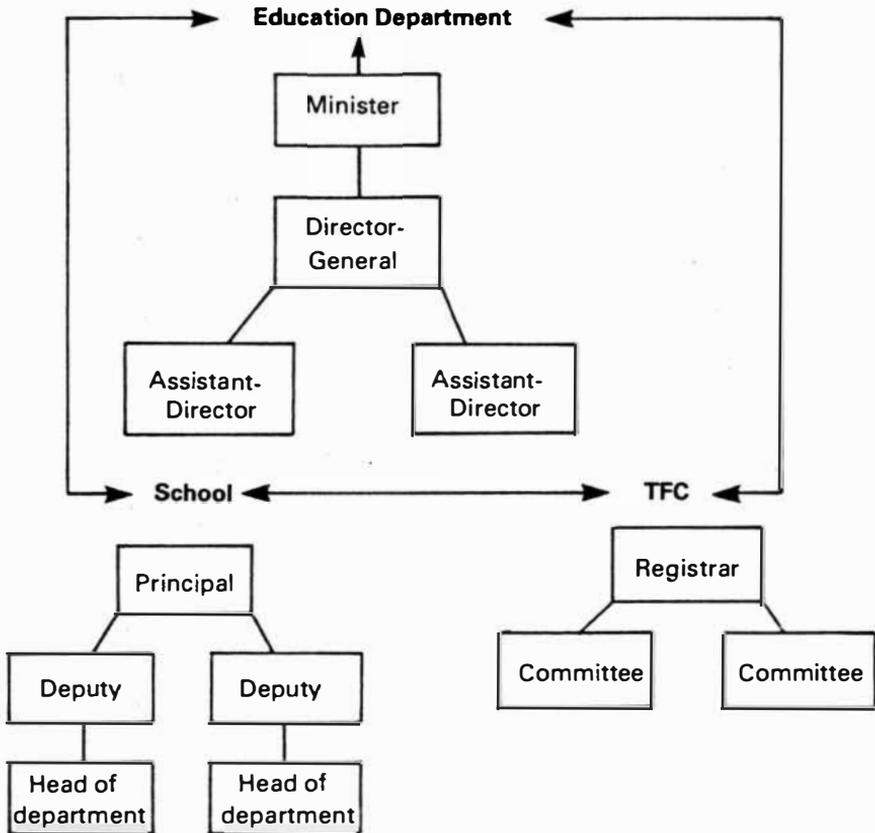


Fig. 9. Decentralisation: different levels

The **delegans** – in this case the minister, administrator or director – usually delegates these powers in terms of legislation to the autonomous bodies but **cannot** perform these functions **personally** in his own name. He may, however, exercise certain forms of **control** over the independent body: for example, he may appoint certain members of the body and thus obtain indirect participation in its activities. The controlling body may also have a

power of review over the activities of the independent body: if review does take place, it will be in the **name of the independent body.**⁴⁴

Strictly speaking, decentralisation does not involve a delegation of powers but rather a division of **such powers and functions amongst independent bodies and organs.** The fundamental idea in this relationship is that the superior body must **respect the subordinate organ as an independent body.**

6.3. Delegation of tacit (implied) powers

It has been mentioned above that legislation does not always provide a clear description of powers. Tacit powers (or ancillary powers) are those powers that are not embodied in legislation **expressly or by necessary implication.**

The delegation of these powers is also found within the **three basic relationships of authority**, namely, the mandate, deconcentration and

⁴⁴ The liaison between the education departments and the various education councils, schools, management councils and education committees may serve to illustrate this point. The Minister of National Education (as well as the Minister of Education and Culture (Whites) may be regarded as the **delegans** in the decentralisation relationship with the TFC (Whites). The TFC is an independent body and acts in its own name. It has extensive discretionary powers regarding the registration, professional code of conduct and disciplinary enquiries of White teachers. Although it has a representative nature, as a professional body, some of its members are appointed by the department (minister). These members are direct representatives of the department and report back to the minister (director): the TFC is, of course, also an advisory body. If the TFC acts *ultra vires*, the minister may intervene and review the case in the name of the TFC. The management council of a school is also an autonomous body with wide powers in terms of the physical and material management of the school. Although linked with a school (through the principal or a teacher serving on one of its committees), it liaises directly, through submission of reports, with the director of the particular education department (the principle of control). In *University of Pretoria v. Minister of Education* 1948 4 SA 79 (T) the court held that the Minister could not appoint the rector of the university but that the council of the university itself should appoint him. The Minister must, however, confirm the appointment but he cannot substitute his own decision for that of the council. As was recently observed in the incident surrounding the Menlo Park High School's management council, the Minister of Education and Culture respected the decision of the council although he urged the members to resign. There were rumours that the Minister could, in fact, dissolve the council in order to afford the parent community an opportunity to elect a new representative body. However, policy considerations prompted the Minister not to use his juridical powers. The law provides the framework within which competent officials and bodies operate; the way in which they perform is, however, governed by policy. Matters of policy are not generally governed by the law unless a discretionary power has been exercised incorrectly. See the discussion on the requirements for validity, *infra*.

decentralisation. Because these powers are not provided for in legislation, it is difficult to find the **source** or **authority** for the relationship.

The education structure provides ample examples of the existence and delegation of these tacit powers.⁴⁵ Certain **general guidelines** may be followed to determine whether the education body or organ in fact possesses these tacit powers and whether he may delegate them.⁴⁶

- a. The purpose and content of the relevant legislation must be closely analysed. The existence of ancillary powers which are necessary for the independent and expert running of the education administration, must be acknowledged. The courts should via their interpretative task, deduce the existence of ancillary powers if the public-education interest would be promoted by their doing so. However, where existing powers have an onerous effect, the courts should be reluctant to extend the powers yet further by means of the acknowledgement of additional onerous (implied) powers.
- b. An act which is performed in terms of these implied powers or the delegation of implied powers, must still comply with all the requirements for a valid administrative education act. This means that it may not have an unreasonable or unfair effect, may not infringe existing rights, privileges and freedoms and exclude the courts' power of review. As in the case of all other administrative education acts, this particular act must also comply with the general principle of legality in the law of education.⁴⁷

6.4. The authoritative position of the school principal

To explain the position of authority held by the principal, it must be borne in mind that in terms of his **capacity** as **school principal**, he may be

⁴⁵ To illustrate this point: the principal applies these tacit powers within the school structure in order to achieve effective management and education. He is responsible for the determination of **school policy** and **discipline** as well as the **general welfare** of the pupils. The particular powers in this field, as well as their scope cannot be conferred in legislation: in most of these cases only broad guidelines are supplied. To determine whether the principal has in fact acted *intra vires* – in other words, within the scope of his powers – the guidelines stated *supra* must be consulted.

⁴⁶ The interpretation of tacit or ancillary powers is rather problematical. For more information in this regard see the discussion *infra* on extensive interpretation of statutes.

⁴⁷ The requirements for valid administrative acts and the principles of general legality are discussed *infra*.

regarded as one of the **principal liaison** authorities in the **public-education structure**. In this respect, legislation pertaining to the description and particular qualifications of his position must be studied. Although the principal, in his capacity as **professional leader** within the school substructure, has wide discretionary powers of management, policy and control, which he exercises **independently**, he is still subject to **control** exercised by superior bodies higher up in the education hierarchy. In the **relationship of decentralisation** between the school and the education department, the principal acts as the key figure – within the school structure he is vested with **authority** which enables him to execute **effective school policy and administration**.

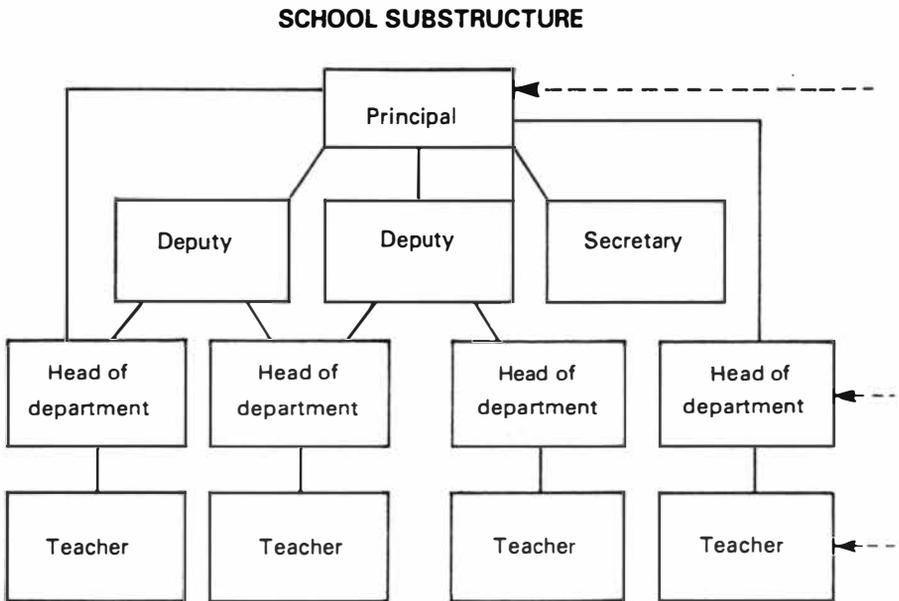


Fig. 10. The authoritative position of the school principal

Within the **school institution**, the administrative relationship between the principal, his staff and administrative personnel, rests on **deconcentration** and the **simple mandate**. The latter raises no questions as it is only the mere request/instruction of the principal which is implemented. The principal remains the **authoritative** organ and has, in fact, **personally** exercised his discretionary power.

The **origin** of most of the powers of delegation in the school, however, lies within the **relationship of deconcentration**. The principal delegates some of his discretionary powers to certain **expert** members of his staff in order to achieve **effective division of work**. The teacher concerned has to exercise his own discretion on the matter and make a decision.⁴⁸ The teacher, however, is not an independent organ within the school substructure and therefore does not act independently but always remains under the leadership of the principal who holds the **authoritative** (superior) position. Consequently, although the principal follows the practical division of work through delegation of certain powers, it does not mean that he has renounced his **position of authority**. One may conclude that delegation of his powers in the relationship of deconcentration does **not** include **delegation of his authoritative** position. The principal remains the authoritative organ who will be **internally** as well as **externally** (though sometimes indirectly) **responsible** for the delegated act.

Legislation, whether it is of internal or external application, cannot provide a comprehensive demarcation or description of the principal's powers. He also derives certain powers from the common law, for example, disciplinary powers, which are necessary for good school administration. Furthermore, the existence and delegation of the principal's **implied or ancillary powers** enhance **effective school management** and do not, in fact, affect his **authoritative position**.

In order to promote and uphold effective school management and administration, it is of the utmost importance for the principal to delegate powers.⁴⁹ Similarly, the **way** in which powers are delegated must be aimed at the

⁴⁸ In this way the various heads of department may help the principal in the formulation and application of individual subject policy within the broad framework of general school policy.

⁴⁹ Owing to the complex nature of public education, a clear distinction cannot be made between school management and educational (didactic) acts. Effective school administration is, however, a prerequisite for well-organised education. Relationships of delegation do not exist only in the **management** section of the school, but also in the **educational** (didactic) sphere: in the didactic field, the principal also delegates specific powers to certain teachers who are, by virtue of their professional expertise, the most suitable people for the job.

promotion of good administration. Although the activities of the principal may not be hindered by rigid rules and instructions, he must, in his capacity as principal, cultivate a sense of **legal consciousness**.

In order to determine the nature and scope of the principal's powers of delegation, certain **guidelines** may be followed:

- by virtue of his principalship and professional leadership of the school, the principal acquires certain qualifications: for example, in certain cases he must exercise the power **himself**, or he may entrust the **implementation** of his decision to another or, delegate the **discretionary** power. In all these cases the division of work is channelled via the principal as the **authoritative body**;
- by virtue of his position of authority, the principal may withdraw delegated powers from one organ and delegate them to another; he may withdraw powers before the act is completed, or exercise the powers he has withdrawn, himself;
- in certain cases, where subdelegation is prohibited, it does not necessarily mean that the principal may not ask **advice** on the matter. He may accept or reject advice and may eventually exercise his own discretion;⁵⁰
- the **nature** of the powers that are delegated must be determined: with regard to **spatial** operation, powers are exercised within the **school sphere**. A further division is possible, for example, powers which apply in the media centre, or, powers relating to sports activities which apply on the athletics field. Certain powers are **time bound** and have certain limitations as regards to time, for example, powers exercised during examination periods, educational trips, science periods or school breaks;
- the rules of statutory interpretation must be applied in determining the powers of delegation.

Finally, it must be mentioned here that sound and judicious delegation of powers creates good **management** policy: it promotes solidarity, creates a team spirit and opens channels for communication. The school principal

⁵⁰ From a general point of view, it may be said that administrative legislative powers may not be subdelegated unless there is an express or implied provision to that effect. The legislative power to formulate school policy vests in the principal. Although he himself institutes policy he is still able to consult with his deputy and heads of department for advice.

who wants to do everything himself, will isolate himself, fail to win the trust of his staff and discourage solidarity.

In the next section the focus will be on the various **administrative acts** performed by the principal in his capacity as **administrator** of the school.⁵¹ The **internal** operation of these acts – within the school structure – will be highlighted.

Résumé

Delegation of powers in the public-education structure is aimed mainly at division of labour and effective administration. Within the internal sphere of education, the superior organ delegates to an inferior body. Questions may arise regarding the authorisation and scope of these delegated powers.

The pattern of authority is divergent: different substructures, which have their own internal lines of authority, are grouped together by overarching structures which, eventually, envelop the education structure in its entirety. The principles of devolution and deconcentration feature prominently within the education structure of authority: the rigidity of the old system is tempered by the incorporation of a broad spectrum of “education partners”.

Legislation is normally regarded as the most important source of the organ’s powers and functions. Common law and case law also constitute significant sources. Where case law (judicial precedent) is concerned, the courts have an important task to determine, by means of the application of rules of interpretation, the existence of implied and ancillary powers within the context and purpose of the legislation.

Within the school substructure the principal is the central authoritative body and the pivot on which management powers and their delegation, hinge. He derives his authoritative status from his position as principal and professional leader of the school. This position underscores his extensive management, guidance, organisation and controlling powers.

When the administrative body has allegedly exceeded its powers – acted **ultra vires** – resulting in an uncertainty or a dispute, the aggrieved person may rely on **internal administrative measures of control** to settle the

⁵¹ The guidelines referred to above may also be pondered in the discussion of the various administrative acts *infra*.

dispute. The internal educational controlling body will reconsider the matter and make a decision in terms of prescribed education rules. **Judicial (external) control** by the ordinary (civil) courts exists alongside internal control. The aggrieved person may, under certain circumstances when the internal system of control does not offer a satisfactory solution to his case, appeal to the civil courts for review.⁵²

7. ADMINISTRATIVE EDUCATION ACTS

7.1. Introduction

In this section the emphasis will be on **management acts** within the **school substructure**: namely, management acts performed by the principal in his capacity as “manager” and “policy maker” within the school. Delegation of powers to his deputies, heads of department and other staff members will also be examined. These acts will normally have **internal** operation within the school situation but may also, as a result of the complex nature of the school structure, apply **externally** when pupils, parents and other private individuals become involved. The following discussion will, however, concentrate mainly on **internal** application within the school substructure.

The day-to-day school administration is a complex task having many facets. As is mentioned above, the school substructure – as a component of education administration – forms part of the **state administration** within the sphere of the traditional **executive**. Notwithstanding the executive character of these organs – after all, education bodies carry out public education policy – school policy must be formulated according to certain **prescribed rules and instructions**. **Control** measures must also be applied to the implementation of these acts.

School management within the school as a substructure of the education system covers the whole **administrative-law sphere** of the law of education because various education bodies and organs (the principal and his staff) perform different tasks, for example:

- a. **Administrative legislative acts** which deal with the formulation of school policy and rules;

⁵² More information *infra* on internal and judicial (external) control.

- b. **Administrative controlling acts** which are exercised when the superior organ/body (the principal or the reviewing body) reconsiders the act of the inferior body;
- c. **Purely administrative acts** which usually exist within the individual legal relationship because an individual or a group of individuals (the principal or teachers of a particular school) becomes involved.

All these acts are regarded as administrative acts of the education administration: the reason for distinguishing between the different acts is that the law attaches **different consequences** to them. However, it is of the utmost importance to remember that the ordinary civil courts will very seldom interfere with the **internal administration** of a school. These acts form part of the practical **school policy and administration** and it is generally accepted that the principal as the **professional leader**, is the person best equipped to perform them. On the other hand, the jurisdiction of the courts is not **excluded**, and in particular instances the courts will indeed intervene.¹

7.2. Administrative legislative acts

Administrative legislative acts are **general prescripts with binding legal force** which apply within the school substructure. Legislation (including quasi-legislation) pertaining to the **state administration** is formulated by means of these acts. Administrative education legislation is usually **delegated (subordinated)** legislation which is adopted at the **second and third level** of government. The principal, as the competent legislative body within the school substructure (third tier of government), formulates school policy and rules.

Administrative legislative acts must comply with certain requirements, namely:

- a. Administrative legislative acts such as proclamations and regulations create **general legal relationships** as they have a general applica-

¹ In **Cape Teachers Professional Association and Others v. Minister of Education and Others** 1986 4 SA 412 (C) the court examined the legality of policy decisions made by the Minister of Education concerned. The Minister had refused to postpone the examinations of pupils as a result of the emergency situation. The Cape Teachers Professional Association then appealed to the court to review the matter. The court held that in the absence of proof of unauthorised purpose, **mala fides** or lack of attention, it may not interfere with the decision by the education authority.

tion. Within the education sphere, we also find **internal legislation** having internal application only: for example, the manuals and circulars by the different education departments to schools and principals. In the following discussion the focus will be mainly on **internal** legislation as the principal has to formulate his school policy and rules according to the provisions laid down by this legislation;²

- b. In terms of the Interpretation Act 33 of 1957 specific rules of interpretation apply to the promulgation, amendment and repeal of administrative legislation;³
- c. The power to subdelegate a **legislative** power exists only where provision to that effect is made expressly or by necessary implication;⁴

The principal has extensive internal legislative powers to formulate and develop his school's policy within the **broad guidelines set by "general" and "own" affairs education policy**. These powers include the drafting of rules pertaining to planning, organisation, guidance, management and

² The binding legal force of subordinate legislation having internal application, must not be underestimated: internal legislation is binding on the principal and his staff. Legislation with general application will also be binding on the private individual outside the education sphere.

³ In terms of the Interpretation Act the rules of statutory interpretation also apply to "any other enactment that has the force of law". The interpretation of statutes is discussed *infra*.

⁴ The principal derives his position and powers from different parliamentary (authoritative or primary) enactments as well as second-tier legislation (administrative legislation) such as, ministerial regulations, provincial ordinances and proclamations. Internal administrative legislation may be found in the circulars and manuals of the education departments. The **Manual for General School Organisation** confers specific legislative powers, such as the power to plan a comprehensive school policy, on the principal. The power to subdelegate these legislative powers to his deputy will not be assumed automatically. There must be a clear indication either expressly or by necessary implication, that the deputy indeed has the power to formulate school policy. However, the **Manual** does not contain such a provision. It is, however, contended that it is impossible to establish an absolute demarcation of functions. For this reason and the fact that the principal is the **professional leader (manager)** of the school, he may exercise his discretion and empower the deputy to make decisions on school policy and to implement them. The deputy may, however, not act independently as he is still under the **leadership and guidance** of the principal who will bear the **ultimate responsibility**. The principal may even transfer the power to another senior member of staff. From this argument one could infer that the individual register teachers have the power to formulate their individual classroom policy, naturally within the framework of school policy. The guidelines regarding the **deconcentration relationship** are clearly applicable here.

control. The departmental **Manual**⁵ must be consulted in order to determine the nature and scope of his legislative powers, and to establish which of these powers may be subdelegated. If the principal requests that his decision be implemented, the implementation may be regarded as a simple mechanical act without any discretion exercised by the teacher executing the instructions: a **simple mandate/request**.⁶

It has been said above that the subdelegation of legislative powers of the principal within the **deconcentration relationship**, should be approached with circumspection. The principal is the **manager** of the school and must offer guidance in all instances where the determination and formulation of school policy and rules are relevant. However, within the sphere of general school policy, certain **specialised areas** exist where the principal needs the co-operation of senior members of staff in the drafting of general school policy.⁷ The principal remains the **responsible organ** who will be held **liable** if the legislative act does not conform to the provisions of the **Manual** and other enabling legislation. Likewise, the principal may transfer the power to another suitable teacher, or even withdraw the power before the act has been completed.⁸ In conclusion, one may say that although no clear provision is made in the **Manual** for the delegation of powers, it must be assumed that these powers exist by **necessary implication** as the principal as **professional leader**, must **promote and uphold practical and effective school administration**. These powers may

⁵ The **Manual** under discussion is the **Manual for General School Organisation 1986** TED. Similar manuals are applicable in the other provinces.

⁶ A practical example would be the principal giving instructions to the head of a department, the secretary or the typewriting teacher to rewrite or type the document containing the school policy and to distribute it to members of staff.

⁷ The principal (if for example, he is a language teacher) may not have the expertise to formulate the sports policy of his school. Therefore, the sports organiser must co-operate in the drafting of rules in this respect. The sports organiser will work under the guidance of the principal but has a wide discretion to draft, within the range of his professional expertise and experience, the most suitable rules for sports policy. The principal, however, remains responsible for this administrative legislative act. Many similar examples in the school structure may be mentioned: school policy and rules with regard to the planning and operation of the media centre are formulated with the co-operation of the media-centre teacher; hostel policy and rules are drafted in co-operation with the resident hostel parents.

⁸ When the principal delegates a legislative power to the sports organiser as explained above, the latter may not subdelegate it to another sports teacher. In practice it may occur that the junior sports teacher does not have the expertise in this regard. Furthermore, the control and guidance of the principal (in this instance channelled via the sports organiser), would be hindered. The doctrine *delegatus delegare non potest* will be applicable: the sports organiser, as the delegate, may not subdelegate this power to the junior sports teacher.

actually also be regarded as essential **implied or ancillary powers** without which effective administration can hardly exist.⁹

The reference to **liability** incurred by the principal means that the superintendent of schools or any other competent **controlling body** in the education department, may approach the principal if the rights and privileges of certain members of staff have been affected by his conduct. The acts performed by the principal must therefore be **fair and reasonable** and the higher controlling body may test these acts against the **requirements for validity** which apply to **all administrative acts**. If the principal has acted in an irregular manner, resulting in an encroachment upon the rights and privileges of a teacher, the case must be settled by means of internal control measures, for example, disciplinary steps against the principal.

For the sake of completeness, it must be noted that delegation of legislative powers in terms of the **decentralisation relationship**, does not occur **within** the school substructure. When the principal delegates legislative powers to his deputy, it does not mean that the latter acts independently, as an autonomous organ. The **overarching** effect of decentralisation is, however, clearly illustrated where two different substructures of education, namely, the school and the education department are linked together. In the case under discussion the legislative powers of the principal are determined by the **Manual of the education department**. The principal is the independent organ bearing responsibility but subject to the **control** of the controlling body/organ in the education department concerned.

7.3. Administrative acts of control

The education structure embodies a powerful structure of **internal control**. Some of the most important bodies/organs are: professional teachers' councils that control the professional conduct of teachers and superior authoritative bodies/organs that scrutinise teachers' conduct in the public-education sphere.¹⁰ These different means of internal control provide for an

⁹ Whether implied or ancillary powers exist, must be established in accordance with the three basic guidelines *supra*.

¹⁰ Within the school situation, the principal exercises control over the internal acts of his staff members. For example, the disciplinary committee of the TFC (Whites) will take disciplinary steps against a teacher who has been reported by the principal. The administrator/director/minister/superintendent may, under certain circumstances, act against a teacher who has been guilty of incompetence or misconduct. (According to the new regulations issued in terms of Act 103 of 1986 section 14, an effort is made to co-ordinate all inquiries against teachers. The disciplinary committee of the TFC is of an extensively representative nature which means that inquiries by the education department regarding misconduct, and disciplinary inquiries by the TFC, are now combined into one inquiry by the TFC: members of the **education**

effective system of appeal to settle administrative education disputes easily and informally. The **structure** of internal appeal and the procedures involved are usually described in legislation.

The administrative control body will reconsider the matter before it **in toto** (fully). This means that new evidence may be heard, additional enquiries may be instituted, and a resolution may be taken which may differ considerably from the previous one. When the principal has to settle an administrative dispute/uncertainty between members of staff in his authoritative capacity, his decision will have **internal binding force** on the members involved. However, his resolution does **not** have to be **final**, as the parties may take the matter on higher appeal if they are dissatisfied with the result, or when the principal has acted irregularly.

The resolution by the principal, as well as those by the other internal controlling bodies, do not create **judicial precedent** (case law) as these acts of review do not comply with the requirements for a **judicial act**. Judicial acts are normally **authoritative, final and binding**. The principal, for instance, does not have the qualifications of a judicial official; he does not follow court procedures in his examination of the case; he may himself reconsider his previous decision and may even come to a different decision although the facts before him were identical or similar to those of another previous case.¹¹

Within the school situation there are many **internal acts of control** which, although they are strictly speaking of a **purely administrative nature**, do in fact reveal **characteristics** of a judicial nature. The administrative act of the principal in which he **exercises a discretion which affects the rights, powers and privileges** of a teacher, comes to mind here.¹²

Although the internal control bodies are not of a judicial nature, their acts still have to be performed in a just and equitable manner. The principal and

¹⁰ cont. department, TFC and a wide spectrum of other representatives serve on the disciplinary committee.)

¹¹ There are only a few **administrative** bodies which perform judicial acts: such bodies are in **substance**, courts of law. Examples are to be found in administrative courts such as the Water Court, the Court of the Commissioner of Internal Revenue, the Court of the Commissioner of Patents. See also the discussion under judicial control *infra*.

¹² This act will be discussed under purely administrative acts, *infra*. In legal circles these acts are referred to as **quasi-judicial** acts. These acts are distinguished from other administrative acts because the **rules of natural justice** are usually applicable.

other controlling bodies must still act legally correctly and, consequently, their performances must comply with the requirements for validity applicable to all administrative acts.¹³

The various superior bodies of control in the education structure, may be referred to as **administrative education tribunals**. However, administrative tribunals have a particular legal status and although they do not create "administrative case law", a high regard exists for their objective and fair handling of administrative disputes. Whether one may indeed refer to all controlling bodies in the education structure as education tribunals, remains an open question, as these tribunals are not always well defined in terms of their powers and procedures.

7.4. Purely administrative acts

Note that internal administrative acts of control, although discussed separately for reasons of efficacy, actually form part of purely administrative acts.

In the discussion of purely administrative acts within the internal school substructure, emphasis will fall on the principal as **author** of these acts. The principal thus has, in addition to his legislative and controlling powers which have been discussed *supra*, the power to execute or implement school policy or rules. During the implementation of these tasks, it may happen that the rights, powers and privileges of a teacher, or a particular group of teachers may be infringed. A basic distinction will be made between acts which affect rights, powers and privileges and those that do not affect these rights. In both instances the act emanates from an **individual legal relationship**: in other words, the individual teacher or a group of teachers is involved, irrespective of whether the principal's act has affected their rights or not.

7.4.1. Internal acts that do not affect rights and privileges

Such acts, performed by the principal, fall **outside** the sphere of the courts' power of review, and quite rightly so, because no rights or privileges have been encroached upon and there is therefore nothing for the court to decide about. For example, the principal is responsible for the division of work among teachers according to their professional qualifications and expertise.

¹³ Internal and external control of administrative acts is discussed *infra*.

The senior English teacher who actually wanted to teach only the best senior English classes, cannot approach the court when the principal has allocated all the senior English classes to him. Even when his colleague (who has the same qualifications and expertise) at another school teaches only the best senior English classes, he may not contest the principal's wide discretionary powers in this regard in court.¹⁴

The teacher involved will, naturally, voice his dissatisfaction about the principal's decision. The matter was, in all probability, discussed thoroughly before the decision was made but no alternative solution could be offered. The fact remains that the courts will not interfere under these circumstances but will show respect for the wide discretionary powers of the principal. On the other hand, this does not mean that these acts fall within the sphere of **non-justiciable** acts. The principal must always act in **the interests of public education**: in the cases under discussion it means that he must, within the parameters set by "general" and "own" education, and with the teachers at his disposal, offer the best possible educational opportunities to his pupils. When the discretionary power of the principal has not been exercised according to the powers prescribed by law (**in casu** through legislation: central and delegated legislation which includes the **Manual**) and he refuses to reconsider the matter, the courts may be approached to review the case.¹⁵

Not only does the principal exercise wide discretionary powers, he also determines the **form** (method or procedure) taken by certain acts. For example, when it comes to planning, he may institute special work committees, management committees and sub-committees to **advise** him on the planning of time-tables, the programme for the year and the organisation

¹⁴ There are many examples of the principal's wide discretionary powers in terms of his functions of planning, guidance, organisation and control. The senior sports teacher who has to coach the senior rugby teams, cannot approach the court because he has to devote more of his free time (in relation to the junior rugby instructors) to coaching the senior teams. The junior language teacher cannot raise his dissatisfaction in court when the principal instructs him to teach the senior language classes during his free periods for the duration of the absence of the senior language teacher.

¹⁵ Under these circumstances the principal has exceeded his powers – has acted **ultra vires** – and the correct procedure would be to approach the higher controlling body within the education structure – the administrator, minister or director – to reconsider the allegedly unauthorised conduct of the principal. The legislative rules governing these **internal control measures** must thus be analysed. In cases where a **gross excess of power** – **ultra vires** – has occurred and individual rights and privileges are affected, the teacher concerned may appeal directly to the court without using the internal structure of control.

of textbooks, stock and teaching aids.¹⁶ These committees act in an advisory capacity and do not make **decisions** on behalf of the principal. The principal may disregard the advice and must in any event, exercise his **own discretion** when he makes the **final decision** on the matter. If the principal delegates his discretionary power to the advisory committee, his action would be **ultra vires** and may be taken on internal appeal. It is only in **exceptional** cases where rights and privileges are affected, that the aggrieved party may appeal to the courts for judicial (external) control.

The powers conferred on the principal to lay down the correct **procedures** for certain conduct, may be regarded as essential **implied or ancillary powers**, provided they fall within the ambit of public-education policy and comply with the general principle of legality in the law of education.¹⁷

7.4.2. Internal acts that affect rights and privileges

Because the principal possesses such wide discretionary powers in respect of planning, guidance, organisation and control, it may happen that the rights and privileges of certain members of staff are affected in the implementation of these tasks. Although the principal is regarded as the professional leader of the school, he himself and his teaching staff enjoy the **protection of a professional teachers' council**.¹⁸ As is mentioned above, the special committees of these councils represent the registered corps of teachers and act on their behalf while, on the other hand, **internal disciplinary measures** are taken against teachers who violate the provisions of the professional code of conduct.

It must be borne in mind that, from the viewpoint of the **education departments**, there is legislation which describes **incompetence and misconduct** and the **action and procedures** required to punish teachers who are guilty of incompetence and misconduct. This legislation is applicable to **all** teachers in the **public-education** structure. Thus the teacher enjoys protection both in his **professional status** as a teacher and in his

¹⁶ Other similar advisory bodies are: sports committees advising on the sports activities of the school; subject committees on subject policy; selection committees on the evaluation of pupils; vigilance committees on school and pupil safety.

¹⁷ The principle of legality will be discussed *infra*.

¹⁸ Not all teachers are as yet represented by official professional teachers' councils. This matter is presently being considered by the education administration.

status as an **official** in his position as a representative of the education administration when his rights, powers and privileges are at stake.¹⁹

As the professional leader of the school, the principal is responsible for **school administration** and is also the key figure at the **professional level**. By virtue of his position of authority in the **internal school** sub-structure, it may happen that the rights, powers and privileges of members of staff are affected – directly or indirectly – by the implementation of some of his wide discretionary powers.²⁰ Because of this **authoritative** position he is, under certain circumstances, **entitled** to impinge on the rights, powers and privileges of his members of staff. Say, for example, that the sports organiser (senior sports teacher) had on several occasions disappointed his principal and other members of staff by his incompetent handling of the organisation of school sports meetings. The principal decides to appoint the teacher who is second-in-charge of sports activities, to organise the next sports event. The sports organiser complains to the principal that this conduct would affect his chances of being nominated for a merit award and would also influence his opportunities for in-service training and staff development. Encroachment on the rights, powers and privileges of the sports organiser will be justified if the principal acts in terms of his **authority** and in a **just and equitable** manner. In other words, the discretion exercised by the principal which may affect the rights and privileges of the teacher, must be **fair and reasonable**. Discretionary power is indeed a **judicial power** and therefore, subject to the **law**. If the teacher's rights are infringed in an **unauthorised** manner, which results in **unfair and unreasonable consequences**, he may approach the principal for reconsideration of his case. If the principal cannot, under certain circumstances, reconsider the case himself, the sports organiser may approach the **higher controlling body**, for example, the professional council or the administrator/director/superintendent/minister, as the case may be. In exceptional cases he may have a direct appeal to the ordinary courts.

To establish whether the principal has indeed acted in a fair and equitable manner, his conduct must be tested for compliance with the **legal requirements for valid administrative acts**.

¹⁹ His protection in terms of the professional council is aimed at the image of the teaching profession as such, while protection via the education departments promotes the public-education image.

²⁰ The principal has, for instance, a wide discretion regarding the order in which he recommends teachers for merit awards; he makes internal arrangements and draws up the timetable for long leave and study leave; he writes testimonials for teachers; he proposes teachers for in-service training.

7.5. The legal force and effect of administrative acts

(Sections of this discussion have already been incorporated elsewhere. What follows is purely a summary.)

The legal force of an administrative act is the **effect** that such an act has in law. An administrative act has **formal** as well as **material** legal force; these usually exist simultaneously and complement each other. **Formal** legal force means that the **validity** of the act cannot be contested in a court or by other administrative bodies, while **material** legal force means that the act has **definite legal consequences**. Most administrative acts have full material legal force when all the requirements for their creation have been complied with but will acquire formal legal force only when their existence cannot be terminated by the court or another administrative body.²¹

An **invalid** administrative act has no legal force, and once the court or the higher administrative body has declared it invalid, the act becomes **null and void** and the individual need no longer concern himself with it.²² A **defective** administrative act has legal force, and until the action is declared invalid by the competent controlling body or the court, compliance with it can be enforced. In these cases the act is **voidable**.

When dealing with the question of the termination of the legal force of an administrative act, the type of act must be analysed. A legislative administrative act may be amended or repealed by the legislative body (author) concerned after it has come into operation. The author may, however, not repeal or amend its legislative act with retrospective effect without express or implied authority to do so, since individual relationships may have been created in terms of which individuals have acquired rights, duties and privileges. In the case of administrative controlling acts and purely administrative acts, a distinction must be drawn between **valid** and **invalid** acts. Briefly, an invalid act may be amended by its author provided the individual has not acquired rights in terms of the original act and pro-

²¹ If a law on education provides that the minister will issue regulations on the conditions of service of teachers, it will not have material legal force until the regulations have been issued. This law will, however, possess formal legal force, as its validity cannot be contested in a court.

²² When a higher controlling body invalidates the principal's act, the case will be settled internally, depending on the circumstances. The principal (author) may, for example, receive instructions concerning the correct implementation of the act; the higher body may execute the act itself; internal disciplinary measures may be taken against the principal. The member of staff who has been prejudiced by the invalid act, may, depending on circumstances, have his status quo restored or receive internal compensation or reimbursement in another form.

vided, further, that the individual has not challenged the case before the court or the higher controlling body.²³ In the case of a valid act, a distinction must be made between beneficial and onerous dispositions. When an administrative body has placed a duty or prohibition on the individual (an onerous disposition) he may amend the act at any time as this would be to the individual's advantage; in the case of a beneficial disposition (which confers rights, privileges and powers), the author himself may rescind or withdraw the act only if he is authorised to do so expressly or by necessary implication since such a withdrawal or revocation could, of course, prejudice the individual.²⁴

In the last-mentioned case the act will be scrutinised by the higher controlling body or the court – depending on the circumstances.

Note that the administrative body/organ, as the author of an act, may at any time vary its conduct **before** it is **completed**. The discussion **supra** thus relates to **complete administrative acts**. Whenever the administrative body has dealt with a matter **finally**, its role has ended and it cannot re-examine or change its decision afterwards. It is then said to be **functus officio**.

Résumé

The discussion **supra**, focuses on the internal management acts of the principal. It is impossible to make a definite distinction between internal and external acts as internal conduct often results in the rights of the private individual (subject) being affected.

The principal holds a central position in the school and is vested with extensive legislative, controlling and purely administrative powers. These powers must be exercised in terms of the general and own affairs education policy.

²³ The principal himself may amend or repeal his invalid act (see example **supra**) which has been completed but not taken on higher appeal. If the teacher concerned had acquired rights in terms of the original act, the invalid act must, in any event, be scrutinised by the higher controlling body in order to restore equilibrium.

²⁴ When the principal validly deprives the teacher of certain rights, for example, if the sports organiser **supra** is prohibited from organising the next sports event, nothing should prevent the principal from subsequently reinstating the sports organiser in his former position: he would then be in charge of the following sports meeting. This act of "reinstatement" does not have to be implemented or controlled by the higher controlling body provided, of course, it is a valid act. If a teacher acquires rights in terms of the valid act of the principal, these rights must be acknowledged and protected and may, therefore, be altered only in specific authorised instances.

Although most of his powers are embodied in legislation, certain original powers of the principal have their origin in the common law. Whenever his powers are not provided for expressly or by necessary implication, they must be regarded as implied or ancillary powers if their existence is essential for practical and effective school administration.

In the event of delegation of powers within the internal school substructure, the principal, as leader of the school, will always be the person who is responsible, and potentially liable, for the act. This illustrates the principal's role as leader and manager in school administration.

As a result of the extensive functions of the principal and the lack of demarcation of the functions, it frequently happens that the exercise of these powers affects the rights, powers and privileges of members of staff. (Whether rights, powers and privileges are indeed affected, is often a difficult question, even for our courts.) When this happens it must be established whether the infringement was lawful: the principal must have devoted proper attention to the matter and all the legal requirements for the validity of administrative acts must have been adhered to. His conduct must, therefore, at all times be fair and equitable. If the teacher's interests are prejudiced by the irregular conduct of the principal, he may appeal to a higher authority.

The ordinary courts of law are, in general, very reluctant to interfere with internal school administration – policy matters. However, this does not mean that their jurisdiction has been excluded or that internal school administration operates in an area which is not subject to the law. The education hierarchy has established a powerful structure of internal control having binding force. Although these controlling bodies do not perform judicial acts, their conduct must always comply with the basic legal requirements for valid administrative acts.

The legal force and effect of administrative acts has been discussed in a summarised form, as parts of this section have been dealt with elsewhere in this study. Within the school substructure the principal (as author) may amend or repeal his own act, provided it has not yet been completed. In the case of his completed acts, a distinction must be drawn between valid and invalid acts. If the principal has dealt with a case finally, he is regarded as *functus officio* and the case must go on higher internal appeal.

Administrative acts within the school substructure have been discussed *supra*. However, these acts are also performed within every other substructure in the public-education system: within the TFC the manager/head will manage the organisation of the council in the same manner; the

director-general of an education department manages his department likewise; within the different management councils and education committees these administrative acts are also performed in a similar manner.

This discussion provides only a basic framework on this topic. Additional literature may be found in the bibliography.

8. REQUIREMENTS FOR THE VALIDITY OF ADMINISTRATIVE ACTS

The requirements for the validity of administrative education acts extend over a wide area and require intensive research. The following discussion will focus on the main divisions only.

8.1. Introduction

Administrative acts are valid when specific legal requirements have been complied with. The validity of these acts may be tested by the author himself, the higher administrative controlling body or the civil courts. In a theoretical sense, all administrative acts may be scrutinised by Parliament, although this is not always the most effective way of control. As is mentioned above, many of these requirements have been identified and developed over the years by the courts through case law (judicial precedent) although some of them also bear a common-law origin. Case law and common law, together with legislation, are regarded as the well-known sources of these requirements of validity.

8.2. The doctrine of *ultra vires* and the principle of legality

The *ultra vires* doctrine has been used to denote the framework within which administrative authorities are required to exercise their powers. The principal will act *ultra vires* when he exceeds the powers entrusted to him in terms of empowering legislation.²⁵ The question arises whether an act

²⁵ If the principal were not vested in terms of the Manual with powers regarding planning, management and control of extramural activities, he would not have been able to delegate these powers and his conduct would be *ultra vires*. If, in terms of the Manual, he does in fact have these powers and his conduct would be *ultra vires*. If, in terms of the Manual, he does in fact have these powers but is not entitled to delegate them – for instance, when he is the most suitable person for organising sports activities – he will act *ultra vires* if he delegates the power to the sports organiser.

which is *ultra vires* (an act which is performed within the bounds of the empowering enactment), will necessarily be a valid administrative act. If that were the case, the requirements for validity would have had a very narrow interpretation. For example, it would mean that the principal who performs his acts in accordance with the **Manual**, will always act validly irrespective of his bad motives (*mala fides*) or the unreasonable implications of the act for a teacher. As is mentioned above, the source of the requirements for validity is not only legislation (empowering laws), but also common law and case law.

The legal requirements for administrative acts must, therefore, not be reduced to statutory requirements only. The principle of **general legality** constitutes the foundation on which these legal requirements are structured. According to the principle of legality, administrative acts must conform to the **general requirements of the law**. This means that the relevant area of law should be examined in its entirety: in addition to legislation, the principles of the common law and case law must be observed.

As the legal requirements relate to the entire sphere of the law, it follows that the general principle of legality (being its foundation) requires **all administrative acts to conform to the requirements for validity as provided for in law**. The principal must realise that his wide powers are exercised within a specific area of the law and that his conduct must meet certain legal requirements. If he is to meet all these requirements the principal must consider **all the aspects of the matter**. Consequently, according to the general principle of legality the author must **devote proper attention to all the relevant legal requirements**.

Résumé

The *ultra vires* doctrine relates to the powers of the education administration as embodied in the empowering enactments.

The principle of general legality relates to the powers and the **entire activity** of the education administration. General activities include administrative procedures, aims and objects. The *ultra vires* doctrine and the general activities of the education administration are, therefore, components of the principle of legality which, ultimately, endorses just and equitable education administration.

8.3. Requirements relating to the author of the act

The author of an administrative act is the education body/organ performing the act.

8.3.1. Qualifications of the author

In some cases where the author is required to have certain specific qualifications to perform a certain act, it is obvious that he cannot delegate the powers and must perform the act **personally**. The principal as the professional leader of the school, is **responsible** for the management, guidance and control of extramural activities. If he delegates this final responsibility for sports activities to his deputy who, in turn, delegates it to the sports organiser (see example), it would constitute an **ultra vires** act by the principal as he cannot evade his **final responsibility** with regard to management, guidance and control of extramural activities.²⁶

The principal may not delegate the **exercise** of his discretion to other members of staff unless he has express authority to do so. In the example **supra**, the deputy cannot **decide** whether the sports organiser should get another opportunity to organise a sports meeting, or whether the other sports teacher should be put in charge. The principal may, however, **instruct** the deputy to **implement the decision**, namely, to tell the sports teacher that he would be in charge of the next sports meeting.

If the principal has appointed a sports committee to **advise** him on sports activities, he may not **subjugate** himself to the directions of this committee. He still has a discretionary power to make his **final** decision on the matter.

8.3.2. The author's act is geographically bound

The principal, as professional leader, exercises his powers within the **school substructure** – the school's territory. If he transgresses his area of jurisdiction, his act will be **ultra vires**. For example, he has no authority over the management of another school.

8.3.3. The author's act is time bound

Whenever the principal has to exercise his powers within a certain time limit, his act will be invalid if it is not exercised within the prescribed period

²⁶ The principle of *delegatus delegare non potest* is illustrated in this case. Principalship is vested with unique status and inherent qualifications which render the principal the best suited person for the job. Bear in mind, though, that without delegation of powers, effective school administration cannot exist. However, the various forms of internal division of work cannot be regarded as the activities of independent or autonomous delegates because the principal cannot delegate his **authoritative position** and his ultimate liability.

of time. He has, for example, certain powers to be exercised when the school opens, when it closes and when he leaves the school. These powers must be exercised within those time periods.

8.3.4. The subject and object of the author's act

The principal usually deals with concrete matters, for example, division of work, school funds, filling of posts and extramural activities. As an example, sports meetings may be classified under extramural activities: the holding of sports meetings is the **subject** of his authority. The **object** of his authority is his powers of management and guidance in this respect. Both subject and object are usually found in empowering legislation. With regard to the subject of authority, it will only apply to sports meetings as an activity of the particular **school**. According to the object of authority, the principal cannot degrade his powers of **management and guidance** to mere regulatory powers. On the other hand, authority to manage and guide extramural activities does not mean that he may **forbid** extramural activities (sports meetings).

It has been said above that the principal cannot maintain effective school administration unless certain **implied and ancillary powers** are recognised. As these powers are not embodied in legislation (the source), it may prove difficult to ascertain the subject and object of these powers. The rules of statutory interpretation will, however, always be applied when the subject and object of the principal's powers have to be determined.²⁷

8.4. Formal requirements

The formal requirements for administrative acts are usually found in **legislation** and the **common law**. Formal requirements relate to the **form and procedure** of the act.

8.4.1. Statutory requirements

The rules of statutory interpretation are applied in the determination of the statutory requirements. The most important question is whether the form

²⁷ The interpretation of implied and ancillary powers constitutes an important part of the interpretation of statutes. Questions may arise about the category of implied powers involved and whether the courts would acknowledge such powers.

and procedure employed correspond to the **purpose** or object of the legislation (the **intention** of the legislature). Furthermore, it must be established whether the statutory provisions are of a **peremptory** or **directory** nature. Peremptory provisions – usually indicated by “**shall**” – mean that adherence to the prescribed procedure and form is compulsory. Directory provisions – normally indicated by “**may**” – are not compulsory and may be dispensed with under certain circumstances.²⁸

The courts have developed certain **useful guidelines** for determining whether provisions are peremptory or directory. These guidelines or tests may, however, not be used as general rules. Consequently, each case has to be considered individually.²⁹ Strictly speaking all statutory provisions must be regarded as **binding** rules and the distinction between directory and peremptory provisions would then be juridically unsound. According to this view the question should not be whether the provision is peremptory or directory but rather whether the administrative authority has the **power to dispense with the obligation to adhere to the particular statutory provisions**.

8.4.2. Common-law requirements

Generally speaking, **all administrative acts must be clear and understandable** and not vague and embarrassing. If **original legislation**, for example parliamentary legislation, is vague and ambiguous, the courts will not declare it invalid but will leave it to the legislative body concerned to put matters to rights. The responsible legislative body will pass either an amending law or a repealing law. The courts may, however, declare **subordinate legislation**, for example proclamations, regulations and by-laws, invalid on the ground of vagueness and uncertainty. Departmental **Manuals** and circulars (under discussion) bearing **internal application**, that are

²⁸ If non-compliance with the requirements of form and procedure leads to unjust results for members of staff or pupils, these requirements must be regarded as peremptory. See *infra* under the discussion of interpretation of statutes.

²⁹ In *Sutter v. Scheepers* 1932 AD 173 the court decided that the word “shall” usually denotes a peremptory provision and non-compliance will result in nullity of the act; if a provision is worded negatively “no person shall”, it is deduced that non-compliance will result in invalidity; if the provision is worded positively but no sanction for non-compliance is attached, non-compliance will not result in invalidity and the provisions will be regarded as purely directory.

vague and ambiguous may be rectified by the competent internal legislative body.³⁰

The rules of natural justice

It has been mentioned *supra* that the rules of natural justice apply to **quasi-judicial acts**. This means that the rules will apply when the rights, powers and privileges of the teacher are affected by the wide discretionary powers of the principal.³¹ The rules of natural justice are also applied by the **courts as judicial acts** usually affect rights, powers and privileges of individuals (parties involved).³² Briefly, these rules mean that the party (parties) concerned must be afforded the opportunity to state his (their) case and must be offered an impartial hearing.³³

As the rules of natural justice form part of the **formal requirements** for administrative acts and are thus related to the **general principle of legality**, one may conclude that these rules are, in fact, applicable to **all administrative acts**. These rules are, in truth, an ingredient of the requirement of **proper attention** which is, according to the principle of legality, applicable to the law of education. The significance of these rules may be further illustrated by the fact that they prescribe **forms and procedures** which have to be followed **before** a decision is made. The principal must approach the sports organiser (see example) and discuss his grievances with him **before** the other sports teacher is appointed for the next meeting. Through their discussion the sports organiser must be given the opportunity to present his version of the matter and the principal must furnish reasons why he is dissatisfied with his conduct. The principal must also be unbiased towards the sports organiser. If the sports organiser is able to put forward **valid reasons** for his apparent incompetence or misconduct, the principal may reconsider the matter and decide to keep him in charge of the next meeting. In other words, under such circumstances his rights, powers

³⁰ When the vagueness or ambiguity of internal subordinate legislation (*Manual*) is placed in dispute before the civil court, the court will not readily interfere and invalidate it. The matter would be referred back to the internal legislator to be remedied.

³¹ See the example under discussion where the principal's conduct did in fact affect the rights, powers and privileges of the sports organiser. Consequently, these rules had to be applied.

³² The internal controlling act, mentioned *supra*, is not a judicial act but in most cases a quasi-judicial act **because** rights and privileges are affected.

³³ See *infra* on the individual rules.

and privileges would **not** be affected: if the principal, however, had **not** applied the rules of natural justice during their discussion, he would most probably not have reversed his original decision.

Finally, it should be noted that the application of the rules of natural justice, albeit in a very informal manner, ensures that the rights and privileges of the teacher will not be **unjustifiably infringed**.³⁴ If rights and privileges are affected and the rules (**and** all the other requirements for validity) have been applied, the decision by the principal will be **just and equitable** and the sports organiser will have to bear the consequences. Under these circumstances one would say that the principal has **devoted proper attention to all the aspects of the case**.

The content of the rules of natural justice

The individual rules may be summarised as follows:

- a. Any person (party) whose existing rights and privileges could be affected by the exercise of the discretionary powers of the administrative authority, must be given the opportunity to put his case: personal appearance is not necessary as the person may put his case in writing.³⁵ According to this rule the person will not have a **right** to legal presentation unless it is conferred by statute.³⁶ This rule is generally referred to as the **audi alteram partem** rule (to hear the other side).³⁷
- b. Any consideration which may count against the person concerned must be communicated to him to enable him to defend the issue effectively. However, where he should reasonably have foreseen which facts would

³⁴ It is very important that the rules (which embody fair procedures) are always applied because it is not easy to determine beforehand whether rights and privileges will/may be infringed.

³⁵ This rule is of prime importance and the courts have already gone so far as to grant the individual an opportunity to put his case **after** the administrative authority has made a decision. Through this procedure the individual, who has not had the opportunity before the time, could now try to persuade the authority to change its decision: **Everett v. Minister of the Interior 1981 2 SA 435 (C)**.

³⁶ The courts will, however, allow legal representation in the case of technical matters where the individual is not capable of defending his own case, or where his freedom is at stake.

³⁷ See *supra* for examples of the application of the **audi alteram partem** rules (rules of natural justice) in education matters.

be taken into account against him, he cannot complain if he did not act upon this knowledge.³⁸

- c. The administrative body that has exercised a discretionary power, must furnish reasons for its decision. It is imperative to know what the reasons for the decision are if one is to prepare an effective case.³⁹
- d. The administrative body exercising the discretion must be unprejudiced and free from bias. The idea behind this is that the body should make an objective decision without having a personal interest in the matter. An important Latin phrase comes to mind: **nemo iudex in sua causa** – no-one may be a judge in his own cause.⁴⁰ A biased exercise of discretion cannot be just and equitable.

Implications of the application of the rules of natural justice

The rules of natural justice must be regarded as **principles of effective state administration**. The author of an administrative act must cultivate a **legal consciousness** and the realisation that he has a **duty** to act in a **just and equitable** manner at all times. Through the application of these basic rules of fairness, accurate, objective and informed decisions can be made in the public interest. The significance of these rules of procedure should not be underestimated.

8.5. The author's act must serve an authorised purpose

The empowering enactment must be analysed to determine what the "authorised purpose" of an act is. The **purpose of the legislation (inten-**

³⁸ The sports organiser (example supra) cannot complain to the principal that he was unaware of the number of guest schools participating in the sports meeting. As organiser of sports activities it seems only reasonable that he should be aware of these facts.

³⁹ In many previous cases administrative authorities contended that they need not furnish reasons for their decisions because, as part of the traditional executive of the state, their **bona fides** (good intentions) could not be disputed and, consequently, the furnishing of reasons would then be superfluous: see **Goldberg v. Minister of Prisons** 1979 1 SA 14 (A) – in particular the minority judgment by Corbett JA. In other instances the courts deduced **mala fides** (bad faith) where the authority refused to furnish reasons for the decision: **WC Greyling and Erasmus (Pty) Ltd v. Johannesburg Local Road Transport Board and Others** 1982 4 SA 427 (A).

⁴⁰ The principal must be careful not to allow his personal opinions to influence objective decision-making. In other words, the exercise of discretionary powers requires professional involvement only.

tion of the legislature) must be established. As is mentioned above, all acts of the state administration must **primarily** serve the **public interest**. Apart from this general purpose, administrative acts are also performed for a **specific purpose**.⁴¹ Whenever the administrative body seeks to achieve an unauthorised purpose through its conduct, it is, in fact, extending its **statutory powers**: it **assumes** certain **legislative powers** and is in fact assuming the function of the legislature. This arrogation of powers will be invalid.

It may happen that the principal is pursuing an ulterior purpose in perfect good faith; sometimes an unauthorised purpose may be pursued **mala fide**, namely, deliberately and consciously. In both cases the motive of the principal, whether he has acted in good faith or in bad faith, is immaterial. The objective **purpose** remains the decisive factor.⁴² A power which has been conferred may not be diverted in such a way that the authorised purpose for which the power has been conferred cannot be served. Such a diversion will manifest itself in the effect and consequences of the act in question.⁴³

It sometimes happens that an administrative organ is pursuing a lawful objective (purpose) but **consciously** uses an **unauthorised procedure** in order to achieve this objective. In some cases this procedure is followed because the correct procedure is more cumbersome or difficult.⁴⁴ Although

⁴¹ See the example given *supra* where in terms of **public-education policy**, the principal acts in the interests of the pupils but also specifically within the **school substructure** where public-education policy is carried out in the form of **extramural activities** (sports meetings).

⁴² If the principal uses his management powers in respect of extramural activities for an unauthorised purpose – for example, to advertise a firm dealing in sport equipment in which he has a majority shareholding, or to sell the equipment at **organised school sports meetings** – it would result in an invalid act. The principal may be guilty of misconduct. To abuse his powers for an unauthorised purpose, remains invalid irrespective of whether he acts **mala fide** or **bona fide**. For example, the principal undertakes to deposit a certain percentage of this income in the school fund account: these good intentions still do not alter the position and his conduct remains invalid.

⁴³ If we use the above example: it becomes clear, after the sports meeting that the principal's excessive commercial activities detracted from the real purpose of sports meetings, namely, to encourage school sports activities and healthy competition.

⁴⁴ The principal is conscious of the cumbersome and complicated procedure for recommending teachers for merit awards. Without giving proper attention to the matter, he decides to use an easier procedure for recommendation which would, in any case, eventually lead to the appointment of the particular teachers as candidates. The superintendent of the department concerned, approaches him as some of the prescribed reports regarding this matter, have not been completed. The principal's conduct is regarded as invalid and he will have to start the preparations all over again using the correct methods. In the meantime, a teacher concerned could have been prejudiced by the principal's original conduct as he would have to wait so much longer to be considered as a candidate for a merit award.

the **fraudulent intention** may have been absent in the previous case it will play an important role here. Strictly speaking, this **procedural** defect could have been dealt with under the heading of **formal requirements**, but because the **effect and consequences** of this act are decisive factors, it is treated in a similar way to an act performed with an unauthorised purpose in mind. It may thus be contended that where an authorised purpose is being pursued, but an unauthorised procedure employed, the act should, in fact, not be invalid. However, because the authorised purpose is being pursued in an **unauthorised manner**, it is invalid.⁴⁵

8.6. The requirements relating to the consequences of the author's act

The question arises whether the **unreasonable effect and consequences** of the administrative act constitute a sufficient ground *per se* for invalidating the act. The courts are not inclined to see **reasonable effects** as an **independent requirement for validity** but rather take the line that the unreasonableness should be of such a serious nature that it is symptomatic of non-compliance with one of the other requirements for validity.⁴⁶ For example, once it has been established that the **author** has acted **ultra vires**, this and not the unreasonable consequences of his action will be the decisive factor influencing the validity of the action. In the same way, where the **formal** requirements have been ignored, the act will be invalid on the ground of those formal defects rather than on the ground of the unreasonable consequences of the failure to comply with the formal requirements.⁴⁷

⁴⁵ In the *Van Coller* case *supra*, an unauthorised procedure was followed for a lawful (authorised) objective: more specifically, disciplinary proceedings were disguised as a transfer. The act was declared invalid as the rules of natural justice (formal requirements), which should have been followed, were not observed. The authority chose to follow an easier and more convenient procedure. Although the transfer of the principal was indeed the lawful objective of a disciplinary inquiry against him, the *audi alteram partem* rule (a procedural requirement) was prescribed for disciplinary proceedings.

⁴⁶ In *Feinstein v. Baleta* 1930 AD 319 the court held that the unreasonable consequences of an administrative act, could not *per se* be regarded as a ground for contesting the validity of the act. They can, however, be used to prove *mala fides*, unauthorised purpose or a lack of proper attention. In *Stadsraad van Vanderbijlpark v. Administrateur, Transvaal en Ander* 1982 3 SA 166 (T) it was held that reasonableness *per se* does not constitute an objective requirement for validity.

⁴⁷ Another approach is that the presence of unreasonableness is a sign that the author has not paid due attention to the matter, that he has not acted in compliance with a general "duty to act fairly". Although the emphasis here is not so much on the objective consequences as such, the end result is much the same: the administrative act must be performed with due regard to all requirements for validity.

The unreasonableness of an administrative act should be judged by applying legal criteria which are derived from the **common law**. Under the common law there are **presumptions of interpretation of statutes** according to which an act must have a specific, reasonable, effect.⁴⁸ Certain individual rules emanating from reasonableness, have crystallised as requirements for the validity of administrative acts. For example:

- no person may be done an obvious injustice;
- the authority must exercise its powers in such a way that the effect oppresses the individual as little as possible;
- administrative powers must not be exercised in an arbitrary or ridiculous manner;
- there must be no discrimination between groups or classes of persons.⁴⁹

Finally, one may deduce that the administrative authority may not, without express or implied authorisation, cause unreasonable consequences to ensue through his conduct.⁵⁰ If this approach is adopted, **objective unreasonable effects, per se**, must give rise to invalidity.⁵¹

⁴⁸ Common-law presumptions are discussed in greater detail *infra*.

⁴⁹ With regard to unreasonable and discriminating legislation, bear in mind that the courts cannot declare **parliamentary** legislation invalid on the ground that they are unreasonable or discriminatory. The courts will merely interpret the legislation according to its clear purpose (the intention of the legislature). If discrimination and unreasonableness are thus authorised, the courts are bound to give effect to the legislation: *S v. Adams* 1979 4 SA 793 (T). In the case of **subordinate** legislation, the courts may indeed invalidate unreasonable and discriminatory enactments: provided discrimination and unreasonableness are not authorised in the **empowering** enactment expressly or by necessary implication. In other words, if the administrative body discriminates without the authority to do so, its conduct would be *ultra vires* – beyond the bounds of its statutory powers: *S v. Werner* 1980 2 SA 313 (W).

⁵⁰ The principal who intentionally, or through an oversight, had omitted a teacher's name from the list of merit awards, thereby causing unreasonable consequences, would have performed an invalid act. If the principal had caused unreasonable consequences to the teacher through his **bona fide** conduct, and one had to evaluate the act on the premiss that reasonableness is not an independent requirement (the first view discussed), the teacher would not have had a ground for invalidating the act as it could not have been invalidated under any of the other requirements for validity. If reasonableness is, however, recognised as an independent requirement, the **state of mind** (intention, which is measured by a subjective criterion), of the author would not be regarded as the decisive factor but rather the **effects and consequences** (tested by an objective criterion) emanating from his conduct.

⁵¹ In *Theron en Andere v. Ring van Wellington van die NG Sendingkerk in Suid-Afrika en Andere* 1976 2 SA 1 (A) the Appellate Division recognised reasonableness as an independent ground for validity although there was no clear majority on the issue. The view of the minority (which, of course, is not binding in terms of the **stare decisis** principle but may have persuasive power) was that unreasonableness should be an independent ground for invalidity. The practical effect, if the minority decision is followed, is that our courts will have a much wider power of review and will be obliged to apply the common-law presumption against unreasonableness.

8.7. The rule against *mala fides*

All administrative acts must be performed in good faith. The application of this rule goes further than the operation of one or more of the requirements for validity: it actually applies to **all the requirements for validity**. To put it crisply, if the author had given proper attention to all the aspects of the case, it follows naturally that he would also have acted **bona fide**. On the other hand, the author who acted **mala fide**, could not have given proper attention to the case because his **conscious** blameworthy state of mind prevented him from devoting proper attention to all the aspects of the case.⁵² **Mala fides** thus relates to a **consciousness of wrongfulness** (invalidity). On the other hand, it must be remembered that an invalid act does not become valid simply because it has been performed in good faith (**bona fide**).⁵³

Although **bona fides** is not an independent requirement for validity, it constitutes the basic rule **underlying** the validity of **all administrative acts**.⁵⁴ There are certain consequences attendant upon **mala fides**:

- a. Where it is provided that all internal remedies must be exhausted before a judicial remedy is sought through the court, the **mala fide** conduct of the author will give the aggrieved individual the right to appeal to the courts **directly**;
- b. Even where judicial review is expressly excluded by statute, acts performed **mala fide** will nevertheless be subject to review;
- c. The courts are hesitant to interfere with the discretionary powers of the administrative authority and will not, by means of review, substitute

⁵² For example, the principal who acted **mala fide**, knew or should have known that as a result of his bad faith, his conduct would not, for example, meet the requirements regarding the author, formal requirements, the purpose or effects of the act, but nevertheless he persisted in performing the invalid act. Therefore the principal who acted in bad faith against the teacher omitting his name from the list recommending merit awards, was conscious of his blameworthy state of mind (his intentions) and also realised that he could not allow his personal grievances to affect his conduct. The superior internal controlling body may invalidate the principal's act and give strict instructions on how the act is to be performed.

⁵³ To go back to the discussion under unauthorised purpose as a requirement for validity, the **good intentions** of the author cannot validate an act performed for an unauthorised purpose.

⁵⁴ In **Bam v. Minister of Justice and Others** 1976 4 SA 643 (Tk) the Transkeian court confirmed this and held that in the field of administrative law the expression **mala fides** is used to cover a wide variety of situations.

the resolution of the authority for its own. Although the invalid act is usually referred back for reconsideration this is not done where **mala fides** is present. Under these circumstances it would be senseless to refer the matter back for reconsideration and the court will usually give **specific instructions** on how the decision should be altered;

- d. The state is liable for invalid administrative acts performed **mala fide** by the body/organ (employee), even where such liability has been excluded or otherwise limited.

Résumé

According to the general principle of legality as it applies in the law of education, all administrative acts, whether internal or external, must comply with all the legal requirements for the validity of administrative acts.

These legal requirements for valid acts must be followed by the principal when he exercises his wide discretionary powers within the school sub-structure.

Basic fairness is not found only in the judicial acts performed by the courts, although court decisions constitute authoritative case law. Fair and equitable conduct constitutes the foundation of sound education policy and administration and requires the conscious pursuit of these aims by all administrative bodies/organs.

Each individual requirement for validity is aimed at a specific aspect of the act. Only when proper attention has been given to all the aspects of the case, may one say that a just and equitable act has been performed. An act which lacks compliance with all the requirements for validity, is usually regarded as unlawful (irregular) because a rule (or rules) for validity has been ignored. The superior administrative controlling body scrutinises the invalid act by way of a complete reconsideration of the issues and restores equilibrium through the application of internal measures. Under certain circumstances the courts may, however, exercise judicial control by means of review.

9. CONTROL OF ADMINISTRATIVE EDUCATION ACTS

(The following discussion is presented in a summarised form as some of the material has already been incorporated elsewhere.)

9.1. Introduction

Control over administrative acts may be divided into **judicial control** and **non-judicial control**.

9.2. Non-judicial control

9.2.1. Internal control

Internal or domestic control is the most important form of non-judicial control and is exercised by the administration within the **internal structure** of control. This form of control is exercised over administrative acts with **internal** as well as **external** operation.⁵⁵ As is mentioned above, internal control is an effective and relatively cheap way of settling administrative disputes without interference by the ordinary courts.⁵⁶

The case is reconsidered by the higher administrative body (domestic tribunal) which actually reviews the matter fully: this is usually referred to as a *de novo* hearing. All surrounding facts and reasons (also new evidence) are considered to establish whether the alleged excess of powers or irregularity has occurred. Furthermore, the desirability of the act is examined and its merits assessed. Briefly, the controlling body must determine whether a **valid** act has been performed.⁵⁷ Internal control therefore pro-

⁵⁵ Bear in mind that acts performed within the public-school administration may also have application outside this sphere: the implementation of internal school policy and administration may also affect the parents and other private individuals. Acts with typical **internal** operation are those performed by the principal *vis-à-vis* his members of staff; for example, in relationships between the principal and the sports organiser and the principal and the sports teacher. (The relationship that could develop between the sports organiser and the sports teacher, see the example given above, is also an internal matter.) A school management act which may have **external** effect, is the act of the sports organiser *vis-à-vis* the pupil (his parent/guardian) when arguments arise about the pupil's participation in sports activities.

⁵⁶ The education administration is, after all, part of the traditional **executive**. The **judiciary** (civil courts) performs judicial acts which constitute our case law. This clearly illustrates the **separation of powers** principle in terms of which internal controlling bodies cannot perform judicial acts.

⁵⁷ By virtue of his position of authority within the school substructure, the principal will be in control of internal matters. He will have control over internal matters regarding his members of staff: if the sports organiser's instructions to the sports teacher give rise to certain arguments, the principal, as the person ultimately in control of extramural activities, will scrutinise the sports organiser's conduct – naturally by considering the requirements for validity. In the same way he will control and decide on the external act between the sports organiser

vides for the re-hearing and re-evaluation of administrative decisions and for the removal from office of inefficient officials, where necessary. Within the school substructure the principal is the authority which reviews all internal matters regarding his members of staff. He cannot, however, demote or dismiss a member of his staff on the ground of unprofessional conduct or inefficiency. This is a serious matter which entails much more than internal school administration only: after all, the principal is subject to the control of the education department and the professional teachers' council in terms of the **decentralisation relationship**. Under these circumstances the principal must report the matter to the superior controlling body: the appeal will go further to the highest body and the teacher concerned must get the opportunity to defend himself.⁵⁸

The **structure** of internal control is usually found in **legislation**. In terms of his position of authority and as professional leader of the school, the principal will, in terms of internal legislation, be the controlling body within the school situation. The TFC (with its disciplinary committee) constitutes an important controlling body and may, in terms of subordinate legislation, institute disciplinary steps against teachers. Central and subordinate legislation provides the channels for control within the different education departments, for example, an appeal to a particular director, administrator or minister. The minister is normally the highest controlling body within the education department.

9.2.2. Parliamentary control

The traditional **executive is responsible to Parliament** (the legislature). This means that all executive councils/bodies at central level, as well as second- and third-level executive bodies, must eventually report to Parliament, whether directly or indirectly. In this vein all administrative acts may be controlled by Parliament. Within the education sphere it means that the respective ministers' councils must report to their respective houses in Parliament on **own-affairs** education matters: in the case of

^{57 cont.} and the parent of the pupil (example *supra*). In both instances the principal may call new evidence and examine facts that were not previously directly relevant. He may also consult his sports committee about the desirability of a decision. Through these methods of examination the principal must ultimately make an independent decision which is just and equitable.

⁵⁸ The act of the principal against the sports organiser (see example), cannot be reviewed by him (since the sports teacher has acquired rights) unless it has not yet been finalised. The principal's conduct (as author) must go on higher appeal to the superintendent or the directors of education concerned.

general-affairs education, the Cabinet must report to Parliament (the three houses). For example, proclamations by the State President and the administrators, and regulations by the ministers, must be tabled in Parliament (or the house concerned) within a certain number of days after promulgation. These different forms of control are not always effective as party politics play a significant role.

9.2.3. The requirement that internal remedies should be exhausted

The question often arises whether the prescribed **internal remedies** which are offered via internal control, should be exhausted before the ordinary courts are approached for judicial control. Judicial control exists **alongside** internal control but is in reality foreign to the internal structure and mechanism of the administration and stands outside it. When viewed in this light, insistence on the rule that internal remedies be exhausted can be justified. It is indeed unreasonable for the individual to rush to court before statutory remedies (internal) have been exhausted: the latter are usually cheaper and more expeditious than judicial remedies.

Our **legislation** and **case law** are not always clear on whether internal remedies should be exhausted or not. However, certain practical guidelines which emphasise the **nature** of the **administrative-law relationship** within which the internal appeal is taking place, have been formulated:

- in the relationship of **administrative deconcentration** it is simply logical and desirable that the possibilities of internal appeal be exhausted before the court is approached. The principal is, after all, the **responsible** body with complete powers of review and control within the school substructure. It may indeed be said that an approach to the court, before the principal has had the opportunity to review the case, is untimely and would thwart the practical school administration. One could say that the dispute is not yet justiciable at this stage and can thus not be brought before the court as a **concrete legal dispute**.⁵⁹

⁵⁹ It does not seem desirable for the sports organiser or the sports teacher to approach the court about the principal's *mala fide* act. Strictly speaking, the principal does not control this act because he was the **author** (he performed it) and is the responsible organ: the sports organiser and the sports teacher could, in any event, not have acted independently. The principal is bound to the education department by the relationship of **decentralisation** and, therefore, cannot be taken to court in his capacity as **principal**. The highest body in the public-education structure (usually the minister, administrator or director) will **ultimately** bear the responsibility in its capacity as highest authoritative organ and this body will represent

- in the relationship of **administrative decentralisation** the possibility of judicial appeal exists **alongside** internal appeal. The nature of the application for review will be decisive. If the case relates to considerations of efficacy or policy, internal control is desirable, as the court will not express its views on policy matters. When the case is based on purely legal grounds, for example, non-compliance with the requirements for validity, an appeal to the court is obviously more desirable. Bear in mind, though, that it is totally erroneous to assume that only a court of law may decide about **disputes of law** by means of **judicial acts**.

9.3. Judicial control

Judicial control is exercised by the civil courts. These **authoritative** decisions create **case law** which, in terms of **precedent** (the **stare decisis** principle) is binding on the inferior courts.⁶⁰ Although judicial control stands **outside** the state administration, it is known to be the corner-stone of the control of administrative action in a democratic state: from this one may deduce that judicial control exists side-by-side with internal control.⁶¹

There is **solidarity** within the public-education hierarchy. This means that one administrative body cannot institute a court case against another:

^{59 cont.} the state in a court case. State liability will be discussed in greater detail *infra*. (Bear in mind that the sports organiser and sports teacher may, in cases where they have been personally prejudiced by the principal, institute a **private law** (civil) action against him: under these circumstances the principal will be sued in his personal capacity.) See under judicial control for the requirements regarding a **legal dispute**.

⁶⁰ A court decision (judicial act) must comply with certain requirements:

- a. A **legal dispute** (*lis inter partes*) or an **uncertainty** must exist in respect of rights, powers and privileges and a **decision** must be made;
- b. The organ/body performing the judicial act must be a court in substance: it must be independent, accessible, must follow formal court procedures and be composed of officials with legal training;
- c. The act performed must be **final and binding** and the author (court) must be **functus officio**;

Bear in mind that **judicial** officials often perform administrative acts: the magistrate issues a reception order for the mentally ill patient; the judge issues a sequestration order. These orders or decrees (purely administrative acts) do not comply with the requirements for judicial acts, but are often called **quasi-judicial** acts.

⁶¹ According to the doctrine of **separation of powers** the state administration (the executive) is separated from the judiciary. The judiciary is, after all, renowned for its **independence**.

All administrative bodies serve the same **public interest** and must show a **united front**. The **state** is vested with **legal personality** which means that, from a legal perspective, the state is recognised as a **subject** (a person in the eyes of the law) bearing rights, powers, duties and privileges. The components of the state, administrative bodies/organs, do not, except in certain cases, have separate legal personality but act as representatives of the state. It is a well-known fact that the **state** will ultimately be liable for the unlawful acts of its officials (servants, employees).⁶²

When the administrative body (the principal or teacher) decides to approach the court (external control) for judicial control of **internal** matters, the official must sue the education authority in his **personal capacity**.⁶³ The court decision which emanates from the court case creates **authoritative** case law which applies in **public**: for this reason the one administrative body cannot act in public against the other as it would impair the solidarity of the state.

In the case of **external** acts, namely, where the parent of the pupil or another private person institutes legal proceedings against the principal in his official capacity, or against the superintendent (inspector), the **state** will be held liable for the unlawful act of the official (servant); the highest education authority, as the representative of the state, is usually cited as **respondent** in appeals and applications.

In order to approach the court for judicial control, the applicant must meet certain conditions, for example, he must have **locus standi** to bring his case before the court and internal remedies must have been exhausted.⁶⁴

9.3.1. Review

The **Supreme Court** (with its different provincial divisions) is the **body** which is responsible for the **judicial review** of administrative acts.

⁶² The **highest executive body/organ** of the state is cited in a court case. This also explains why the principal cannot dismiss the teacher because the case has to be heard at the highest **internal** level. See *infra* on state liability.

⁶³ Refer to the **Van Coller case supra**, where the principal acted in his personal capacity against the Administrator; in the **Swart case supra** the teachers concerned (among them Swart) sued the Minister of Education and Culture (House of Representatives) in their personal capacities.

⁶⁴ See the discussion on **locus standi infra**, and internal remedies *supra*.

Under the **common law** the Supreme Court has an **inherent power of review** over all **administrative acts**.⁶⁵ Even in cases where legislation has excluded this power, the courts will be reluctant to accept this exclusion and will, under certain circumstances, still exercise their power of review.⁶⁶

When an administrative act is reviewed, the courts will **presume** that the act has been performed **validly** unless there is a clear indication to the contrary. The application of this presumption cannot, however, validate an invalid act. The grounds for review are mainly gross **irregularity** or clear **illegality**: in other words, **non-compliance with the requirements for validity**. The court will not express itself on matters which deal exclusively with school policy, nor will it make decisions on the desirability or efficacy (merits) of school management actions. Furthermore, the court may go beyond the record of the proceedings in order to establish whether the irregularity did indeed occur. The court will, however, not substitute its own opinion for that of the administrative body but will usually refer the case back to the internal authority for reconsideration.⁶⁷

Review offers an **effective judicial remedy** for administrative disputes as it applies to all administrative acts. Nevertheless, administrative policy and efficacy are always respected by the courts. There are different procedures relating to review which will not be discussed here.

9.3.2. Statutory appeal

Statutory appeal is also an **effective judicial remedy**, although our courts have no **inherent appeal jurisdiction**. The courts hear appeals

⁶⁵ The court cases that are mentioned in this study and in which the highest education authorities have acted on behalf of the state, are mostly decisions in which disputes from **internal controlling bodies** were reviewed by the provincial divisions of the Supreme Court. In the *Van Coller* case *supra*, the Transvaal Provincial Division of the Supreme Court reviewed the disciplinary proceedings by the Administrator against the principal. The Administrator of Transvaal, the highest education authority in the Transvaal, was sued on behalf of the state. In *Cape Teachers Professional Association and Others* *supra*, the Cape Teachers Association – which is not an official (statutory) professional council – approached the Cape Provincial Division to review the decision of the Minister of Education.

⁶⁶ There are instances in education legislation where no express provision is made for judicial review or appeal (see *infra*): the *Mentally Retarded Children's Training Act* 63 of 1974, provides in section 27 that the minister's decision is "final"; the *Ordinance on Special Education (Transvaal)* 20 of 1968 provides in section 4 that the administrator's decision is "final"; in the *Educational Services Act* 41 of 1967 section 36, the minister's decision is "final".

⁶⁷ Where the internal authority has acted *mala fide*, the court will give special instructions about the way in which the decision is to be taken.

on **matters of fact or law** but only when jurisdiction has been specifically conferred by **statute**. Subordinate legislative bodies, such as administrators, ministers, or legislative education bodies at third level, cannot, unless authorised by Parliament (by means of central legislation), provide for statutory appeals in subordinate legislation.

During appeal proceedings the court of appeal is restricted to the record before it but must go into the merits of the case. Appeals may be lodged only against final orders, not provisional or interlocutory orders. There are three kinds of statutory judicial appeal:

- a. Appeals from lower courts to the Supreme Court in terms of the Magistrates' Courts Act;
- b. Appeals from statutory, non-judicial bodies such as the liquor licensing board, which are treated in the same way as above,⁶⁸
- c. Appeals from statutory bodies such as the race classification board, for which special appeal procedures are provided.

9.3.3. Interdict

The interdict also provides an effective judicial **remedy** and may be applied for when the applicant fears that an act or impending act by the administration will prejudice him or affect his rights. The interdict is usually issued in **urgent** cases when no other effective remedy is available. The applicant must prove that he will suffer **irreparable damage** if the interdict is not granted.

There are several other judicial remedies which are not discussed here. Consult the bibliography for more information.

9.3.4. The requirement of **locus standi**

Locus standi raises the question whether the interest which the applicant clearly has in the matter is a sufficient, **legally recognised interest** which

⁶⁸ The South African Teachers' Council for Whites Act 116 of 1976 (now repealed) provided in section 24 that the aggrieved teacher could after due notice had been given to the SATC, appeal to the relevant provincial division of the Supreme Court of South Africa within three months after the former had acted against him.

can justify his application for judicial redress. In our law the position is that any person has **locus standi** to apply to the court for relief by means of **review**, an **interdict**, or to bring an action for damages, if he has sustained **loss or damage**.

When **administrative legislative acts** which create **general relationships** are in question, the applicant must prove that he belongs to the particular class or group of persons to whom these general measures are applicable and that his rights, privileges and powers will be infringed in the event of the general application of these measures. Moreover, persons in the **general administrative-law relationship** have an interest in compliance with the rules and procedures that govern such a relationship without having to prove that they have suffered **real or potential prejudice**.

In the **individual legal relationship** rights, powers and privileges are vested, altered or terminated. If the interests of a private individual or an administrative body are **directly** affected by an administrative act, such a person or body has **locus standi** to approach the court for judicial redress. **Third parties** – subjects not directly involved in the individual relationship – will have **locus standi** only if they are able to prove some **personal interest**: for example, that the implementation of the act would probably prejudice them, or that they belong to a class or group on whose behalf the act was carried out.

Résumé

Different forms of administrative non-judicial control exist: the most important form of control is internal control as it underlies effective, practical state administration. Although it does not constitute case law, it is binding within the particular administrative hierarchy.

Judicial control is exercised by the ordinary courts of law and creates case law which has a general binding effect. Internal remedies are normally exhausted before an appeal may be made to the courts. An applicant must have **locus standi** before he is entitled to approach the court for a judicial remedy.

This discussion must not be seen as comprehensive. Additional material, listed in the bibliography, must be consulted.

10. THE LIABILITY OF THE STATE FOR ADMINISTRATIVE EDUCATION ACTS

10.1. Introduction

Bear in mind that the following discussion refers to the liability of the state as a result of **judicial proceedings** instituted against it. Whenever the state is sued by its **officials** (servants) or the **private individual** in the **civil courts** (the public courts), both applicants act in their **private capacity**: as regards the official, it is the state and not its components, which is vested with **legal personality** in this case.⁶⁹

As was said above, the state administration comprises all the administrative bodies/organs which are directly involved with the execution of authoritative powers. During the course of its activities the administration performs duties which may affect the rights of individuals and cause prejudice. In most cases though, the administration has a **lawful basis** for its conduct in which case the individual has no action. If, on the other hand, the administration acts **wrongfully** and causes **damage or loss** to the individual, the law requires that the individual be compensated for the loss or damage.

Section 1 of the State Liability Act 20 of 1957, provides that the state will be liable for “**any wrong committed by any servant of the State acting in his capacity and within the scope of his authority as such servant**”. In terms of this Act as regards the wrongful act (delictual liability), no difference exists between the position of the state and its servants (public law) and that of the master and servant in private law.

If state liability were based on a private-law basis, this could, however, cause problems, as the state is not merely a **private** employer. The state and its components must, after all, act in the **public interest** and in this respect a private-law basis would be ill-equipped for this purpose. As yet, no wholly and generally acceptable legal basis for the liability of the state for administrative acts has been established in our law. A more acceptable basis – which includes a **form of private-law liability** – would be that the state in rendering wide-ranging services to promote the general public

⁶⁹ Bear in mind, though, that certain autonomous administrative education bodies, like the TFC, are clothed with legal personality. Under certain circumstances such a body may file a suit in its **official capacity** against, for example, the Minister of Education and Culture (House of Assembly).

interest, must take responsibility for the **risk** that its **employees** may commit **delicts** (wrongful acts) which may cause loss that has to be made good.

Because state liability arises almost exclusively from administrative acts within the **individual legal relationship**, the emphasis will fall mainly on “purely administrative acts” as a source of such liability.

10.2. Lawful administrative acts

A **lawful** administrative act by the administration is performed within the sphere of its **authority**. The interpretation of “authority” – as is also mentioned in the Act *supra* – raises certain questions. It may be given a narrow interpretation, in which case authority would be **statutory** authority (statutory powers). In this regard the **intra vires** act performed by the administration would be a lawful act, irrespective of the fact that it may have caused unreasonable consequences for the individual. Seen from this angle, the administrative act would not comply with the principle of **general legality**: in other words, according to the discussion on valid acts *supra*, it would be an **invalid** administrative act. As general legality constitutes the foundation of sound administration, it must be said that the exercise of a statutorily authorised power in an unreasonable manner, is **invalid** and also **wrongful** if the **unreasonable exercise** thereof infringe rights, powers and privileges.⁷⁰

It is suggested that “authority” in the above-mentioned Act should be given a wider interpretation in order to mean “**acting within his capacity and within the scope of his employment as such a servant**”.⁷¹

In the education administration this approach would mean that the principal cannot act purely in terms of his **statutory powers** (whether provided expressly, by implication or as ancillary powers) but must also act in a **just and equitable** manner. Compliance with the requirements for validity

⁷⁰ As was said *supra* under reasonableness as a requirement for validity, **unreasonableness** relates to the **infringement of rights, powers and privileges** of the individual.

⁷¹ This interpretation was followed in a decision of the Appellate Division, **Mhlongo NO v. Minister of Police** 1978 2 SA 551 (A). **In casu** state liability for the acts of policemen was put beyond doubt by the inclusion of section 5 in the Police Act 7 of 1958. The effect of this amendment is that the state will be liable for the **wrongful act** of a policeman performed within the scope of his “employment”. However, as police acts constitute a particular type of administrative act, one would be cautious not to equate them with acts normally performed by the state administration.

thus signifies not only **lawful** conduct but also **valid** conduct according to the **general principle of legality**.

10.3. Wrongful administrative acts

Flowing from the discussion above, the statement may be made that **wrongful** administrative acts are **invalid** acts which **infringe the rights** of individuals in a **culpable** manner causing them **damage or loss**.

In the assessment of wrongful acts by the administration, the following criteria are employed:

10.3.1. A wrongful administrative act is naturally invalid

Wrongful administrative acts are not automatically delicts.⁷² Only those wrongful acts which **infringe the rights of the individual and cause damage or loss**, raise the possibility of state liability.⁷³

10.3.2. The administrative organ who has acted delictually must have a blameworthy state of mind

The form of fault that is required here, as well as in private law, is either **intention (mala fides or dolus)** or **negligence (culpa)**. The **blameworthy state of mind** which is required in **mala fides** is tested by means of **subjective** criteria, for instance, did the **particular principal act mala fide**? Where negligence is concerned, the care of a **reasonable man** (the **bonus paterfamilias**) is used as criterion: for instance, would a reasonable principal have acted in this way? This test is an objective test of reasonableness.

10.3.3. The wrongful authoritative act must be performed by a servant of the state

In order to determine who is a servant of the state, the **status** of the particular person must be considered. The following questions could serve as

⁷² Delicts are found in private law and are tested against similar requirements.

⁷³ Many examples exist where the acts of the principal, in terms of his authoritative position, may encroach upon the rights of his members of staff: this infringement is, however, not always wrongful.

guidelines: who pays the person? with whom has he entered a service contract into? who decides on his promotion, transfer or dismissal?

The next question is: when does the servant act in his capacity as a servant of the state? Certain **formal** and **material** tests are used here. The formal test is whether the delictual act took place during ordinary working hours. This test is not conclusive, as the principal may also act in his capacity as principal **after** working hours. Certain material tests must therefore be used with the formal test. For example, the **purpose** and the **nature** of the principal's act must be examined.⁷⁴ Another material test that may be applied is to examine the **nature** of the **relationship** between the state and the principal. In this regard the courts will ask whether the principal was under the direct **control** of a higher authoritative body while performing the act. The control test caused many problems in the past as it was accepted that a servant who exercised a **discretion**, was not under the control of the state.⁷⁵ From this point of view, the exercise of a discretion implies that the person is acting in a **private capacity** and consequently, the principal would be **personally** liable (in his private capacity) for his discretionary conduct.

The courts do not actually use the original control test any longer but, instead, enquire whether the servant has acted in terms of the **authority** vested in him. In other words, the courts will still examine the **control** exercised over the servant, but on a much wider level, namely, whether the act was performed in accordance with the general requirements of the law.

10.3.4. The aggrieved person must prove that he has suffered damage

The type of damages which can be claimed from the state in respect of administrative acts, is also determined by **private law**. Material damage may be claimed via the **actio legis Aquiliae** while damage to the person (for example for dishonour to his reputation, dignity or integrity) may be

⁷⁴ When the **nature** of the principal's act is scrutinised, his **position of authority** must be considered. The deputy may also perform acts of school management in his capacity as servant of the state although he cannot perform them in terms of an **authoritative position**. Within the school substructure only the principal is vested with this special **status**.

⁷⁵ In another police case, **Naidoo en Andere v. Minister van Polisie** 1978 4 SA 954 (T), the court rejected this narrow application of the control test with its ridiculous implications.

claimed via the **actio iniuriarum** (action for defamation).⁷⁶ The individual may institute the **actio iniuriarum** against the state, but the state cannot institute this action against an individual.

10.3.5. The state has the power to alter its liability by way of legislation

The state may regulate its liability at any time before or after the commission of a wrongful act by its servants. It may also exclude liability in certain instances.⁷⁷ Certain formal procedural requirements may also be instituted through legislation, for example, compliance with provisions relating to the service of documents; compliance with provisions as to whom to cite as nominal defendant or respondent; compliance with provisions relating to the time within which actions may be instituted.⁷⁸

10.3.6. Strict liability based on risk

As a general rule, our law does not recognise strict liability based on risk. In some instances the state does not compensate individuals who have suffered damage or loss despite the fact that there has been no fault on the part of the servant (author), for example, in the case of dangerous activities by the state in terms of the Electricity Act 40 of 1958.⁷⁹

⁷⁶ Both actions are called delictual actions but are instituted according to the nature of the damage or loss. The **actio legis Aquiliae** is used by an aggrieved person in the case of material damage or loss. To illustrate this point: say that the school bus has been damaged as a result of the **mala fide** conduct of the principal. The law supplies a remedy for the pecuniary loss caused by this act and normally a sum of money will be paid out. In the event of the **actio iniuriarum** where the aggrieved person's reputation, dignity or personality is dishonoured, the loss or damage is not of a material (pecuniary) nature but immaterial as it affects personal qualities. An example would be the defamatory conduct of the principal against the teacher or pupil. However, once the **actio iniuriarum** has been successfully instituted against the offender, the "loss" or "damage" will be calculated by the court in financial terms and paid out to the aggrieved party.

⁷⁷ The South African Teachers' Council for Whites Act *supra*, provided in section 25 that the former SATC and a member or employee of the council would not be liable for damages resulting from an act performed in terms of certain sections of the Act.

⁷⁸ In terms of the above-mentioned Act the teacher could appeal to the Supreme Court within three months after the SATC had acted against him.

⁷⁹ In order to succeed with a delictual claim against the state, the plaintiff must not only prove wrongfulness and damage or loss, but also that the official acted intentionally or negligently.

10.3.7. Limitation of state liability by the presumption that the state is not bound by its statutes

The presumption that the state is not bound by its statutes applies, unless the legislature binds the state expressly or by necessary implication.⁸⁰

Résumé

When the liability of the state for administrative acts is determined, the nature of the relationship between the state and its servant must be analysed. Certain criteria are employed in this regard.

The state is vested with legal personality and therefore the highest authoritative body in the education structure will normally be cited – in its capacity as the representative of the state – in legal proceedings.

“Lawful” administrative acts must be interpreted according to the general principle of legality in order to render the state liable for administrative acts conducted in an unreasonable manner.

Wrongful administrative acts are invalid. Certain aspects must be borne in mind whenever state liability must be established.

This discussion must be supplemented with additional material from the bibliography.

⁸⁰ More information will be supplied on this point *infra* under interpretation of statutes.

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SECTION B

THE INTERPRETATION OF
EDUCATION LEGISLATION

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PART ONE GUIDELINES FOR THE INTERPRETATION OF STATUTES

This section consists of two parts. Part One deals with the **theoretical** part of the interpretation of statutes and Part Two covers the **practical application** of the rules of statutory interpretation.

1. INTRODUCTION

The interpretation of statutes, or more correctly, the **juridical** interpretation of statutes, is a comprehensive task which covers almost **every facet of the law**. Because it is so comprehensive, it involves many rules and methods which, unfortunately, cannot be neatly compartmentalised. It is therefore quite understandable that law students regard the interpretation of statutes as one of the most difficult subjects.

According to the title, this section deals with the interpretation of **statutes** (legislation). Legislation as a **source** of the **law of education** has been discussed **supra**. It was also observed that statutory law (written law) must be seen as the most significant source of the law of education: it creates the public-education structure and regulates its organisation, powers and activities.¹

As the powers and activities of education bodies are embodied primarily in education legislation, teachers should have some knowledge of the **interpretation of statutes**. The principal will consult the education legislation, whether it be **central or subordinate**, to establish the nature and scope of

¹ Refer to the discussion on legislation as a source of the law of education and administrative legislative acts **supra**.

his powers and duties; the teacher must acquaint himself with his powers and duties **vis-à-vis** the professional council or the education department; the superintendent (inspector) must consult legislation in order to determine his position **vis-à-vis** the principal or the teacher; directors of education or other bodies of internal control must adhere to particular rules when they act against subordinate education officials. Statutory interpretation is therefore encountered not only in **problem cases** but throughout the **application** of legislation, whether consciously or unconsciously.

The civil courts (**judiciary**) are the chief interpreters of legislation: our case law consists of authoritative decisions that are binding on the lower courts. Through this process the rules and principles of statutory interpretation have developed and become established. Within the **internal education sphere** legislation is interpreted on an almost daily basis by a wide spectrum of **education officials** who are all, needless to say, aware of the many problems which arise from the process of interpretation. Ignorance of this field of study may, however, be the main cause of these problems.

In the discussion which follows, an attempt will be made to demarcate the theoretical field of interpretation of statutes and the practical application will be explained. The intention is not to provide a comprehensive discussion but only a basic framework to which may be added the reading matter to be found in the bibliography.

2. THE NATURE AND SCOPE OF INTERPRETATION OF STATUTES

Within the theoretical structure of this field of study, there is a variety of **rules of interpretation**, which differ in **nature and application**. Some of these rules may indeed be called **legal rules**, as their origin or source would be legislation, the common law or case law.² Other rules of interpre-

² The Interpretation Act 33 of 1957 may be regarded as an important source of rules of interpretation; legal presumptions which have a common-law origin, also form a valuable source; decisions of the Supreme Court relating to interpretation of statutes, also create binding rules of interpretation. For example there is, *Dadoo Ltd v. Krugersdorp Municipal Council* 1920 AD 530 on the application of the literal rule; *S v. Kohler* 1979 1 SA 861 (T) on the application of the *eiusdem generis* rule; *Klipriviersoog Properties (Edms) Bpk. v. Gemeenskapsontwikkelingsraad* 1984 3 SA 768 (T) where modificative interpretation was applied in order to establish the manifest purpose of legislation.

tation are merely **rules of logic, guidelines** or **tests** which are applied under special circumstances.³ Nevertheless, these rules of interpretation constitute the **theoretical norms** or **working tools** which are used by the interpreter – the judge in court or the school principal – to establish the **purpose** or object of the legislation. Consequently, to establish the **juridical** meaning of legislation, the interpreter must apply the **rules of statutory interpretation**.

Résumé

Interpretation of statutes relates to the juridical meaning of legislation. As legislation constitutes an important source of this field of study, the different categories of legislation must be examined.

In order to establish the juridical meaning of a statute the interpreter has to apply theoretical rules and methods to solve or explain a practical problem situation. Certain techniques must be mastered for the correct application of these theoretical aids to a given concrete situation.

The purpose or object of the legislation constitutes the decisive criterion in the interpretation process: all rules of interpretation and other aids must be applied towards achieving this goal.

3. THE THEORETICAL STRUCTURE OF INTERPRETATION OF STATUTES

The theoretical basis of interpretation of statutes consists of the different rules of interpretation and other internal and external aids which are used in the interpretation process. The **ratio** for applying these rules is to establish the **manifest purpose** of the legislation. It is averred, quite rightly, that legislation is adopted with a specific aim or **purpose** in mind and therefore the interpretation process should involve a **purposive activity**.⁴

³ In *Sutter v. Scheepers* 1932 AD 173 the court held that the tests which have been developed for the determination of peremptory and directory statutory provisions, must be regarded merely as guidelines in the search for the intention of the legislature.

⁴ In *Jaga v. Dönges* 1950 4 SA 653 (A) the court held that the text of the legislation in question, must be construed in the light of its general policy and purpose thereof; in *R v. Westeraad* 1941 OPD 103 the different provisions of an ordinance were interpreted and reconciled with the express or clear purpose of the legislation.

As is mentioned above, different procedures or methods may be used in the interpretation process. The theoretical norms, rules and methods constitute the working tools which are used in a specific manner: this follows that the **techniques** of interpretation must be understood and mastered. In order to understand these techniques, the **theories** underlying the basic rules and methods, have to be examined.

3.1. The narrow or purely textual approach

In general terms one may explain the textual approach as the **meaning of the words used in the text**. This statement signifies the predominance of the meaning of the **written word**. Furthermore, it is said that words should bear an **ordinary or plain** meaning as they function primarily within ordinary daily situations. After all, the layman should be able to understand legislation. Because the interpreter cannot surmise a meaning or “add” meaning to a word, an approach has been developed whereby the **plain or ordinary** meaning, in fact, becomes the **literal** (grammatical) meaning.

The notion existed at one time that the **intention of the legislature** should be established from the **words** that are used in the text: the interpreter could not go **beyond** the text and, consequently, the **intention** of the legislature was equated with **literal meaning**.⁵ If the ordinary meaning does not make sense, is confusing or ambiguous, the courts (interpreters) should refer the legislation back to the **legislature** for emendations.

Over the years much **criticism** has been raised against this narrow form of interpretation. The following points may be mentioned:

- The written word is a **medium** to convey meaning but does not bear meaning in **itself**. Words are interpreted within a specific **context or structure of language** and cannot be construed in isolation;⁶

⁵ This approach is, of course, in line with the doctrine of **separation of powers**: the legislature, as the **sovereign** legislative power, is responsible for the drafting of legislation while the interpreter is in charge of interpretation only. The interpreter is therefore, bound by the text of the enactment and cannot add or omit a word or sentence.

⁶ It is said that words, sentences and even the whole text, do not bear any inherent meaning irrespective of how meticulously the legislator has phrased them. The text must therefore be construed within its context.

- the **intention** of the legislature is of paramount importance but cannot be equated with the **literal rule**.⁷ According to this narrow approach **intention** is degraded to a mere **rule** of interpretation although it should in actual fact be the **frame of reference** within which the **purpose of legislation** is established;⁸
- the **intention** (state of mind) of the legislature is a **fiction** as one can hardly establish the **subjective state of mind** – something which requires subjective criteria – of a **composite body**. When legislation is launched through Parliament, unanimity is seldom reached and the protracted legislative process makes it difficult to determine at which stage, and whose intention should be used as the criterion.⁹ The concept “intention of the legislature” must therefore be regarded as an **imaginary construction** to explain the legislature’s **conduct** and to place it within the **frame of reference of the purpose of legislation**;
- the **intention** of the legislature cannot be the main or **decisive aim** of the interpretation of statutes. The intention theory creates the impression that once the legislature has spoken, the courts lose any **creative functions** which they might have had. This approach (a strongly **positive** approach which emphasises the **written law**) rejects any creative influence in the law and refuses to recognise legal values and criteria of fairness which could prevent unjust and unreasonable effects.¹⁰

⁷ According to the narrow approach, the meaning of the text must be found in the “intention” (or the idea) of the legislature which is hidden behind the words or language. Words, or the language in itself, are, however, not always the true symbols of intentions or thoughts as incorrect or inappropriate words are often used to convey ideas.

⁸ There are many instances where the narrow “intention” of the legislature, as a result of deficiencies in the written word, has not conveyed the true intention (meaning the purpose of the legislation): in *S v. Kukarie* 1972 2 SA 907 (O) the court acknowledged that it could not understand the legislation because of the confusing, ambiguous words that were used in the text. It was therefore, almost impossible to determine the true intention of the legislature. If the court could have elevated the intention of the legislature to the purpose or object of the legislation, the true intention would have ruled supreme: *Dadoo Ltd. v. Krugersdorp Municipal Council* 1920 530 (AD). In *casu* the intention of the legislature was found in the literal meaning of the words and as the court could not “create the law”, the legislation was referred back to the legislature for the necessary amendments. The “new” intention in the amendment Act then coincided with the true intention as it was originally construed in a contextual manner, but not applied.

⁹ The opposition party and its members will oppose certain legislation and it also frequently happens that some parliamentarians are not present when a bill is launched through the legislative process. Furthermore, it must be remembered that it is not the legislature itself which drafts legislation but a specialist drafting body.

¹⁰ Such a strong viewpoint would then, *inter alia*, disregard the application of common-law rules in the interpretation process. The significant role played by legal presumptions (common-law rules) in the interpretation of statutes, will be discussed *infra*.

3.2. The wide, contextual approach (teleological or functional approach)

This approach to interpretation is conducive to the **purpose orientated nature** of legislation and other **purposive** approaches. The **intention** of the legislature still fills an important place but within the wide **contextual** meaning of "intention": in other words, the intention is determined within the **ambit** of the underlying **purpose** of the legislation. To put it crisply, the purpose of legislation is the decisive factor in determining the legislature's intention.

According to the contextual approach, the **purpose** of legislation is preferred to the **intention** of the legislature in its **narrow** sense. This indicates a change from the **subjective intention** of the legislature to a more **objective purpose** of legislation. The latter **objective aim or purpose** thus forms a sound **theoretical foundation** for the interpretation of statutes.¹¹ In order to approach legislation in relation to its **broad context**, a **wide contextual framework** must be acknowledged from the **outset** of the interpretation process.¹² According to the textual approach the interpreter may deviate from the literal meaning in **particular** instances only, for example, where the words of the text do not reflect the intention of the legislature, or, where absurd results would take effect which could, in any event, not have been the intention of the legislature.¹³

The purpose-orientated approach provides a **balance** between the grammatical (literal) and wide contextual meaning. It can also accommodate the **continuous time-frame** in which legislation operates and acknowledges

¹¹ To build the theoretical structure of interpretation of statutes on a subjective-intention criterion, may cause many problems, for instance, it would cause the development of improved interpretation techniques to stagnate.

¹² This broad approach thus indicates an opposite method of interpretation: the first step in the textual approach is to establish the literal meaning of the words as it is found within the narrow meaning of "intention". This is done without regard to **surrounding circumstances** or other **related matters**. The contextual approach, on the other hand, **starts** with the legislation in its wide context, which means that all relevant **intra-textual** and **extra-textual** circumstances and matters will be considered from the outset.

¹³ To illustrate this point, the court held in *Du Plessis v. Joubert* 1968 1 SA 585 (A) that words convey their ordinary meaning **unless** this would conflict with the intention of the legislature. The intention of the legislature must then be established by examining the enactment as a whole, and surrounding circumstances. Once this is established, the court may deviate from the plain, ordinary meaning, provided the text is capable of bearing another meaning. In the *Jaga* case *supra*, the minority judgment (with persuasive power only) acknowledged the interpretation process within a contextual framework.

the flexibility and peculiarities of language, historical aspects and preliminary discussions as valuable aids to interpretation.

Bear in mind, though, that the courts are not yet unanimous about the interpretation of the **intention of the legislature**. In some cases intention still bears the restricted meaning while in other cases it has been construed in relation to context.¹⁴

Résumé

The interpretation of statutes is a purpose-orientated activity in which certain methods and techniques are to be mastered by the interpreter.

The theoretical structure of interpretation is based on different theories of which the narrow textual approach is one. According to this approach the literal meaning of the word is seen as the intention of the legislature: the intention of the legislature is found within the literal meaning. Criticism of this approach is directed at the deficiencies of words as separate units of meaning and the lowering of the status of "intention of the legislature".

The wide contextual or teleological approach prefers a wide frame of reference which includes extra-textual aspects. The "intention" is elevated to the frame of reference in which the "purpose of the legislation" is to be determined. In this way the shortcomings of "intention" as a subjective criterion are made good by linking the concept of intention with an objective purpose-orientated test.

In some cases it will be difficult to determine which approach has been followed by the courts; in other cases the interpretation process will have elements of both approaches. The wide, contextual method is recommended as it provides a broad frame of reference which offers adequate opportunity for proper attention to be denoted to each stage of the interpretation process. After all, fair and equitable conduct should also be the hallmark of this field of study.

¹⁴ In some cases it is quite difficult to establish how the courts have interpreted "intention": sometimes reference is made to the **intention of the legislature**, which could indicate a combination of the two elements (subjective and objective). In recent court decisions dealing with the national emergency measures and the interpretation of subordinate legislation (proclamations by the State President), there are many examples of the way in which the courts interpret legislation in relation to its context: see in this regard, *State President and Others v. Tsenoli and Kerchhoff v. Minister of Law and Order* 1986 4 SA 1150 (A).

4. FUNDAMENTAL RULES OF INTERPRETATION OF STATUTES

Whether the interpreter follows the purely textual or wide contextual approach, there are certain basic or **fundamental rules** applicable to the interpretation process. It may happen that in some cases where the purely textual approach has been followed, certain basic rules have been used **incorrectly**, or **not** at all. The discussion which follows will deal briefly with the fundamental rules of statutory interpretation and additional literature may be found in the bibliography.

4.1. The common-law presumptions

As is mentioned in the discussion above, the common law is regarded as a **source** of the rules of interpretation. This means that common-law rules, for example legal presumptions, exist alongside statutory rules and case law as a source of interpretation of statutes. Although there is still no complete unanimity about the **nature of presumptions**, one may conclude that for the purpose of statutory interpretation, legal presumptions apply **unless excluded by legislation** either expressly or by necessary implication. Briefly, one may **presume** that a particular legal presumption will find application unless it is **rebutted** by legislation. In the case of rebuttal, the presumption will not apply.

The interpreter must be conscious of legal presumptions from the outset as they form the **basic guidelines** to be followed throughout the interpretation process.¹⁵ Adherence to presumptions ensures **legality** in the interpretation process: it guards against unjust results and the retroactive operation of statutes – unless such operation proves to be in the individual's interest.¹⁶

The most important presumptions will be discussed briefly.

¹⁵ Supporters of the **contextual** approach refer to presumptions as the ABC and XYZ of the interpretation process and regard them as **intra-textual elements** of legislation (within the structure of legislation). Following this statement, presumptions operate as the **material grundnorm** (the original form) of legislation.

¹⁶ Refer to the discussion of legality *supra*, and the emphasis on **just and equitable** conduct.

4.1.1. The presumption that the state is not bound

The **general rule** is that the state is not bound by its own legislation, except by express provision or necessary implication to the contrary.

If the state (which naturally includes the **state administration**) is not bound by its own legislation, the question of **state liability** strictly speaking, cannot arise. A distinction must, however, be made between the higher acts of state, where the state acts as the **sovereign**, and the state in its **administrative** capacity, as discussed previously. In the latter instance, which is of particular importance in the public-education sphere, the state will indeed incur liability through the conduct of its organs. The criterion for liability is, of course, the conduct of the servant “within the scope of his **employment**”.¹⁷

Finally, it must be remembered that, in determining whether the state is bound, each case must be considered **individually** and the relevant legislation analysed in **context**. The aim is to establish the objective **purpose** of the legislation involved.

4.1.2. The presumption against provisions which are futile or nugatory (purposeless legislation)

Unless the contrary applies, it is presumed that the legislature does not intend legislation which is futile or without any purpose. This presumption therefore supports the contextual approach which emphasises the **purpose-orientated** characteristic in the formulation of legislation.¹⁸

The presumption is also applicable to **subordinate legislation**, where the maxim **ut res magis valeat quam pereat** applies: in other words, valid

¹⁷ In terms of the legislation mentioned above, Act 116 of 1976 (now repealed), the official of the SATC (in effect, the state) did not incur liability when performing its **functions and duties** in the **prescribed manner**: section 25, read with section 18(a) or (b), 19 or 23. In other words, the officials must act within the scope of their employment. With reference to these binding provisions, one may deduce that the state may also be bound by one section or several sections of a statute. See also the discussion on state liability **supra**.

¹⁸ Because the narrow meaning of “intention of the legislature” was followed in the **Dadoo** case, **supra**, the court preferred to hold that the provisions in question were futile and nugatory rather than to apply **modificative** interpretation. The legislature had to pass an amendment Act. If the presumption had been applied, the court would have been able to project the true intention of the legislature onto the purpose of the legislation and to have given a positive decision. Thus the provisions of the original enactment would, according to the purpose of the legislation, have been valid and operative.

rather than invalid subordinate legislation. Subordinate legislation which is **ultra vires** is, of course, invalid. This maxim will apply only where two interpretations of the provision are possible. Clearly invalid provisions can not be cured or validated by the application of this maxim.

The courts are indeed prepared, in the light of this presumption against futile and nugatory provisions, to apply modificatory interpretation but will not, for other reasons, apply modification at will.¹⁹ Only when the ordinary meaning of the words does not reflect the clear purpose of the legislation, and when the words are capable of such a construction, will modificatory interpretation be applied.

4.1.3. The presumption that the legislature intends to promote the public interest

Strictly speaking, this presumption must be regarded as an **irrebuttable** presumption as it is accepted that legislation is **always** passed in the public interest. Although legislation regulates **public** (general) provisions, it is also applicable to the **individual** as a citizen or inhabitant of the state. A proper balance must, therefore, exist between the public interest, which applies to **all** individuals, and **individual** interests and rights.²⁰ After all, the law must, *inter alia* by means of legislation, create and maintain equilibrium within the community. The object of this presumption is mainly to guard against unfair or unequal treatment.

Public interest and **general** interest must, however, not be regarded as synonymous. The **general** interest is aimed at the interest of a **particular group**, for instance, teachers, farmers or business executives. Even in cases where the interests of a substantial group of individuals are at stake, it cannot be regarded as the **public** interest. **Public** interest therefore includes the general interests of specialised groups of individuals: the

¹⁹ One of the reasons is, of course, the demarcation of powers in terms of the doctrine of **separation of powers**. See the discussion on modificatory interpretation and its application, *infra*.

²⁰ It is, however, not always easy to maintain this balance: in many cases the public interest will carry more weight. In *R v. Magana* 1961 2 SA 654 (T), section 14 of the Interpretation Act was in question. The court held that the statute was promulgated for the public good and, consequently, the powers of public officials (civil servants) must be interpreted in an extensive manner and not restrictively.

general interest is specified by public interest.²¹ Following this argument one cannot say that a matter of general interest will necessarily **clash** with public interest. It also becomes clear why this strong presumption is generally regarded as irrebuttable.

4.1.4. The presumption against the exclusion or limitation of the courts' jurisdiction

Unless it is expressly provided in the legislation concerned or must be inferred by necessary implication, it is presumed that the legislature does not intend to exclude or limit the jurisdiction of the courts. Education legislation, as mentioned above, empowers superior education bodies or organs to make decisions. Whether the courts are competent to review such decisions depends on the **purpose** of the authorising legislation. Even where the courts' jurisdiction is excluded **expressly**, this does not indicate a **general** exclusion: the Supreme Court still retains its **inherent common-law power of review**.²²

4.1.5. The presumption that the legislature does not intend altering the existing law more than is necessary

In terms of this presumption, legislation must be interpreted in such a way that it agrees with existing law, or deviates from it as little as possible.

Where the **common law** is concerned, this presumption will not apply where the legislature provides expressly for the alteration of the common law. Such an alteration must be implemented.

With regard to **statutory laws**, the presumption means that in interpretation of a subsequent Act, it is assumed that the legislature did not intend repealing or modifying the earlier Act. Any repeal or amendment has to be affected expressly or by necessary implication. In principle, the interpreter

²¹ Primarily, a matter of public interest is not regarded as a private matter. There must, however, be reconciliation and correlation between public and private interests. In certain cases the courts have allowed a **private action** to be instituted in the **public interest**: **Bamford v. Minister of Community Development and State Auxiliary Services** 1981 3 SA 1054 (C) and **S v. Innes** 1979 1 SA 783 (C).

²² Referring to the education legislation mentioned **supra**, a "conclusive" or "final" decision by the organ does not mean that the courts' jurisdiction is excluded **in toto**. The Supreme Court may still review the matter, for example in the case of **mala fides**.

must read the earlier and later enactments together in an attempt to reconcile them. If such a reconciliation is impossible, it has to be presumed by necessary implication that the subsequent legislation amends or repeals the earlier legislation.²³

4.1.6. The presumption that the legislation does not intend that which is unreasonable, harsh or unjust

This presumption has already been mentioned in the discussion of the requirement of reasonableness *supra*. The presumption arises only if **doubt** exists about the meaning of a provision, and if **more than one** interpretation is therefore possible. If the aim of the legislation is clear, the courts must implement it, regardless of how unfair or unreasonable the effect might be. The courts are thus not empowered to pass a verdict on the **merits and demerits** of the results such legislation might have.

With regard to **onerous** provisions, they should be interpreted in such a fashion that they **burden or restrict** those to whom they apply as **little as possible**. Onerous provisions are therefore **strictly** interpreted.²⁴ In the case of **beneficial** provisions, where two interpretations are possible and doubt exists, the interpretation **most beneficial** to the individual should be adopted.

Unless a contrary intention is clear, the presumption exists that the legislature intends **equal treatment** of all who are affected by the legislation in question.²⁵ Therefore, if there is a clear indication that the legislation should be harsh or discriminatory, this presumption will not apply. **Parliamentary** laws which are based on racial discrimination and clearly indicate such a purpose, must be interpreted by the courts irrespective of its unreasonable or discriminatory effects. In the case of **subordinate** legislation, unequal treatment is allowed only where express or implied provision to this effect is made in the **empowering** (authorising) enactment.²⁶

²³ In such a case the legislation (or certain of its provisions) to be compared, must have the same **purpose**.

²⁴ Onerous provisions include provisions that encroach upon rights; provisions imposing monetary obligations; penal provisions.

²⁵ According to the **common law** all persons are equal before the law. Legislation which causes inequality and discrimination, has been adopted in South Africa by means of **legislation** and forms part of government policy.

²⁶ The subordinate legislative body must therefore act within the scope of its legislative powers as provided for in the main (empowering) enactment. See also the discussion *supra* under the requirement of reasonableness.

4.1.7. The presumption against retrospectivity

Unless a contrary intention appears either expressly or by necessary implication, it is presumed that the legislature makes laws for the future only. This rule is based on the prevention of unfair results, as rights which exist and are vested in the individual, are not taken away. In a number of **exceptional** cases, the presumption will fall away and the legislation concerned will have retroactive force, for example:

- if it appears clearly from the Act that a retrospective effect is intended;
- if the Act deals with procedure; and
- if the provisions of an amendment Act favours the individual.²⁷

Résumé

For the purposes of this discussion, the most significant legal presumptions are seen as common-law rules. These rules apply unless the contrary appears either expressly or by necessary implication.

These presumptions constitute the basic guidelines in the interpretation process and are often referred to as the “basic norms” in the interpretation of statutes. They apply in particular at the outset and in the final stage of the interpretation programme.

Legal presumptions may be regarded as the inherent norm “grundnorm” of legislation and their application in the interpretation process ensures legality. Viewed from this angle, legal presumptions form part of the basic rules of justice and fairness.

4.2. Other fundamental (basic) rules in the interpretation of statutes

4.2.1. The ordinary meaning of the word

Legal presumptions are seen as important basic rules of interpretation of statutes. Another basic rule is the application of the **ordinary meaning** of the text. This rule has several ramifications.

²⁷ An offender who is convicted in terms of a certain Act but has not yet been sentenced, will receive the benefit of the lighter sentence if the amendment Act has reduced the original penalty. The amendment Act is therefore assumed to have retroactive force. Where the punishment is, however, increased under similar circumstances, the person involved will still not be unduly burdened and receive the benefit of the doubt: the original lighter sentence will be passed and the amendment Act will not have retroactive force.

The concept of **ordinary meaning** of the text has undergone a change in emphasis: according to the **purely textual** approach, it had a **literal** meaning; in the **wide contextual** approach the plain, ordinary meaning is still examined **but** within the **context** and **purpose** of the legislation. In the latter case it does not necessarily mean that the words will bear a literal meaning.

The ordinary, grammatical meaning of words

Under **ordinary** meaning, one may include the **grammatical** meaning of words. According to the purely textual approach, this rule was watered down to the **literal** meaning of separate words, sentences or paragraphs of the text. Legal writers referred quite rightly to this approach as the “slavishly literal squabbling about words”. Fortunately, the wide contextual approach brought about a change in emphasis and words now bear the **ordinary, grammatical** meaning within the context of the enactment. This means that the legislation must be studied **in toto** (as a whole) from the outset, and the meaning of words construed in terms of the **wider context** and **purpose** of the legislation.

Technical terms

Legislation of a technical nature, which applies to a specific trade or profession, has a particular meaning which deviates from the ordinary, colloquial meaning. Under these **circumstances** though, the technical meaning may also be regarded as the ordinary meaning and the words should be construed according to their “ordinary” specialised, technical connotation.

The interpretation clause

A large number of statutes contain an interpretation clause which is usually embodied in section 1 of the enactment. It is an explanatory list of terms in which specific definitions are given to certain words or phrases used in the legislation. The definitions are not absolute and the interpretation clause is usually introduced with the words, “Unless inconsistent with the context, in this Act ...” The meaning of a word in the interpretation clause must be in accordance with the purpose of the legislation in the contextual sense: under these **circumstances** the interpretation clause will then have an **ordinary** meaning.

A meaning assigned to every word

According to the **ordinary** meaning of words, no word or sentence may be regarded as superfluous or redundant. This rule does not apply absolutely as repetition and overlapping may occur in some cases. The court will, however, be reluctant to decide that words are superfluous or that certain words have been omitted from the text. Under these circumstances modificative interpretation may be necessary.²⁸

4.2.2. No addition or subtraction

It is a basic rule of interpretation that no additions may be made to, or subtractions be made from, the words used in legislation. The courts will also be careful not to extend the meaning of the legislation beyond the words that are used. Adherence to the **literal** meaning is still evident here, for the following reasons:

- according to the maxim **iudicis est ius dicere sed non dare** the function of the court (the presiding official), is to interpret and not to make law. This approach is derived mainly from the doctrine of separation of powers or **trias politica** (the idea that there are three authoritative organs of the state) which concerns the division of powers of these organs;
- the **casus omissus** rule is also derived from the principle of separation of powers and means that the interpreter may not supply an omission in a law, as this is the function of the legislature. As is mentioned above, this approach will not always supply a satisfactory solution. At the moment there is some confusion about the application of this rule but in general, one may say that the courts will not supply omissions in legislation **at will** though they may, under special circumstances, supply an omission in order to achieve the **manifest purpose** of the legislation.²⁹

Against the background of the wide **contextual** approach and with due consideration of the **legal presumption** that the legislature does not

²⁸ Modificative interpretation is discussed *infra*.

²⁹ In the **Dadoo** case *supra*, the court refused to supply an omission although the purpose of the legislation indicated clearly that such an addition was necessary. In the **Klipviersoog** case *supra*, the court was prepared to supply an omission in order to fulfil the clear purpose of the legislation.

intend futile or nugatory provisions, one may conclude that whenever the purpose of the legislation is clear the court, as the last link in the legislative process, should ensure this process is brought to a **just and meaningful conclusion**.

4.2.3. The balance between text and context

As is mentioned above, the courts' view used to be that if the text of the law was clear and unambiguous, it should be put into effect **without** even considering the law in its contextual relationship. The wider context of the law was taken into account only if the language concerned seemed unclear or ambiguous. According to the contextual approach in interpretation, the interpreter may examine the wider context of legislation from the outset of the process, **even** when the text is quite clear or unambiguous. The meaning of words is thus explained **in terms of the wide context** (the enactment as a whole) and other surrounding circumstances in order to reflect the **manifest purpose** of the legislation. Therefore all these matters **as well as** the words of the text must be taken into account from the **first step** of the interpretation process.

Résumé

Besides legal presumptions, there are other basic rules which exist in the interpretation process. Although, at first glance, some of these rules appear to encroach upon the wide contextual approach, only a slight change in their application has occurred.

The individual fundamental rules must be applied within the broad contextual (teleological) frame of reference in order to explain the meaning of words, sentences or paragraphs according to the purpose of the legislation.

5. AIDS TO ESTABLISHING THE PURPOSE OF THE LEGISLATION

The structural aspects of this section will be dealt with in the ensuing discussion. Consult the bibliography for additional literature.

The **manifest purpose** of legislation is regarded as the fundamental or ultimate aim of statutory interpretation. In many cases it is not easy to

establish this purpose as it is not spelt out in legislation. A wide range of **aids**, which differ in nature and scope, are at the disposal of the interpreter. In certain cases these aids will have to be **researched** in order to determine the purpose of the legislation in question. The aids fall into two categories:

- **internal** (or **intra-textual**) aids comprise the legislation and its component parts, in other words, the **internal structure** of the enactment;
- **external** (or **extra-textual**) aids are those factors that are external to the text of the legislation.

In the wide contextual approach both categories of aids are examined from the outset. The Interpretation Act 33 of 1957 also constitutes an important **aid** and will be discussed separately.

5.1. Internal aids

5.1.1. The text in the other official language

All legislation in South Africa is drafted in **both official languages**. The text in the other language can therefore be used to clarify obscurities.

In the case of **parliamentary legislation**, one of the copies of the law must be signed by the State President. The Afrikaans and English copies are signed alternately. As a general starting point one may say that **both copies have equal authoritative weight** and that the signed text does not carry more weight merely because it was signed. The signed text will be **decisive** only when an interpretation problem arises and an **irreconcilable discrepancy** or a **conflict** between the two texts occurs.³⁰

The principles applying to parliamentary legislation, apply to **provincial ordinances** as well.³¹

³⁰ The meaning of “conflict” and “irreconcilable discrepancy” has been examined on several occasions: *Handel v. R* 1933 SWA 37. A conflict or irreconcilable discrepancy does not exist when the two texts are read together to determine the true meaning. Nor does it exist when the meaning of the one text is wider than that of the other and a “common denominator” meaning is established.

³¹ Refer to the discussion *supra* of provincial ordinances under legislation as a **source** of the law of education. Although no more provincial ordinances will be promulgated under the new system of provincial government, this rule of interpretation still applies to the many provincial ordinances that remain in operation under the new system.

With regard to **subordinate legislation** (regulations, proclamations and by-laws) as well as **internal legislation** (departmental manuals, circulars and rules on school policy), the State President obviously does **not** always have to sign a copy of the text.³² If one text has been signed, it will **not** carry more weight than the unsigned text. Even when a conflict or irreconcilable discrepancy arises, the signed text will **not** be decisive. Thus both texts of subordinate legislation enjoy equal status **at all times**: in the case of a conflict or irreconcilable discrepancy, both texts are read **together** to establish the true meaning and purpose of the legislation. If a conflict or irreconcilable discrepancy occurs, the court will give preference to the version that **benefits the individual concerned**.³³

5.1.2. The preamble or **considerans**

Although statutes beginning with a preamble are rare nowadays, the preamble may be used in **context** to determine the **purpose** of the legislation but only in exceptional cases.³⁴

5.1.3. The long title

The long title contains a short description of the subject-matter of the legislation.³⁵ It may be used to establish the **purpose** of the legislation.

³² For example the State President must sign proclamations issued by him. It would, however, be impossible and quite impractical for the State President to sign the entire body of administrative legislation.

³³ One may come to the conclusion that the courts will use these methods to avoid a *casus omissus* in the enactment: where two interpretations are possible, the court will apply the presumption against harsh and unjust results and the individual will be given the benefit of the doubt rather than admitting that a shortcoming exists in the text.

³⁴ A good example of a preamble may be found in the 1983 Constitution.

³⁵ The long title of Act 103 of 1986 reads as follows: "To amend the National Education Policy Act, 1967, ... administration of the said Act and certain ordinances to the Minister of Education and Culture; to allow greater participation by the organized teaching profession and the organized parent community in the education in schools and the training of teachers; to establish an education council for each provincial education department; to make provision for the recognition by the said Minister of a body for the organized teaching profession;...".

5.1.4. Headings of chapters or sections

These headings may be regarded as **preambles** to those chapters or sections and may be used in particular instances to determine the **purpose** of the legislation concerned.³⁶

5.1.5. Marginal notes

Marginal notes are not considered to be part of the legislation as they are not inserted by the legislator, but by the draftsmen. Their value in interpretation is therefore questionable although the courts may use them in exceptional cases.

5.1.6. Paragraphing and punctuation

Punctuation is not considered to be **part** of the legislation, in principle, although it may well be used to establish the **purpose** of the legislation.

5.1.7. Schedules

Schedules differ in nature and format but are mostly used as abridgements of sections in the Act. In such a case the schedule will have the same force of law as the content of a section of the legislation. In the case of a conflict between the section of the legislation and the schedule, the section prevails.

5.2. External aids

5.2.1. The source of particular sections in a statute

As a result of English influence in our law, a considerable part of our legislation has its origin in **English legislation**.³⁷ The earlier approach was that if a problem of interpretation arose regarding a South African Act

³⁶ The 1983 Constitution offers some examples: the different chapters of the Act are divided into the State President, Legislature, Executive, Judiciary, President's Council, etc.

³⁷ For example, the Companies Act 61 of 1973; the Patent Act 57 of 1978; the Mental Health Act 18 of 1973.

which was taken over verbatim from English legislation, the courts would follow the interpretation given by the English courts. However, this approach negated the operation of our legislation in the **South African context**. Recent developments indicate that our courts will now construe such legislation in terms of the South African **legal situation** although English case law may be used as a **guideline** to establish the true **purpose** of the legislation in question.

5.2.2. Preceding discussions

Preceding discussions may include debates on a specific bill, explanatory memoranda and reports of commissions of enquiry. The courts are not unanimous about the use of these aids: for example, in some cases commission reports have been admitted and in other cases, rejected. A speech by a cabinet minister in Parliament has also been seen as an aid to interpretation.³⁸

It would appear that the courts are now more prepared than they were previously to use preceding discussions. After all, these matters may help towards a better understanding of the legislation.

5.2.3. Surrounding circumstances

These are the conditions prevailing **before** and **during** the adoption of the legislation, which **led** to its creation. The **history** of the legislation is thus used to place the provisions in question in their proper **perspective**.

The use of surrounding circumstances was also referred to as the **mischief rule**. Briefly, the content of this rule was aimed at eradicating the so-called "mischief" that surrounded the legislation. This was done by examining and analysing the problems, defects and remedies surrounding the legislation. To put it crisply, in applying this aid the interpreter is able to examine the **history** and other **surrounding circumstances** of legislation.

5.2.4. Dictionaries and linguistic evidence

Because of the increasing technical and specialised nature of legislation, dictionaries are being used more frequently by our courts. The dictionary

³⁸ For more examples see: *Harris v. Minister of the Interior* 1952 2 SA 428 (A); *Hopkinson v. Bloemfontein District Creamery* 1966 1 SA 159 (O); *Mpangele v. Botha* (1) 1982 2 SA 633 (C).

meaning may, however, be used only as a **guideline**, as the **context** in which the word is used should be the **decisive** factor in construing its meaning.

5.2.5. The influence of custom or usage

Custom or usage (application over a long duration of time) may be used in the interpretation process regardless of whether it had evolved prior to the commencement of a particular enactment or was received subsequently. Custom can, however, never abrogate legislation. Custom or usage may influence interpretation in the following instances:

Contemporanea expositio and subsecuta observatio

The principle of **contemporanea expositio** – literally, simultaneous interpretation – relates to the exposition (custom or usage) of the legislation **at the time of or shortly after** its adoption. The implication is that this exposition was probably given by persons who were involved in the adoption of the legislation, or in its first application shortly afterwards. These expositions are regarded as authoritative for interpretation purposes because it is assumed that the functionaries of the state who were closest to the origin of the enactment knew best what it was intended to mean. Marginal notes, paragraph divisions and punctuation marks may serve as examples of **contemporanea expositio**.

Subsecuta observatio – literally, the exposition after adoption – deals with established **use or custom** which may have originated at any time **after** the adoption of the legislation and which may also be in conflict with **contemporanea expositio**.

In principle **subsecuta observatio** bears more weight in the interpretation process than **contemporanea expositio** although the courts have failed to maintain the distinction.

5.2.6. Earlier and subsequent Acts

Previous statutes may be used as a **guide** in construing subsequent statutes provided the statutes are **in pari materia**: in other words, they must deal with the same subject-matter and must be almost identical.

Where **subsequent statutes** are concerned, the same principle applies as discussed above. The subsequent legislation may be used as a **guide** in the interpretation of earlier legislation.

Résumé

Internal and external aids are used in the interpretation process to establish the purpose of legislation.

Internal aids refer to the internal elements of a statute while external aids include external factors.

Consult the bibliography for more information.

5.3. The Interpretation Act 33 of 1957 as an aid to interpretation

The Interpretation Act 33 of 1957 may in the strict sense, also be regarded as an aid to interpretation of statutes. The Act consists of six parts: Part I contains general provisions on the interpretation of statutes; Part II-V contain particular provisions applicable to the different provinces; Part VI provides explicitly that the statute is binding upon the state. Only certain aspects of Part I will be dealt with.

5.3.1. Application of the Act

Section I provides that the provisions of this Act are applicable to the interpretation of **every law** in force in the Republic, and to the interpretations of **by-laws, rules, regulations or orders made under the authority of any such law, unless the contrary intention appears**. The Act is therefore applicable to laws and not to administrative orders or directives. However, the concept "law" for the purpose of this Act, means, "any law, proclamation, ordinance, Act of Parliament or any other enactment that has the force of law".³⁹

5.3.2. The time factor

In terms of **section 2**, specific methods are used in construing "month": a **calendar month** is, for example, the different months as they appear on the calendar – March or October. The term **month**, on the other hand, may stretch over two calendar months, for example, from 15 May 1987 to midnight on 14 June 1987.

³⁹ It is clear that the Act is not applicable to **common-law** provisions unless these provisions have been embodied in laws: in these cases they form part of statutory law.

The computation of time plays a significant role, especially in the case of contractual provisions, where certain **periods of time** are prescribed. There are different methods of computing time : according to the **statutory method (section 4)** time is calculated by means of **days**. **Common law** also recognises different methods of time computation and the common factor here is that the first day/hour of the prescribed period is **excluded**.

5.3.3. The repeal of legislation

Section 11 deals with the **repeal** and **substitution** of legislation. When a subsequent law **wholly or partially** repeals any former law and **substitutes** provisions for the law so repealed, the repealed law (the former law) remains in force **until** the substituted provisions of the subsequent law come into **operation**.⁴⁰ If a law which has been partially repealed by another law is to be interpreted, the remaining or substituting sections cannot be dealt with separately as **both** laws have to be interpreted as a **whole**: the amendment in Act 103 of 1986 amends the original National Education Policy Act 39 of 1967 and, consequently, these two enactments must be read together.

Section 12 deals with the **effect** of repeal. If a law repeals and re-enacts, with or without any modifications, any provision of a former law, references in any **other** law to the provisions so repealed, will usually be construed as references to the provisions so **re-enacted**.⁴¹ This matter may, however, also be regulated in terms of other specific provisions although the **purpose** of the legislation will remain predominant.

Section 12(2) provides that where a **law repeals any other law** then, unless the contrary appears, the repeal will not⁴² –

⁴⁰ The National Education Policy Amendment Act (House of Assembly) 103 of 1986 makes provision for the institution of the TFC which replaces the SATC in terms of Act 116 of 1976 (now repealed). During the launching of the new Act in the House of Assembly and up to its date of publication and commencement (determined at a later date by proclamation), the former Act and, of course, the SATC remained operative. However, at the commencement of the subsequent Act, the TFC became the official professional body. Bear in mind, though, that specific provisions may be included to regulate repeal or substitution in a different way: the **purpose** of the legislation remains the decisive factor.

⁴¹ The provisions regarding the SATC in Act 116 of 1976 were replaced by the provisions on the TFC in Act 103 of 1986. Other existing education laws also contained provision which referred to the SATC. As Act 103 of 1986 is now in operation, references to the SATC in those other education laws, are in terms of Act 103 of 1986 construed as references to the TFC.

⁴² Bear in mind that section 12(1) deals with the particular repealed **provisions** of a law which have been replaced by another law. Section 12(2) relates to cases where one **law** has been **repealed in toto** by another law. The illustrations used *infra* will therefore cover the provisions of Act 116 of 1976 which have been repealed **in toto** by Act 103 of 1986.

- revive anything not in force or existing at the time at which the repeal takes effect;⁴³ or
- affect the previous operation of any law so repealed or anything duly done or suffered under the law so repealed;⁴⁴ or
- affect any right, privilege, obligation, or liability acquired, accrued, or incurred under any law so repealed;⁴⁵ or
- affect any penalty, forfeiture, or punishment incurred in respect of any offence committed against any law so repealed;⁴⁶ nor will it affect any legal investigation, legal proceedings, or remedy in respect of any such right, privilege, obligation, liability, forfeiture, or punishment; such an

⁴³ In terms of section 20 of Act 116 of 1976, White teachers who did not comply with the prescribed conditions for registration were not entitled to teach. To teach under these circumstances constituted an offence. Although Act 103 of 1986 repealed the former Act *in toto*, this does not mean that the conduct of such a teacher now became **legal** as a result of the repeal of the former Act. To put it crisply, whatever was illegal **before** the repeal does not, as a result of the repeal, become legal with **retrospective force**. Furthermore, it means that Act 116 of 1976 will not revive, if Act 103 of 1986 is repealed at a later stage.

⁴⁴ If an act was performed properly and lawfully in terms of Act 116 of 1976, **before** the repeal, the act remains effectual. For example, the registration of a teacher, who was properly registered in terms of Act 116 of 1976, remains effectual even if drastic changes have been instituted by Act 103 of 1986. Bear in mind that **in casu** section 12(2)(b) does not have the effect that **administrative legislative acts**, such as proclamations, regulations, by-laws and departmental circulars which were issued in terms of a repealed law (for example, a parliamentary law), will remain in force. Subordinate legislation will **lapse** when the legislation from which its **authority** is derived, is repealed – unless the contrary is intended. What is of significance is the fact that the **administrative act** which existed between the SATC and the teacher, remains effectual notwithstanding the repeal of the general **legislative act** which instituted the conditions for registration. Refer to **administrative legislative acts** and **purely administrative acts supra**.

⁴⁵ This subsection deals with the **rights, privileges and duties** acquired or incurred in terms of **legislation**. The rights must have been acquired **in terms of** the repealed law and must not have existed independently **before** the coming into operation of the repealed law. Furthermore, the rights and duties must have been **acquired or incurred** before the repeal. With reference to the example given in the previous discussion, the rights, duties and privileges which the **registered teacher** **acquired** in terms of Act 116 of 1976, for example to teach, earn a salary and qualify for leave, will remain effectual even after Act 103 of 1986 has repealed the previous conditions regarding registration.

⁴⁶ A teacher who, in terms of Act 116 of 1976, had been barred from teaching as a result of inadequate qualifications for registration, could be charged and sentenced in terms of section 20(2). If he had been convicted and fined, the conviction and sentence would not be affected by the repealing Act. The teacher remains responsible for the offence he has committed and remains subject to the sentence.

investigation, legal proceeding, or remedy may be instituted or enforced and any such penalty or punishment imposed, as if the repealing law had not been passed.⁴⁷

Sections 11 and 12 of the Interpretation Act may raise complicated questions of interpretation. The practical examples used above illustrate the application of these sections very simply but **cannot** be regarded as model solutions. When similar interpretation problems arise, **each** case must be considered **individually**.

Résumé

The Interpretation Act applies to all rules that have the force of law unless the legislation concerned contains provisions to the contrary.

The above-mentioned discussion covered only certain sections of Part I of the Act. A copy of this Act should be at hand when education legislation is to be interpreted.

6. MODIFICATION OF THE PLAIN, ORDINARY TEXTUAL MEANING

6.1. Introduction

Certain **inherent** or **fundamental** rules are acknowledged in statutory interpretation. For instance, words must bear their **ordinary** meaning and the interpreter is not allowed to usurp the legislative process by adding extensive provisions or omitting others. These basic rules are, however, **subject to the predominant purpose or aim** of legislation which enables the interpreter to deviate from them under special circumstances.

⁴⁷ In terms of sections 18 and 19 of Act 116 of 1976, the SATC had the power to enquire into a teacher's alleged transgression of the professional code. If the enquiry has already been instituted, it will continue and the teacher will eventually be charged and sentenced in terms of the above-mentioned sections as if Act 103 of 1986 had never been passed. The teacher could also have been acquitted by the committee of enquiry and reinstated in his post. If the subsequent Act comes into operation and his previous conduct would be irregular under this new Act, he will not be charged in terms of the new Act. These matters are in fact, similarly provided for in the new section 8C of the National Education Policy Act 39 of 1967. These procedures may, of course, differ in terms of express provisions to that effect.

The ordinary textual meaning of a text must always be tested against the **purpose** of the legislation. This means that the **purpose of legislation**, in its **contextual** relationship, must be regarded as the **qualifier** (or qualifying factor) in the interpretation process. One could say that ambiguities, vaguenesses and absurdities are “**indicators**” or indications that deviation from the ordinary textual meaning is possible. Irrespective of the form of modification or deviation, the **qualifier** and **indicators** must be used as the starting point for such modifications or deviations.

The various forms of **modification** will now be discussed briefly.

6.2. Restrictive interpretation

This form of interpretation comes into play if the **meaning** of the legislation has a **wider** connotation than its **purpose**.⁴⁸ The meaning is then altered to reflect the true purpose of the legislation. Two forms of restrictive interpretation are applied in South African law.

6.2.1. The rule *cessante ratione legis, cessat et ipsa lex*

The maxim literally means that if the **reason** for the law ceases to exist, the law itself also falls away. **Legislation** cannot be abolished by custom or altered circumstances but must be revoked by the **positive conduct** of the legislature itself. Only the **common law** can be abrogated through custom or altered circumstances. The maxim is applied when the provisions of legislation are **not** revoked, but their **operation** merely **suspended** because the **purpose** of the legislation has already been achieved in some other fashion. The rule applies in only two instances:

- if application of the legislation would be **futile**, for instance, to impose a punishment where the accused has already died before sentence is passed;
- if application of the legislation would **defeat its very purpose**.⁴⁹

⁴⁸ In this case the **meaning** must be **tailored** in order to correspond to the **purpose** of the legislation. Note that no **words** are omitted from the text; only the **meaning** is restricted. Modificative interpretation which is discussed *infra*, includes the addition and omission of words.

⁴⁹ A general example would be provided by the case where legislation provides for a maintenance order in terms of which the parent must pay a monthly maintenance fee for his child in an institution; the payment lapses when the child is discharged from the institution. Although the maintenance order is not repealed by an amending Act, the **purpose** of the original Act is that maintenance should be paid **while** the child is still institutionalised. In this particular case the **reason** for the **application** or **enforcement** of the legislation has fallen away.

6.2.2. The *eiusdem generis* rule

This term literally means “of the same kind” and is based on the principle that words are known by **others with which they are associated**. The words are thus qualified by their **relationship** to other words, which means that the meaning of **general** words must be established in terms of **specific** words. Various other prerequisites must also be satisfied before the rule is applied:

- the rule cannot be applied unless the **specific** words refer to a **definite genus** or category. If the specific words refer to divergent instances the rule cannot be applied;⁵⁰
- **specific** words must not have **exhausted the genus**;⁵¹
- the rule may be applied even when **one** specific word **precedes** the general words. The order in which the words occur, is in any event, not important.

The *eiusdem generis* rule is applied with circumspection. Each time the question must be raised whether the **purpose** of the legislation points **unequivocally** to such a restrictive interpretation.

6.3. Extensive interpretation

Extensive interpretation may be regarded as the **opposite** of restrictive interpretation: the **purpose** of the legislation is therefore **wider** than that which is indicated by the **meaning of the words** used in the text. The **central meaning** of the text must be **extended** in order to give effect to the **wider purpose** of the legislation.⁵² There are two forms of extensive interpretation:

⁵⁰ In *Director of Education v. McCagie* 1918 AD 616 the Appellate Division held that the phrase “a university degree or other evidence of the necessary qualifications” could be interpreted according to the *eiusdem generis* rule. The court decided that the general word is “other evidence” and the specific word, “university degree”. The specific word refers to a particular qualification, a university degree. If this qualification had referred to a teaching diploma or another non-degree qualification, the meaning would have been too divergent and a “common quality” which is required for a *genus* would be missing.

⁵¹ See the example illustrated in the previous footnote.

⁵² Only the **meaning** of the text is extended. No physical addition of words takes place as in the case of modificative interpretation, *infra*.

- the meaning of the text is extended to a case **implied** by the legislation (interpretation by implication); or
- the meaning of the text is extended to a **similar** or **analogous** case which is not expressly provided for (interpretation by analogy).

6.3.1. Interpretation by implication

In this form of inclusive interpretation, express provisions of the text are extended by **implicit** provisions. There are various interpretative grounds which may serve to **indicate** that inclusive interpretation should be used. However, these indicators remain **guidelines** and are subject to the **purpose** of the legislation in its contextual sense.

Bear in mind that a clear distinction cannot always be made between the various grounds for interpretation by implication. Only a few grounds are discussed.

Ex contrariis

Where the Act provides for a specific situation, it is assumed **ex contrariis** that the opposite arrangement will apply for the opposite situation. The maxim **unius inclusio est alterius exclusio** (inclusion of the one means the exclusion of the other) also applies in this case.⁵³ This ground constitutes no more than a **prima facie** (on the face of it) indication of the **purpose** of the legislation and must be approached with circumspection.

Ex consequentibus

This maxim provides that where legislation **prohibits** a certain **result**, by **implication** the action/conduct which caused the result, is also prohibited. Transactions which are concluded **in fraudem legis** (fraudulently), in order to achieve prohibited results by seemingly lawful means, are also prohibited.⁵⁴

⁵³ Section 24 of Act 116 of 1976 provided that the aggrieved teacher could within three months after the SATC's action against him, appeal to the Supreme Court. Because a period of three months is expressly provided for, one must assume that it was not intended that the appeal could be lodged within six months.

⁵⁴ To illustrate this point, our law prohibits donations between spouses. It follows that a transaction in which one spouse gives something to a third party so that the latter can, in turn, give it to the other spouse, will also be prohibited.

The opposite also holds true. Where a certain act or result is required or allowed, it follows that everything which **within reason** is necessary to bring about the result or to perform the act effectively, is also permitted or required. The underlying criterion should be whether the conferred power can be exercised **effectively**.

Ex accessorio eius, de quo verba loquuntur

This ground is derived from the **ex consequentibus** rule. It means that if legislation prohibits (or permits) a **principal matter**, any **ancillary or accessory matters** are also prohibited (or permitted).

When an enabling Act confers powers, it confers, by **implication** those powers which are **within reason** necessary to achieve the principal aim.⁵⁵

6.3.2. Analogous interpretation

As is mentioned above, this method involves the extension of provisions from one case to an **analogous** one when the **language** of the text does not **expressly** provide for such an extension. If the **purpose** of the legislation includes the analogous cases, the meaning of the provisions must be extended accordingly. Our courts will, however, not apply this method extensively as in most cases it will amount to supplying a **casus omissus**.⁵⁶

6.4. Modificative interpretation

It has been mentioned above that modificative interpretation differs from extensive and restrictive interpretation. The latter methods involve limitations

⁵⁵ Following the discussion of the powers of the principal and delegation of these powers, *supra*, this rule of interpretation provides that **implied or ancillary powers** will have the same meaning as powers which are **necessary within reason**. In *Brakpan Town Council v. Burstein* 1932 TPD 336 the court also held that only powers which are **necessary, within reason** to achieve the principal aim, may be regarded as **implied powers**. The **implied or ancillary powers** of the school principal, which may be regarded as **necessary powers**, will by **implication** be included here. This explanation tallies with the discussion earlier on: the powers are **necessary, within reason, for effective school policy and management**.

⁵⁶ In the well-known *Dadoo* case *supra*, the court refused to apply analogous interpretation in order to avoid a **casus omissus**. This was not really a case of analogous interpretation but of **modificative interpretation**: a **casus omissus** had to be supplied. See the discussion on **modificative interpretation** *infra*.

and extensions to the meaning of the text while modificative interpretation involves the **physical** addition or omission of **words** in order to achieve the clear **purpose** of the legislation. From the practical point of view, it concerns the **actual insertion, omission or alteration of words**.

In accordance with the **purely textual** or slavish application of the **literal** approach, and as a result of various other reasons mentioned above, the courts have often not been prepared to follow this method of interpretation.⁵⁷ However, they have in many cases rectified deficiencies in the language of the text while in other instances they have even been prepared to supply a **casus omissus**.⁵⁸

The courts will, however, not lightly make use of modificative interpretation. Only when it is established that the **purpose** of the legislation is not reflected in the **ordinary meaning** of the text and the words lend themselves to such a construction, will the court be able to apply modificative interpretation.⁵⁹

A final question which merits attention relates to the **extent** to which the courts may apply modificative interpretation. The answer is that the courts are restricted to **less radical and less extensive** modifications. Penal provisions or restrictive provisions constitute factors which could **limit** the scope of modificative interpretation.

Furthermore, the **presumption** that the legislature does not intend to create legislation which is nugatory or meaningless, could constitute indicators in **favour** of the application of modificative interpretation.

Résumé

If the ordinary meaning of the text, seen from a contextual point of view, does not reflect the purpose of the legislation, certain modifications may be made.

⁵⁷ This approach led to the infamous *Dadoo* case, *supra*.

⁵⁸ A few court cases may be mentioned here: *Alli v. Pretoria Municipal Council* 1908 TS 1120; *Skinner v. Palmer* 1919 WLD 39; *Trivett & Co (Pty) Ltd v. WM Brandt's Sons & Co* 1975 3 SA 423 (A); *Glen Anil Development Corporation Ltd v. Secretary for Inland Revenue* 1975 4 SA 715 (A); *Klipriviersoog Properties (Edms) Bpk v. Gemeenskapsontwikkelingsraad* 1984 3 SA 715 (A).

⁵⁹ This is in keeping with the view that the interpreter may deviate from the clear, unambiguous meaning to achieve the purpose of the legislation.

The meaning of the text will be limited or extended, as the case may be, via the application of restrictive and extensive interpretation to reflect the purpose of the legislation.

Modificative interpretation is a drastic form of interpretation as words are added or omitted in order to bring the text in line with the purpose of the legislation in its contextual sense. Although modificative interpretation is applied only in exceptional cases, the presumption against laws which are nugatory or meaningless, will be an indicator in favour of such interpretation.

6.5. Guidelines for peremptory and directory statutory provisions

If legislation prescribes the **manner** in which an act is to be performed, or **prohibits** it, it becomes necessary to ascertain what the **results** would be if such an act is not performed in accordance with the prescribed rules. If the Act expressly declares such an act to be **void**, no problems will arise. However, as soon as legislation fails to stipulate clearly whether such an act will be void, other indicators will have to be examined.⁶⁰

Where legislation does not clearly provide that non-compliance would lead to nullity, the nature of the provisions should be ascertained to determine whether they are **peremptory** or **directory**.⁶¹ In the case of non-compliance with peremptory provisions, the act so performed could be invalid.

Although the **purpose** of the legislation would still be the decisive factor, certain **guidelines** or “tests” have been devised to help the interpreter in this regard. These guidelines are **not binding** legal rules but merely **pragmatic solutions having persuasive force**. Numerous guidelines exist but only a few will be mentioned here:⁶²

⁶⁰ An act that is null and void (**ab initio** namely, from the beginning) is deemed to have no legal existence whatsoever – it is a nullity. An administrative act which is said to be defective, however (sometimes the term “invalid” is used, which could be confusing), is **not void** but **voidable**. In other words, it remains operative until it has been declared invalid by some higher authority. The significance of this distinction lies in the fact that a **void** administrative act may be disregarded by the individual while a **voidable** act cannot; at any rate until it has been declared invalid. Valid and invalid acts are discussed **supra** under requirements for validity and state liability.

⁶¹ In principle, though, all statutory provisions must be regarded as **peremptory** provisions. A more appropriate question would be whether the competent body has the **power to dispense** with the provisions under these circumstances.

⁶² These guidelines were proposed in **Sutter v. Scheepers** 1932 AD 173 and **Pio v. Franklin** 1949 3 SA 442 (C).

- the word “shall” usually indicates a peremptory provision and non-compliance may result in the act being null and void;
- a provision couched in a negative form (“no person shall”), is deemed to be peremptory rather than directory;
- a provision couched in a positive form with no penal sanction attached to non-compliance with the provision, is deemed to be merely directory;
- if strict compliance with the provision would lead to injustice or even fraud, and no penal sanction or a provision regarding nullity has been attached, there is a presumption in favour of validity;⁶³
- if the freedom of the individual is at stake, the peremptory nature of a provision will be stressed – naturally it should be to the advantage of the individual;⁶⁴
- the attachment of a penal provision to a command or prohibition, strengthens the presumption in favour of nullity. However, the addition of a penal provision may be an indication that the penalty is sufficient and that the resulting act should not be declared null and void.⁶⁵

Consult the bibliography for additional material on this topic.

Résumé

General guidelines or tests are used to ascertain whether statutory provisions are peremptory or directory. Under such circumstances the legisla-

⁶³ This guideline actually means that validity is preferred to nullity: in the latter case, the decision to declare the act null and void, would cause more inconvenience and undesirable results than the prohibited act itself.

⁶⁴ To illustrate this point, it was decided by the court that even where a detained immigrant was a prohibited person, he was still entitled to written information on the reasons for his detention. In *casu* the furnishing of reasons was peremptory. Notwithstanding the fact that he was in principle not allowed in the country, his freedom still had to be protected and respected in law: **Macara v. Minister of Information, Immigration and Tourism 1977 2 SA 264 (R).**

⁶⁵ In some cases the legislature regards commands or prohibitions as of the utmost importance and a penal sanction is attached to indicate its disapproval with or rejection of such an act. Under these circumstances the null and void act is “punished” with an additional penal clause: **Rooiberg Minerals Development Co Ltd v. Du Toit 1953 2 SA 505 (T).** In other cases a prohibited act which is burdened with a penal sanction, would be merely invalid (voidable) and not null and void. The penalty, would then be regarded as a sufficient deterrent: **Eland Boerdery (Edms) Bpk. v. Anderson 1966 4 SA 400 (T).**

tion usually does not give a clear indication regarding the effects of non-compliance with these provisions.

The guidelines are merely tests which enjoy some persuasive force and the purpose of the legislation remains the predominant criterion.

PART TWO GUIDELINES ON THE PRACTICAL APPLICATION OF THE RULES OF INTERPRETATION

7. INTRODUCTION

The first part of this discussion deals with the **theoretical material** which **demarkates** this field of study and determines the various **methods** of interpretation. These various **working tools** are used to solve or explain **practical problems**. The practical application of the working tools is described as **concretisation**.

As the school principal's **administrative acts of management** were highlighted in the earlier discussion, it seems appropriate in this section to **examine the particular administrative legislative rules** which govern his powers and duties.

The various methods of application which are proposed **cannot** be regarded as models, but could be useful as **guidelines** in a step-by-step approach.⁶⁶

8. THE PRACTICAL PROCESS

8.1. Legislation placed in contextual perspective by means of the application of aids to interpretation

If the school principal wants to establish the **juridical meaning** of a provision in the **Manual for General School Organisation**, the rules of

⁶⁶ Each interpretation problem requires individual attention. For example, if the principal has to interpret a provision in subordinate legislation, he will not apply the aids to interpretation in the same manner as in the case of parliamentary legislation. In the latter case, where **internal aids** (such as the text in the other language) have to be applied, the text of the legislation signed by the State President will prevail when an irreconcilable conflict exists. In the case of **regulations** (subordinate legislation), both texts must under all circumstances be read together and in the case of a conflict, the interpretation most beneficial to the individual must be followed.

statutory interpretation will apply: the provisions of the Interpretation Act also apply to rules which have the **force of law**, unless the contrary applies. **Internal administration and policy** are governed mainly by **internal legislation** and, as is mentioned above, the courts are very reluctant to interfere in these matters and will in any event, not **make a decision on school policy**.⁶⁷ One may say that if the internal organs and other bodies of control fail to settle an interpretation problem **internally**, the courts may be approached to settle the dispute or to offer legal advice on the matter.⁶⁸

Among the legislation which is relevant to this discussion there is, of course, the **Manual** which is regarded as **subordinate legislation**.⁶⁹ Chapter 5 of the **Manual** deals with the **Functions and duties of teaching staff** and the powers, functions and duties of the principal are listed under 5.1. The particular section must be seen in **context** and therefore interpreted within the framework of the **Manual** as a **whole**. These **departmental rules** which are applicable to the principal in his **official capacity** must be regarded as **internal subordinate legislation**. Subordinate legislation is, however, subject to **main legislation** (empowering enactments), which in this instance could be **higher** (second level) subordinate legislation – provincial ordinances, and **central legislation** – parliamentary laws. The body of empowering legislation is thus **indirectly** applicable and will form part of the wide **contextual** approach in the interpretation process.⁷⁰

⁶⁷ Refer to the discussion on the control of administrative acts and, in particular, the reference to the incident relating to the management council of Menlo Park High School. In this case, which dealt in principle with the interpretation of the powers (relating to school sports) of a school management council, the court also refused to interfere. Even the Minister refrained from making a decision on the internal school policy. The issues relating to the proper election of the management council and its representative nature, also raised questions of interpretation.

⁶⁸ If it happens that the interpretation of an Act is in **dispute**, and a satisfactory solution or explanation cannot be reached **internally**, the court may interfere and give an authoritative **decision** on the case. In other instances the court may be approached to supply an **opinion** on an interpretation problem: this opinion is **not** a decision. The courts will, however, in most cases refuse to give such an opinion on the interpretation of school policy. Refer to the discussion of judicial control and the requirements for a judicial act **supra**.

⁶⁹ The 1986 **Manual** of the Transvaal Education Department has been used. The other provinces will have similar manuals.

⁷⁰ The main legislation **authorises** subordinate legislation and determines the **scope** of the powers of the organ involved.

8.2. The purely textual approach

When the purely **textual** approach is followed, only the literal meaning of the particular words or sentences in 5.1. of the **Manual** will be examined. This narrow approach will prevent the use of the other **intra-textual aids**, namely, the text in the other language, the preamble, paragraphs and schedules. **Extra-textual aids**, namely, the “surrounding” education legislation, the history of the legislation, preceding discussions on the **Manual**, relevant reports of commissions of enquiry and the Interpretation Act, would also be ignored. All these **contextual (intra- and extra-textual) aids** would be consulted only when the meaning of the words in 5.1. was vague or ambiguous. In other words, only when the literal meaning does not reflect the intention of the legislature would the interpreter look for the contextual meaning.

Résumé

In order to determine the juridical meaning of the powers, functions and duties of the principal in its contextual relation, the relevant legislation must be analysed as a whole but also in its wider context. Through this process, the broad spectrum of education legislation pertaining to the powers of the principal, is scrutinised.

All the internal and external aids should be used in order to establish the purpose of the legislation in its contextual sense. This is the only way to complete the interpretation process.

If the textual approach has been followed, the interpreter would change to contextual interpretation only if the literal meaning of the words does not express the intention of the legislature.

8.3. The basic rules inherent in the interpretation process

Certain fundamental rules must be considered when the powers and duties of the principal are interpreted within the **contextual** framework of the legislation. The **legal presumptions**, as common-law rules of fairness, are in reality “built” into legislation and must be used as guidelines in establishing the purpose of the legislation. For example, if 5.1. is construed in such a way as to render parts of the **Manual** meaningless or nugatory, the presumption against futile or nugatory provisions will apply **unless** the contrary is clear; the presumption in favour of promoting the public interest may also apply when a particular interpretation of the principal’s

would lead to incompetent conduct and would not serve the public interest (for instance, the interest of pupils, parents and other teachers). All the presumptions must be tested in the same way against the **purpose** of the legislation involved in order to ensure fair and equitable interpretation.

The other basic rules must also be borne in mind **constantly**; for example, the **ordinary** meaning of the words under the particular circumstances, must be adopted; no addition or subtraction must be made to the text; a **balance** must be maintained between text and context.⁷¹ Although the basic rules form the structure of the interpretation process, they are **subject** to the predominant aim or **purpose** of the legislation. If the interpretation of the principal's powers in 5.1. does not tally with the purpose of the legislation in its contextual framework, the **meaning** of the words may be altered through extensive or restrictive interpretation, or **physical** modification of **words** may take place through the application of modificative interpretation.

Résumé

All the basic rules must be borne in mind from the outset and throughout the interpretation process in order to achieve the clear purpose of the legislation in question. In other words, in applying the various aids of interpretation, the interpreter must always be mindful of the basic rules of interpretation.

The application of presumptions may be excluded only by express provision or by necessary implication. The other basic rules also ensure that interpretation takes place within the limits provided for by the purpose of the legislation, and prevent legislative powers from being usurped by the interpreter.

8.4. Linking the particular practical situation

The results thus far obtained in the interpretation process should be regarded as **possible** answers or solutions to the problem. These results

⁷¹ In order to determine the **ordinary** meaning of the words in a particular case, one should at this stage of the interpretation process also devote attention to the **guidelines** on peremptory and directory provisions. To illustrate this point, the question could be asked whether the peremptory nature of the word "shall" would under the particular circumstances be regarded as the **ordinary** meaning intended for the words.

must, however, be seen in relation to the **real situation** which applies to the particular legislation. Consequently, the formal, provisional answers must, through the process of **concretisation**, be applied to the specific practical problem in question. The formal answers/solutions must be **compared** with the possible answers in the practical situation.⁷²

It is impossible to provide for all the different practical situations in which legislation operates. If it becomes clear that the words of the text cannot transmit the **purpose** of the legislation to the particular **practical situation**, certain **modifications** must be made. This is done to achieve “reconciliation” between the legislation concerned and the particular situation in question. Under these circumstances the **meaning** of words is extended or limited, or **words** are added to fill shortcomings, or superfluous words are omitted.

Extensive, restrictive and modificative interpretation is used at this stage of the process in order to achieve “logical correlation” and “reconciliation”. The contextual **purpose** of the legislation in **correlation** with the practical solution, is still the predominant aim of this exercise. To put it crisply, under these circumstances the purpose of the legislation can be **grafted** on to the practical situation only by way of the different forms of **modification**.⁷³

8.5. The final solution or explanation

In most cases the interpreter will not encounter conflicting possibilities during this stage of the process. **Correlation** through the different forms of **modification** would then be unnecessary. For example, if a clear solution has been apparent right from the outset of the interpretation process, it needs only to be transferred to the practical situation.

Whether correlation has been discovered or construed or whether it has been apparent right from the start, the interpreter still has to find a **final**

⁷² A hypothetical example could be mentioned: in **principle** all school principals have the same management powers and functions although different circumstances have to be considered in each case. Up to this stage of the interpretation process, the powers of the principal have been interpreted as applicable to **all principals**. The real situation in which the principal of a small primary school in a rural area has to exercise his powers are, however, totally different from that of a principal of a big suburban school. In other words, the **particular practical situation** of the principal concerned, must be considered.

⁷³ Legislation is there to serve the community and therefore applies within the **environmental milieu**. The purpose of legislation must not only exist in the theoretical sense but must be **grafted** onto its practical application.

solution to his problem. The next step then, is to **materialise** the solution or explanation by testing it against the **legal presumptions**.⁷⁴ Bear in mind, though, that the application of presumptions may also be excluded here when, for instance, express provision is made for retrospective force, or to bind the state.

Résumé

The proposed step-by-step method does not offer a magic formula for the interpretation of statutes. Different interpretations and effects may still result from the same legislation. A measure of subjectivity may arise during the stage of concretisation in particular. The interpreter will always have to make choices: choice-making must, however, be legally bound and not made arbitrarily.

⁷⁴ It has been mentioned above that legal presumptions form part of the **juridical reality** and for this reason will also constitute part of **concretisation**.

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SECTION C

GENERAL GUIDELINES
FOR DRAFTING
EDUCATION LEGISLATION

CONTENTS

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Draft legislation is usually referred to as a **bill**. Bills go through the normal legislative process and once they have been adopted by Parliament, are called **laws** or **Acts**. This law or Act will then form part of **statutory law** or the body of **legislation**.

1. INTRODUCTION

It is clear from the discussion of **legislation** as a **source** of the law of education, and **administrative legislative acts** of education, that legislative **drafting** takes place at all levels of the education structure and is performed by different legislative bodies.

The drafting of legislation, like the interpretation of statutes, is an extensive and independent field of study which cannot be covered in detail here. Although these disciplines involve different fields of study, in reality they cover **adjacent** areas of application in which overlapping often occurs. In legal circles serious criticism has been levelled against the lack of **positive** co-operation and co-ordination between legislative drafters and the legislature. The task of the interpreter of legislation would be considerably lighter if the draftsmen were to uphold **uniform** rules that are generally **acknowledged**: the intention of the legislative body and the purpose of legislation must be transmitted in a clear and accurate manner to enable the interpreter, through application of the rules of statutory interpretation, to determine the true intention or purpose. **Objective** criteria must therefore be established for the drafting of legislation as **education laws** and other subordinate **legislative rules on education** form part of an extensive legislative network which is linked to central education legislation. The draftsmen must be conscious of the underlying **juridical** principles or concepts which govern education activities. As is mentioned above, a sound **legal basis** is essential for effective education administration and the well-informed draftsman can contribute a great deal towards improving legal awareness.

In most cases, in particular where administrative legislative rules are concerned, the **specialised** task of drafting is performed by education officials who have not had any formal legal training: the principal formulates school policy; the management council of the school and the committee of university principals each draft their own internal rules.

Because the persons concerned lack formal legal training, one cannot expect the use of strict statutory language in, for example, internal legislation and other legislative rules. On the other hand, it must be borne in mind that the principal may be promoted to a senior administrative post where he may become directly involved in the **formal** drafting of central education legislation. Internal legislative rules on education will, naturally, not bear the same formal characteristics of general education laws. Although this discussion will focus on **formal legislative drafting**, useful **general guidelines** for the drafting of education legislation, may be offered.

2. PREPARATION

The draftsman – the legislative body or the specialist body – must have clarity about the **purpose** or object of the legislation. He must also be acquainted with the **subject-matter** and **status** of the enactment in the legal and legislative environment. For instance, the principal must understand the purpose of school policy; he must realise that it forms part of public-education legislation and fills a special place as internal subordinate legislation within the broad education framework.

With regard to the **subject-matter** of legislation, the draftsman must take cognisance of the legislative network and the case law pertaining to the particular subject. Questions that may arise in this respect are: whether the proposed legislation will cover a new subject, or whether it will merely amend, repeal or co-ordinate existing legislation. Furthermore, it must be ascertained whether the proposed legislation may clash with existing legislation or authoritative case law on the same subject.

The **application** of the proposed legislation must also be examined. School rules have limited (internal) application within the school; provincial ordinances or proclamations operate within specific geographical areas; the overriding education laws for general affairs have general application. When general education legislation is amended or repealed, its overriding force must be considered; the whole spectrum of education legislation –

central or subordinate, “general” or “own” – may be influenced in this way. It must be established whether other general legal principles which also apply outside the education field, are affected.

The draftsman must also consider specific **formal requirements**; for example, if the proposed legislation covers more than one topic, an interdisciplinary enquiry and drafting are often required; if certain procedures are prescribed for adoption, the same procedures are followed in drafting amendments and repeals.

3. DRAFTING A LAW

The two main ingredients in the formulation of legislation are **substance** and **form**. The substance is the language used to give meaning while the form consists of style, divisions and classification. The accurate and correct application of these requirements ensures sound **legislative drafting technique**.

- The most important element of **substance** is the legal **language**. Language must be concise but comprehensive, clear, accurate, direct and linguistically correct. The draftsman must continually strive to enrich and develop his language skills. Quite appropriately the American source (see bibliography) remarks on 90: “Bill drafting must have the accuracy of engineering, for it is law engineering; it must have the detail and consistency of architecture, for it is law architecture.”
- The **form** (structure) of legislation does not only create visual systemisation but also classification of content. Although the form in itself does not bear any legal meaning, the division of the contents into chapters, sections, subsections and paragraphs enhances the meaning of the text. A **chapter**, for example, deals with a specific topic of the legislation and is subdivided into **sections** with separate marginal headings. Each section covers a particular aspect of the topic of which the gist is reflected in the marginal note. If the particular aspect requires more elucidation, **subsections** are used for further discussion or to list the relevant points. A further division would be into **paragraphs** and **subparagraphs**. In many cases a law also consists of a **schedule** which should be read in conjunction with it. When **reference** is made to laws, the following citation is normally used: section 12(2)(b)(i) refers to section 12, subsection (2), paragraph (b) and subparagraph (i). (The sections of a **bill** are called **clauses**.)

4. THE CONTENT OF A LAW

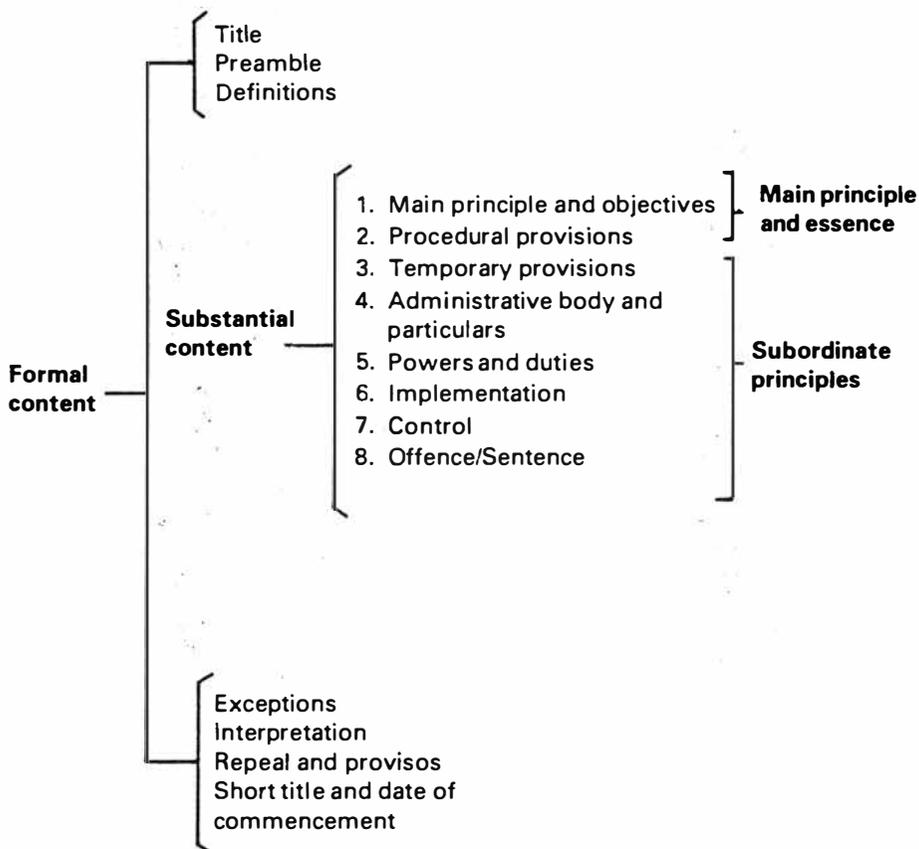


Fig. 11. *The content of a law (simplified)*

The significance of certain **formal** elements of a law, for example, title, definition clauses, repeal clauses and the short title are not discussed here. The **subject-matter** (substantial content), does however, require close examination.

Because of the wide-ranging nature and scope of legislation, no general rule can be devised in respect of its substantial content. One rule will, however, always apply, namely, that this part of the content must evolve in a **logical and systematic manner**: the main principle or rule is followed by its relevant aspects and is arranged around the core in a clear and understandable way.

The substantial content must be seen as the **heart** or core of a law and reflects the main aim or purpose and the legal principles on which it is based. This part of the enactment comes immediately after the general introductory sections and contains the following particulars:

- a. the main principles or objectives which are discussed concisely and clearly in one or more sections;
- b. procedural provisions which are dealt with in the following sections;
- c. temporary provisions (if any) which are discussed next;
- d. sections providing for the institution of an administrative body/organ or instructions to an existing body to administer the enactment. In the following sections particulars regarding service conditions, remuneration, expenses and sundry matters relevant to the administrative body, are discussed;
- e. sections dealing with the powers and duties of the administrative body/organ which are discussed fully;
- f. provisions regulating the different ways of exercising powers;
- g. sections providing for the different ways of control of administrative acts;
- h. sections providing for the identification of offences or crimes and the prescribed penalties.

The main principle and main content of the enactment is discussed under (a). If the principle has a direct bearing on individuals or groups of individuals (for example, teachers, pupils), it must be clearly stated to that effect. The topics which are discussed under (b)-(h) form the subordinate principles of this division and must be covered in a logical manner. For example, provisions which have a general application must precede restrictive provisions; provisions regulating the issuing of licences and permits must precede provisions on their refusal or withdrawal; penal provisions must follow after the powers, duties and prohibitions have been discussed.

5. HINTS FOR THE DRAFTSMAN

Emphasis has been placed throughout upon the principles of brevity, preciseness, clarity, simplicity and orderliness. Unreadable, confusing and misleading bills are condemned as fore-runners of bad laws: not only do they discredit the legislators, but also plague the courts and may cause injustice to the individual.

Up to this point the focus has been mainly on the broad **principles** of legislative drafting rather than the particulars. The following observations of good and bad practices must be borne in mind:

- Each section or subsection must be complete in itself and self-sufficient. It should not serve as a continuation of the preceding section nor as a preface to the succeeding one.
- Exceptions or provisos may cause confusion and should rather be placed either in a subsection or in a separate section.
- Legislation comes into operation at publication or at a specific date of commencement. It should therefore be drafted in the present tense: for example, “the offence is punishable” and not “the offence shall be punishable”.
- Legislation usually refers to singular cases, namely, a crime, a penalty, a committee. Furthermore, a reference to the “individual” usually includes the plural, and masculine usually includes feminine. A “person” may include masculine, feminine or either; “teacher” may include a male or female teacher or all teachers; a “pupil” may be male, female or either.
- When technical legislation is drafted, ordinary or familiar technical terms should be used. If unfamiliar technical terms are used they should be explained in the definition clause.
- A law which includes the provisions of another law by reference should be avoided as this could cause confusion. Problems may also arise when the other law is repealed or amended. If a reference to another law is necessary it should be clear and concise: avoid too many particulars that may cause confusion.
- Words bearing imprecise/non-specific meanings or meanings which cannot be measured objectively, should be avoided: for example, knowingly,

serious, ample, due notice, dangerous, necessary, immediate and forthwith. If a particular meaning must be attached to these words it must be provided for in the definition clause.

- Avoid superfluous and repetitive words: for example, the full particulars of the school should not be mentioned every time since the school rules/policy applies to the particular school only; repetitive words, such as, “instruct and request” may cause confusion. The use of adjectives and adverbs in legal language must be restricted as it is often regarded as unnecessary and inappropriate.
- Correct titles must be used. Carelessness in the use of titles of public bodies, departments and officials discloses sloppiness, is confusing to the reader and may create complications in litigation.
- In the case of peremptory and directory provisions, the correct choice of words must be made. “Shall” usually denotes a command or mandatory provision while “may” has an optional connotation. Other words may also be used to denote the conferment of a discretion, for example, “in his view”, “according to his opinion”, “on the advice of” and “in consultation with”.
- Avoid the use of “and/or” as this causes confusion and tends to conceal rather than disclose the legislator’s intention. Where there is more than one requirement and the legislative intent is that all requirements should be met, the conjunctive “and” should be used. If compliance with only one requirement suffices, the conjunctive “or” is used. Where different standards have to be met, itemisation of the standards is the best practice.
- The same thing should always be expressed by identical words: for example, if “ship” is meant, do not refer to “vessel”; do not refer to “contributions” elsewhere as “payments”; “prescribed” is not “provided”. Words and phrases employed carelessly must be avoided, for example, “responsible” and “liable” have specific legal meanings and must be used in that context. The concept that the deputy principal is the “right hand” of the principal, is vague and requires a better description. Furthermore, the wide-ranging meanings which could apply to concepts such as, “management”, “guidance” and “planning” functions, must be examined and clarified. Generally speaking if a word or phrase means but one thing and is interpreted accordingly, the opportunities for misinterpretation or misconstruction on the part of the courts, administrators or other individuals are reduced to a minimum.

- Correct words must be used. For instance, meetings other than regular meetings are “special” but not “extra”; interest is “at the rate of six per cent” and not “at six per cent”. In beginning a sentence to state a case or condition “In the event of” is preferred to “If”. “One thousand five hundred rand” is preferred to “fifteen hundred rand”. The “date” on which the Act takes effect is better than the “time” at which it takes effect. When fixing minimum amounts or numbers say “not less than” rather than “at least”.
- The use of formulas is recommended where complicated calculations are made: for example, in the calculation of salary scales of teachers in relation to their years of service, a formula should be used which is explained in the definition clause. Other calculations such as playground duty at school and media centre duty by the pupils, may also be formulated.
- Bear in mind that practical consequences result from the application of the written language. Consequently the purpose of the legislation (intention of the legislator) must be clearly reflected in the text. Avoid words or phrases which are conducive to different deductions; apart from the fact that it signifies bad drafting techniques, it may also lead to legal uncertainty.

6. REVISION BY THE DRAFTSMAN

However skillfully and accurately the work may have been done, one must assume that it is capable of improvement and therefore, revision. Once the labour of the original composition is finished, more attention may be devoted during revision to defects or shortcomings in the law. Inconsistencies are rectified during the process of revision; illogical arguments eliminated and awkward expressions replaced.

In conclusion, a quotation from the American source (see bibliography) at 112 may serve as a final remark: “The goal of the true draftsman is to achieve perfection as nearly as possible, and the price of that goal is indeed patient toil. But it cannot be said that the goal is not worth the price, for the bill which is the object of so great and earnest effort may become a law that will endure for ages, to the credit of the statesman conceiving it, the reputation of the legislature enacting it, the advantage and enjoyment of mankind, and the satisfaction of the draftsman. The careful draftsman will not leave a bill until he has revised it, and revised it again, and again, and again.”

Résumé

Although the discussion has focused mainly on formal legislative drafting, this does not mean that the principal may disregard these guidelines in drafting school policy and rules. Education does not operate in an area which is not subject to the law and, after all, internal legislative rules form part of the broad network of education legislation. The principal must be conscious of the juridical nature of school policy and rules and must observe drafting and interpretation against the background of a legal milieu.

In reality the education department provides general guidelines for the drafting of school policy. The principal and his senior personnel must define and implement school policy through the drafting of school rules. For example, the education department will provide general guidelines regarding the safety of pupils. The principal's task is to examine and analyse this particular area of interest and compile suitable rules: for example, safety at the swimming pool, playgrounds, corridors and staircases and safety measures regarding the use of gymnastic and sports apparatus.

School rules must be drafted in a clear, logical and systematic manner in order to enable pupils and teachers to understand them. The principal must endeavour to graft the purpose or object of school policy onto the particular school rules. It must be understood that, in accordance with the discussion on interpretation of statutes, the object or purpose of legislation is not necessarily found in the literal meaning of words or sentences.

School rules must be introduced to the personnel and pupils, preferably in writing so as to provide certainty on their existence and application. School rules must not "over-regulate" and must cover only the main demarcated areas in a clear and concise manner. In this respect the purpose and object of the school rules will always be the decisive factor.

There is a dearth of research in this sphere of education at present. This state of affairs causes uncertainty and shortcomings in this particular field of education. Until such time as sufficient research has been done, principals and other local legislative education bodies are called upon to comply with the proposed guidelines in order to make a positive contribution towards the ultimate achievement of uniform and objective standards.

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