

# SECTION A

## LEGAL PERSPECTIVE ON EDUCATION MANAGEMENT

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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**.<sup>1</sup> 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

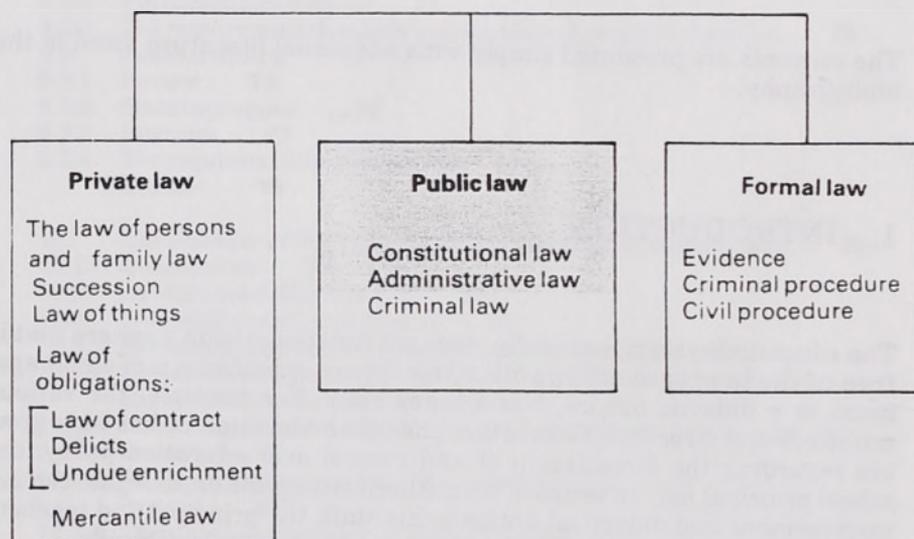


Fig. 1. *The South African legal system*

<sup>1</sup> 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-

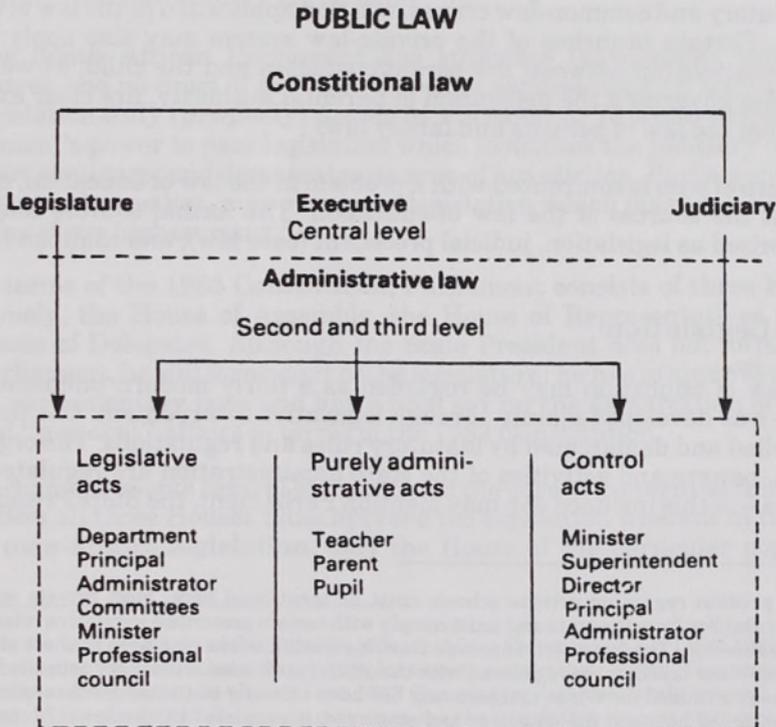


Fig. 2. Public law

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

### 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,

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<sup>2</sup> 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.<sup>3</sup>

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

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<sup>3</sup> 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.<sup>4</sup>

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.<sup>5</sup> 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

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<sup>4</sup> 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.

<sup>5</sup> 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.<sup>6</sup>

### *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.

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<sup>6</sup> 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).<sup>7</sup>

#### *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**.

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<sup>7</sup> 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,

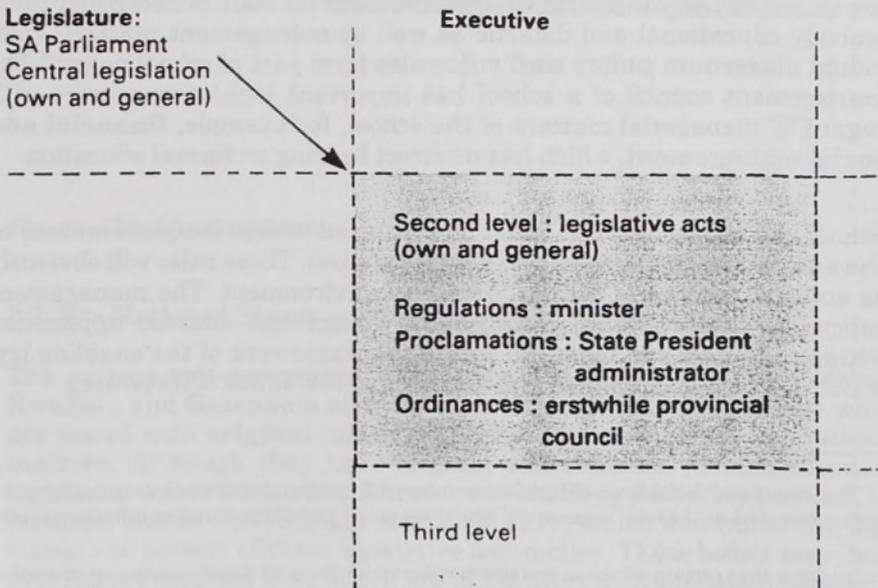


Fig. 3. Second-level legislation

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.<sup>8</sup>

### *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.<sup>9</sup> 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.

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<sup>8</sup> 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.

<sup>9</sup> 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.

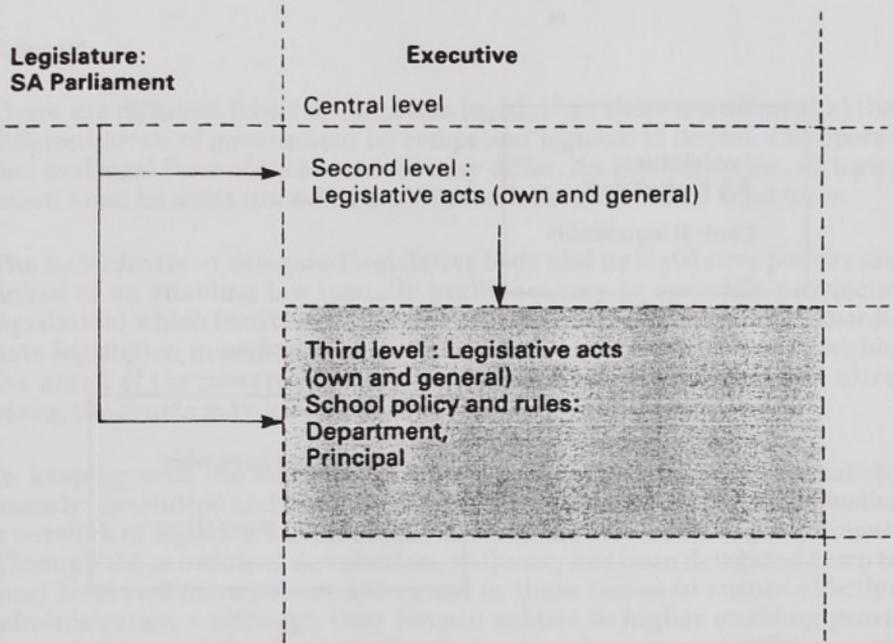


Fig. 4. *Third-level legislation*

### 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.

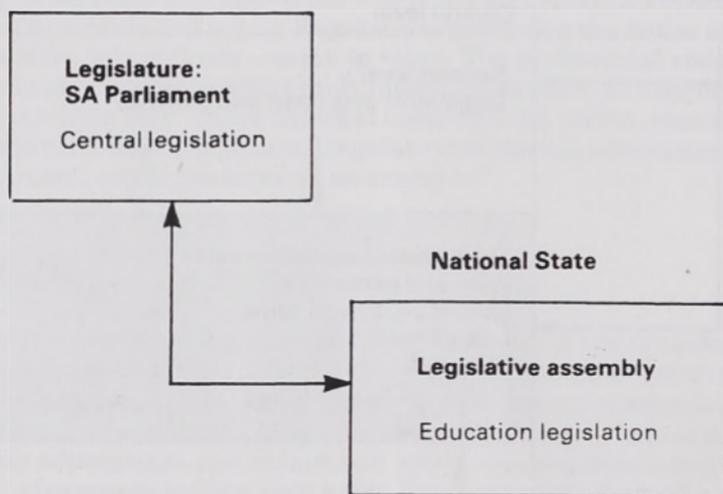


Fig. 5. *Legislation : National State*

#### 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.<sup>10</sup>

### 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.

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<sup>10</sup> 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.<sup>11</sup>

### 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.

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<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup> According to such a viewpoint, the legislature's task

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<sup>12</sup> 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).

<sup>13</sup> 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.<sup>14</sup>

### 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.

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<sup>14</sup> In the **Van Collier** 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.<sup>15</sup>

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.<sup>16</sup> 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.

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<sup>15</sup> 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*.

<sup>16</sup> 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.<sup>17</sup> 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.<sup>18</sup> 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.<sup>19</sup> 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-

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<sup>17</sup> 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.

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

<sup>19</sup> In the **Van Coller** case *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.<sup>20</sup> 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

<sup>20</sup> 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.<sup>21</sup>

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.<sup>22</sup> 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.<sup>23</sup>

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

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<sup>21</sup> 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.

<sup>22</sup> 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.

<sup>23</sup> 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.<sup>24</sup>

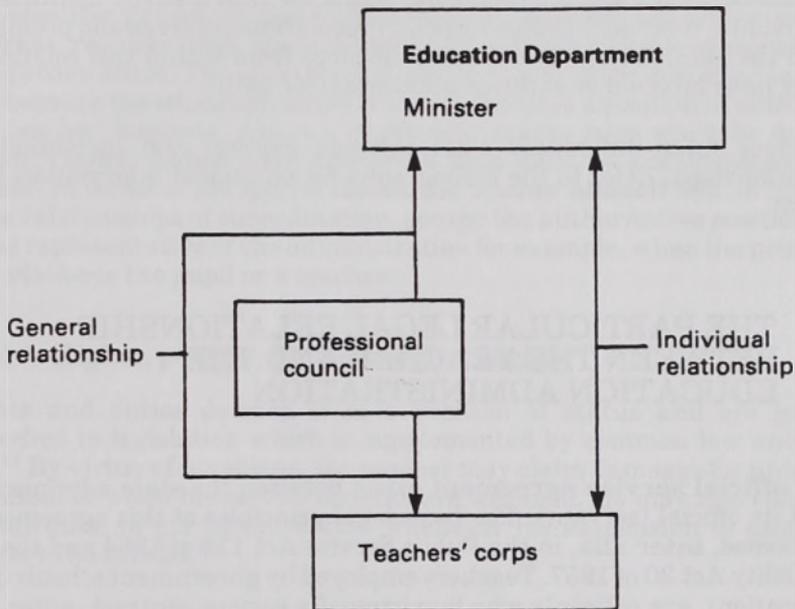


Fig. 6. Individual and general relationship

### Résumé

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

<sup>24</sup> 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.<sup>25</sup> 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

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<sup>25</sup> 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.<sup>26</sup> 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.<sup>27</sup> 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.<sup>28</sup>

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

<sup>27</sup> 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.

<sup>28</sup> 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.<sup>29</sup>

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.<sup>30</sup>

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

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<sup>29</sup> 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.

<sup>30</sup> 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.<sup>31</sup>

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.<sup>32</sup>

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.<sup>33</sup>

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

<sup>32</sup> 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 Coller** 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.

<sup>33</sup> 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.