

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

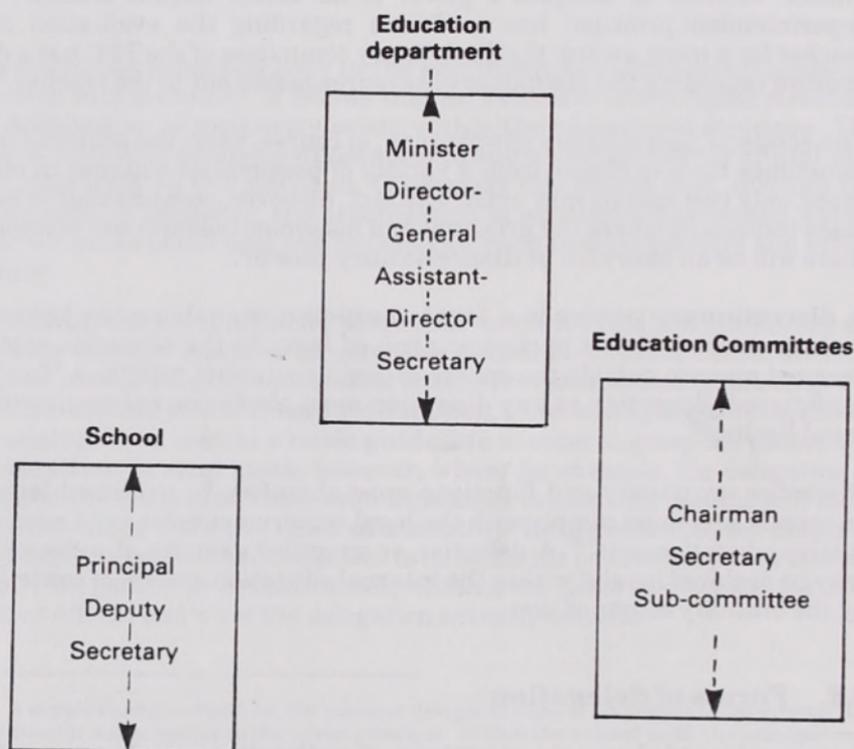


Fig. 7. *Mandate or instruction: different levels*

This is the simplest form of administrative delegation and is found in the usual **vertical line of authority**. These lines exist in the different **sub-structures** 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 *committée* 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.

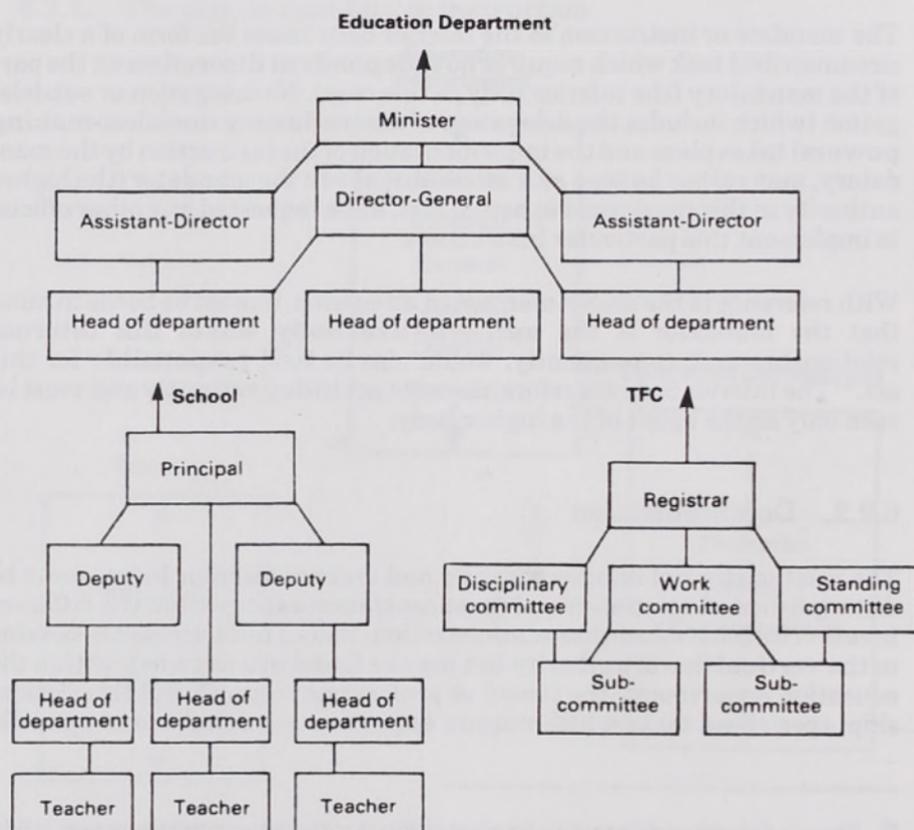


Fig. 8. Deconcentration: different levels

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.

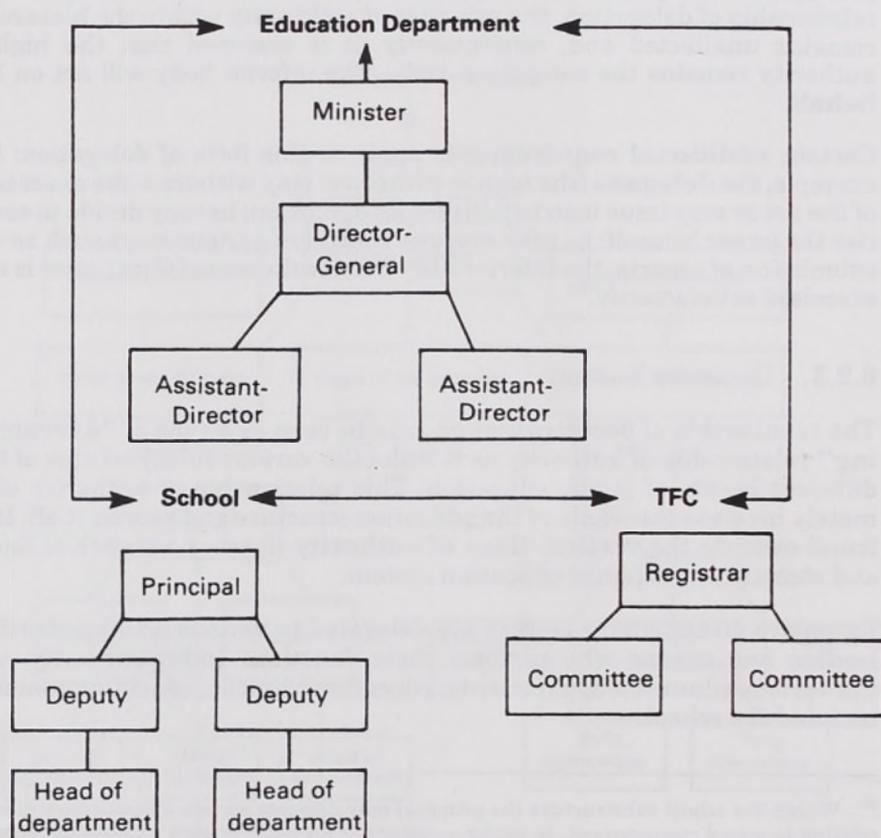


Fig. 9. Decentralisation: different levels

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**.

SCHOOL SUBSTRUCTURE

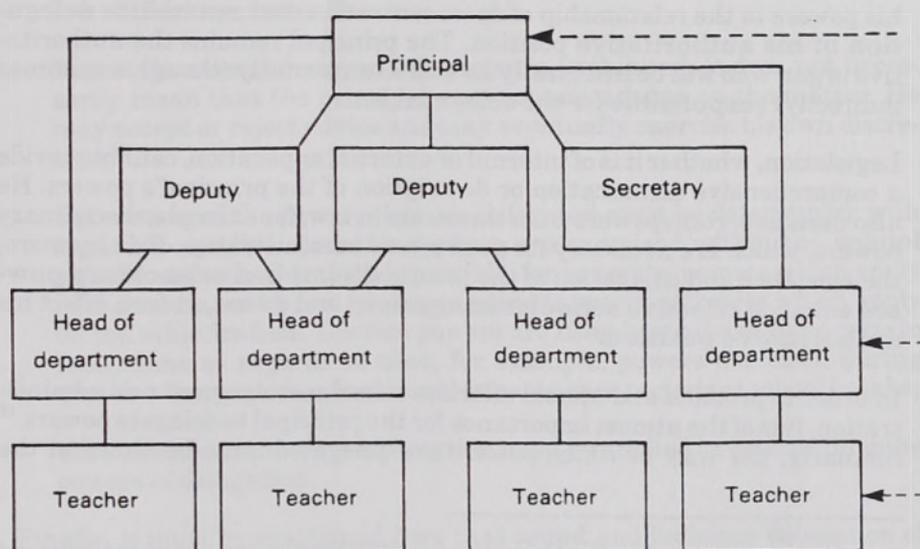


Fig. 10. The authoritative position of the school principal

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 sports 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 Collier* 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 **legal dispute** (*lis inter partes*) or an **uncertainty** must exist in respect of rights, powers and privileges and a **decision** must be made;
- 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;
- 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.