SOUTH AFRICAN LAW COMMISSION

WORKING PAPER 15

PROJECT 24

INVESTIGATION INTO THE COURTS' POWERS OF REVIEW OF ADMINISTRATIVE ACTS

August 1986

INTRODUCTION

The South African Law Commission was established by the South African Law Commission Act, 1973 (Act 19 of 1973).

The members of the Commission are -

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PREFACE

This working paper has been prepared by the research staff of the Commission to serve as a basis for the Commission's deliberations. The points of view, conclusions and recommendations contained herein should not at this stage be regarded as those of the Commission. The working paper is being published in full to provide persons and bodies wishing to comment or to make suggestions for the development, improvement, modernisation or reform of this particular branch of the law with sufficient background information to enable them to place substantiated submissions before the Commission.

Any request to treat comments or part of comments on the working paper as confidential will be respected. If no request for confidentiality or anonymity is made the Commission will assume that commentators agree to the Commission's quoting from or referring to comments and attributing comments to commentators.

Any person or body wishing to make oral representations to the Commission should submit a brief résumé of his or its proposed representations, together with a request to be heard by the Commission, to the Commission in writing.

It would be appreciated if written comments, representations or requests, could reach the Commission by 31 March 1987. Please refer to the previous page for the address to which correspondence should be directed. Please communicate with the researcher if you are unable to submit your comments in time.

The researcher responsible for the investigation, who may be contacted for further information, is Mr H C Trichardt.

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CHAPTER 1

ORIGIN OF THE INVESTIGATION

1 The powers of review of the courts in the case of administrative action is a subject on the Commission's programme.

2 After careful consideration, and mindful of the proposals of the Constitutional Committee of the President's Council in this regard, the Commission decided that the necessary investigation could best be done by examining the following aspects:

- Present procedure in terms of which administrative action or adjudication is taken on appeal or review
- The grounds on which administrative action or adjudication is tested by way of review
- The question whether the grounds for review in respect of administrative and quasi-judicial acts should be extended or restricted
- Administrative appeals: control of administrative acts by other administrative organs.

3 In the investigation use has been made of available literature and reports of law reform bodies of several other countries, to which full reference is made in the working paper.

CHAPTER 2

PRESENT PROCEDURE IN TERMS OF WHICH ADMINISTRATIVE ACTION OR ADJUDICATION IS TAKEN ON APPEAL AND REVIEW

1. INTRODUCTION

1.1 It will be useful at the outset to give the traditional definition of each of the following concepts:

. Judicial act

A judicial act may be defined as the authoritative determination and application of the law by a government organ in the settlement of a legal dispute or uncertainty; this determination and application are binding and final and can be duly carried into effect. An administrative judicial act is a judicial act performed by a government organ within the executive which, unlike the ordinary civil courts or the respective special courts which organisationally fall under the traditional judiciary of the State, also function within the framework of public administration.[1]

. Quasi-judicial act

To sum up, the quasi-judicial act may be said to be an administrative act which displays elements of a judicial act and which is performed in the exercise of a discretion in the making of a decision by the official or tribunal concerned and which affects existing rights, privileges, powers or freedoms of the subject. When a quasi-judicial act is performed the rules of natural justice must be complied with unless compliance has been

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1 M Wiechers Administratiefreg 2nd edition Butterworth 1984 at 113, hereunder Wiechers Administratiefreg.

excluded either by the statute concerned, whether expressly or by necessary implication, or by common law.[2]

- Administrative act

An administrative act is merely an executive act which is performed by the administration for the purpose of creating, varying and terminating the individual administrative-law relationship.[3]

1.2 As far as the above-mentioned three concepts are concerned, the following observation made by Schreiner J A should be noted:[4]

> The classification of discretions and functions under the headings of 'administrative', 'quasi-judicial' and 'judicial' has been much canvassed in modern judgments and juristic literature; there appears to be some difference of opinion, or of linguistic usage, as to the proper basis of classification, and even some disagreement as to the usefulness of the classification when achieved. I do not propose to enter into these interesting questions to a greater extent than is necessary for the decision of this case; one must be careful not to elevate what may be no more than a convenient classification into a source of legal rules. What primarily has to be considered in all these cases is the statutory provision in question, read in its proper context.

For the purposes of this investigation the traditional distinction may be retained. Moreover, this investigation deals only with appeal and review in the case of quasi-judicial and administrative acts.

2. PROCEDURE FOR APPEAL IN THE CASE OF QUASI-JUDICIAL AND ADMINISTRATIVE ACTS

2.1 The concept of "appeal" has on occasion been defined as follows:[5]

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2 Wiechers Administratiefreg at 152-3.

3 See Wiechers Administratiefreg at 129.

4 Pretoria North Town Council v A1 Ice-Cream Factory 1953 3 SA 1 (A) at 11A-C.

5 R v Keeves 1926 AD 410 at 416.

> In its ordinary sense the word 'appeal' denotes an application to a higher authority for relief from a decision of a lower one.

And:[6]

> The word 'appeal' ... may mean ... a re-hearing on the merits but limited to the evidence or information on which the decision under appeal was given, and in which the only determination is whether that decision was right or wrong.

2.2 The most important differences between an appeal and a review are the following:[7]

> Notably there is this distinction between the two, that an appellant comes into court upon a record of the case in the court below, and by that record he is bound; he cannot take advantage of any circumstance which does not appear or cannot be deduced from the record. The litigant who seeks to have a case reviewed depends upon irregularities which need not necessarily appear upon the face of the record. If they do not so appear, he is at liberty by affidavit to bring the facts upon which he relies to the notice of the Supreme Court. He is not bound by the record in the way in which an appellant is ... an appeal without a record is a contradiction in terms.

And also:[8]

> Where the reason for wanting to have the judgment set aside is that the court came to a wrong conclusion on the facts or the law, the appropriate remedy is by way of appeal. Where, however, the real grievance is against the method of the trial, it is proper to bring the case on review.

2.3 An appeal from an administrative decision lies only if it has been provided for by statute.[9] When provision has thus been made for appeals, such appeals may be divided into two groups:

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6 Tikly v Johannes 1963 2 SA 588 (T) at 590H.

7 Johannesburg Consolidated Investment Co v Johannesburg Town Council 1903 TS 111 at 114 and 119.

8 Herbstein & Van Winsen The civil practice of the superior courts in South Africa 3rd edition Juta 1979 at 750, hereunder Herbstein & Van Winsen.

9 L A Rose Innes Judicial review of administrative tribunals in South Africa Juta 1963 at 32, hereunder Rose Innes Judicial review.

- In certain cases the legal provision in terms of which the right of appeal is granted provides that the appeal must be noted and prosecuted as if it were an appeal from a judgment of a magistrate's court in a civil matter.[10] Examples of such a right of appeal are found in the Workmen's Compensation Act 30 of 1941. In terms of section 25(7) a person who is affected by a decision of the Workmen's Compensation Commissioner or the Minister of Manpower may appeal to a provincial or local division of the Supreme Court having jurisdiction. In terms of section 21(1) of the Liquor Act 87 of 1977 any person who is aggrieved by a decision of the Liquor Board may lodge an appeal against that decision when it relates to a question of law.

  In both cases it is provided that the appeal must be noted and prosecuted as if it were an appeal from a judgment of a magistrate's court in a civil matter. The noting of such an appeal must take place within the period of time and in the manner prescribed by rule 51 of the Magistrates' Court Rules.[11] The prosecution of the appeal must take place in accordance with rule 50 of the Uniform Rules of Court.[12]

- In other cases the legal provision in terms of which the right of appeal is granted may either lay down a special procedure or prescribe no procedure for the noting and prosecuting of the appeal.[13] When a special procedure is fully prescribed it must be followed. An example of such a case is to be found in the

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10 Rose Innes Judicial review at 33; see also Herbstein & Van Winsen at 681.

11 See Jones & Buckle The civil practice of the magistrates' courts in South Africa 7th edition by P W E Baker et al Juta 1980 Vol 1 at 295, hereunder Jones & Buckle Vol 1.

12 Jones & Buckle Vol 1 at 295; see also Nathan Barnett & Brink Uniform rules of court 3rd edition by C J M Nathan & M Barnett Juta 1984 at 331 et seq, hereunder Nathan Barnett & Brink.

13 See Rose Innes Judicial review at 33.

Merchant Shipping Act 57 of 1951. In terms of section 292(1) any person who is aggrieved by a decision of a court of marine enquiry or a maritime court may appeal to a division of the Supreme Court within the area of jurisdiction of which, in the case of a court of marine enquiry, the court was held or, in the case of a maritime court, the ship which formed the subject of investigation, or on board which the casualty or occurrence investigated by the court took place, is registered. In terms of section 292(4) such an appeal must be made in the manner and subject to the conditions and in accordance with the provisions laid down in the regulations.[14]

When a special procedure is not or not fully prescribed the provisions of rule 49(17) of the Rules of Court apply. Examples of such cases are to be found in the Admission of Persons to the Republic Regulation Act 59 of 1972. Section 3 provides that the State President may appoint a board for the summary determination of appeals by persons who, seeking to enter or being found within the Republic or any province, have been detained, restricted or arrested as prohibited persons. In terms of section 12(1) such a board may, of its own motion, and shall, at the request of an appellant or of an immigration officer, reserve for the decision of the Supreme Court having jurisdiction, any question of law which arises upon appeal heard before that board under the relevant chapter of the Act.

The Labour Relations Act 28 of 1956 provides in section 16(1) for an appeal to the Minister of Manpower against certain actions of the Industrial Registrar. In terms of section 16(5)(a) any person who is aggrieved by any decision of the Minister on such an appeal may within 30 days after the decision note an appeal to any provincial or local division of the Supreme Court within whose area of jurisdiction he resides. After having given security to the satisfaction of the registrar of that division for any costs that

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14 See Government Notice R1067 of 24 November 1961.

may be incurred by the Minister in connection with the appeal, he must prosecute the appeal within a period of six weeks from the date of such decision.

3. PROCEDURE ON REVIEW

3.1 A review is "a limited re-hearing with or without additional evidence or information to determine, not whether the decision under appeal was correct or not, but whether the arbiters had exercised their powers and discretion honestly and properly".[15] Review is also defined as follows:[16]

> Judicial review in our law and practice is a remedy, distinct from appeal, afforded exclusively by the Supreme Court whenever the proceedings of inferior courts of law and of administrative officials, tribunals and authorities have been irregular or illegal, and whereby such proceedings may be corrected and set aside at the instance of any person whose interests have been prejudicially affected by those proceedings.

3.2 In Harnaker v Minister of the Interior[17] Corbett J, remarked inter alia as follows:

> The locus classicus on the subject of the procedure known as review is contained in the judgment of Innes, C.J., in the case of Johannesburg Consolidated Investment Co. v Johannesburg Town Council, 1903 T.S. 111. The summary of the relevant portion of the judgment contained in the head-note to the report of this decision has been cited, with approval, in the Appellate Division (see Kliprivier Licensing Board v Ebrahim, 1911 A.D. 548 at pp. 463-4) and reads as follows:
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> Review is capable of three distinct and separate meanings:
>
> (a) Review by summons. The process by which, apart from appeal, the proceedings of inferior courts of justice, both civil and criminal, are brought before the Supreme Court in respect of grave irregularities or illegalities occurring during the course of such proceedings.

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15 Tikly v Johannes 1963 2 SA 588 (T) at 590H.

16 Rose Innes Judicial review at 1.

17 1965 1 SA 372 (C) at 376E-H.

(b) Review by motion. The process by which where a public body has a duty imposed on it by statute, or is guilty of gross irregularity or clear illegality in the performance of that duty, its proceedings may be set aside or corrected.

(c) A wide power specially given under particular statutes to the Court or a Judge, enabling such Court or Judge in respect of the matter referred to them, to exercise the powers of a Court of appeal or review, or even a Court of first instance.

Review as contemplated above in paragraph (b) of the quotation from Johannesburg Consolidated Investment Co v Johannesburg Town Council "is the power exercised by the Supreme Court at common law and upon recognized grounds of irregularity or illegality to set aside or correct the proceedings of public authorities, tribunals and officials in the performance of administrative duties imposed upon them by statute".[18] This is the review that usually occurs in the courts and which is the main subject of this investigation.

In so far as review as contemplated above in paragraph (c) of the quotation from the aforesaid decision is concerned, the following should be noted:[19]

> So employed the expression 'review' seems to mean 'examine' or 'take into consideration'. And when a court of law is charged with the duty of examining or considering a matter already dealt with by an inferior court, and no restrictions are placed upon it in so doing, it would appear to me that the powers intended to be conferred upon it are unlimited. In other words it may enter upon and decide the matter de novo. It possesses not only the powers of a court of review in the legal sense, but it has the functions of a court of appeal with the additional privileges of being able, after setting aside the decision arrived at by the lower tribunal, to deal with the whole matter upon fresh evidence as a court of first instance.

Examples of such reviews are to be found in section 151 of the Insolvency Act 24 of 1936 and section 95 of the Administration of Estates Act 66 of 1965.

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18 Rose Innes Judicial review at 7.

19 Johannesburg Consolidated Investment Co v Johannesburg Town Council 1903 TS 111 at 117.

3.3 The procedure applicable to reviews is prescribed in rule 53 of the Uniform Rules of Court. Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing quasi-judicial or administrative functions shall take place in accordance with this rule and by way of notice of motion directed and delivered by the party desiring the review to the magistrate, presiding officer or chairman of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected. Therein the person concerned is called upon to show cause why such decision or proceedings should not be reviewed and corrected or set aside. The magistrate, presiding officer, chairman or officer, as the case may be, is likewise called upon to despatch, within fourteen days of the receipt of the notice of motion, to the registrar the record of the proceedings of which the party desires review together with such reasons as he is by law required or which he desires to furnish, and to notify the applicant that he has done so.

It is a peremptory requirement that the chairman of the tribunal or board must be cited as a party. An applicant is entitled to waive rule 53(1)(b).[20] In terms of rule 53(2) the notice of motion shall set out the decision or proceedings concerned and be accompanied by an affidavit containing the grounds, facts and circumstances upon which the applicant relies for the setting aside or correction thereof. The further procedure to be followed is laid down in the Rules of Court and does not warrant further comment at this stage.

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20 Nathan Barnett & Brink at 347.

CHAPTER 3

THE GROUNDS ON WHICH ADMINISTRATIVE ACTION OR ADJUDICATION IS TESTED BY WAY OF REVIEW

1. INTRODUCTION

The following guidelines for the courts in the exercise of their powers of review under the common law were laid down by Bristowe J:[1]

> If a public body or an individual exceeds its powers the court will exercise a restraining influence; and if, while ostensibly confining itself within the scope of its powers, it nevertheless acts mala fide or dishonestly, or for ulterior reasons which ought not to influence its judgment, or with an unreasonableness so gross as to be inexplicable, except on the assumption of mala fides or ulterior motive, then again the court will interfere. But once a decision has been honestly and fairly arrived at upon a point which lies within the discretion of the body or person who has decided it, then the court has no functions whatever. It has no more power than a private individual would have to interfere with the decision merely because it is not one at which it would itself have arrived.

2. THE GROUNDS FOR REVIEW

2.1 Wiechers states that in most Anglo-American works on administrative law the requirements for validity of administrative acts are discussed under the heading of "grounds for judicial review of administrative action".[2] This is the method followed by Rose Innes.[3]

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1 African Realty Trust v Johannesburg Municipality 1906 TH 179 at 182.

2 Wiechers Administratiefreg at 194.

3 Rose Innes Judicial review at 89 et seq.

2.2 In his classification of the various requirements for validity of administrative acts Wiechers[4] confines himself mainly to the elements of the act. The elements of the administrative act are "those constituent parts which go to make up the creation, existence and effect of the act".[5]

2.3 According to Baxter[6] administrative law rests upon the principle of legality. He contends that the "principle of legality constitutes the obverse facet of the ultra vires doctrine".[7] He points out that both Wiechers and Rose Innes are of the opinion that the ultra vires doctrine does not cover all the grounds for review. According to Baxter, Wiechers claims that "the ultra vires doctrine does not cater for the manner in which the administration exercises this power"[8] and Rose Innes that "the principles of natural justice constitute an additional basis for review and that they are not part of the ultra vires doctrine because they derive, not from statute, but from the common law".[9]

Baxter comes to the conclusion that "the ultra vires doctrine is not merely a 'ground' of review: rather, it is the reason why the grounds of review constitute causes of action at all and why they justify the award of a remedy".[10]

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4 Wiechers Administratiefreg at 205.

5 Ibid.

6 Lawrence Baxter Administrative law 1st edition Juta 1984 at 299, hereunder Baxter Administrative law.

7 Baxter Administrative law at 301. See also Wiechers Administratiefreg at 196: "Authority conferred by government is the corner-stone on which the valid administrative act rests. The act of an administrative organ which exceeds the government authority conferred upon it is ultra vires." (our translation); Estate Geekie v Union Government 1948 2 SA 494 (N) at 502: "In considering whether the proceedings of any tribunal should be set aside on the ground of illegality or irregularity, the question appears always to resolve itself into whether the tribunal acted ultra vires or not."

8 Baxter Administrative law at 309.

9 Baxter Administrative law at 310.

10 Baxter Administrative law at 312.

2.4 With the foregoing in mind the grounds for review will now be considered.

2.4.1 Requirements for validity relating to the author of the administrative act

This group of requirements for validity has to do with the powers of the government organ concerned, that is personal powers as well as powers relating to the place or circumstances of the administrative action, the content of the action and the time or duration of the action.[11] Wiechers[12] discusses these requirements under the headings of requirements for validity ratione personae, requirements for validity ratione loci, requirements for validity ratione materiae and requirements for validity ratione temporis.

(a) Requirements for validity ratione personae

These requirements relate to the personal qualities or qualifications of the administrative organ.[13] Because these requirements are as a rule peremptory conditions for the exercise of administrative powers, the action of an organ that does not comply with these requirements will be invalid.[14] Rose Innes[15] submits that an act by an "improperly constituted tribunal is ultra vires the tribunal so constituted and is invalid". Under the heading of "Improperly constituted tribunals" Rose Innes discusses the following:[16]

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11 See Wiechers Administratiefreg at 206.

12 Ibid.

13 See Wiechers Administratiefreg at 207.

14 Ibid.

15 Judicial review at 96.

16 Rose Innes Judicial review at 120 et seq.

. Qualifications of members

If the enabling provision, for example, requires that the chairman of an administrative organ shall be a magistrate, an advocate or an attorney or must have certain qualifications, and a lay or unqualified person acts as chairman, "the court will quash for excess of jurisdiction".[17]

. Complement and quorum of administrative organ

In order to be properly constituted an administrative organ must consist of the number of members required by the enabling provision and its proceedings and acts must be done by the required minimum of that number of members.

. The rule of unanimity and joint action

Unless otherwise directed by the statute, the proceedings and decisions of an administrative organ must be the proceedings and decisions of all its members. The proceedings and decision of a majority are not sufficient.[18]

. Vacancies

If the enabling statute is silent about the filling of vacancies in the membership of an administrative organ, and a vacancy should

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17 Rose Innes Judicial review at 120.

18 Rose Innes Judicial review at 122; See also Schierhout v Union Government 1919 AD 30 at 44: "When several persons are appointed to exercise judicial powers, then in the absence of provisions to the contrary, they must all act together; there can be only one adjudication, and that must be the adjudication of the entire body ... And the same rule would apply whenever a number of individuals were empowered by Statute to deal with any matter as one body; the action taken would have to be the joint action of all of them ... for otherwise they would not be acting in accordance with the provisions of the Statute."

occur before the organ commences its work, the vacancy may be filled by the appointment of a new member. Should a vacancy occur during the proceedings of an administrative organ, a new member may be appointed, but then the proceedings in question of the organ must commence anew.

The important requirement that an administrative organ that is vested with a specific power must exercise that power itself may also be brought under the heading of requirements for validity ratione personae.[19] The prohibition of the delegation of powers is contained in the rule delegatus delegare non potest.[20]

(b) Requirements for validity ratione loci

Authority is conferred upon an administrative organ to exercise its powers within a specific geographical area or in respect of a specific place.[21] If the organ exercises its powers outside the geographical area or in respect of a place that in terms of the empowering statute does not qualify for the exercise of the power, the organ exceeds its powers and its act is invalid.[22]

(c) Requirements ratione materiae

This group of requirements for validity relates both to the administrative act and to the object of the administrative-law relationship created, varied or terminated by the act.[23] Requirements for validity ratione materiae ensure that the author of the administrative act does not exceed his authority either as regards the

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19 See Wiechers Administratiefreg at 210.

20 For more in this regard see Baxter at 434; Wiechers Administratiefreg at 210 et seq.

21 Wiechers Administratiefreg at 212.

22 Wiechers Administratiefreg at 212.

23 Wiechers Administratiefreg at 214.

physical object of his action or as regards the matter justifying his action.[24]

(d) Requirements ratione temporis

These requirements relate to the time at which an administrative organ must act. A general requirement which may be brought under this heading is the requirement that an administrative act may apply only for the present and the future.[25] In the absence of statutory authorisation the operation of an administrative act may not go back into the past.[26]

2.4.2 Requirements for validity relating to the form of the administrative act

(a) In order to be cognisable, an administrative act must take a specific physical form.[27] In addition to the statutory requirements relating to the physical appearance of the administrative act there are also requirements relating to the outward course or performance of the acts. Wiechers[28] refers to these as procedural requirements. Rose Innes[29] refers in this regard to "jurisdictional facts" and then distinguishes between "jurisdictional facts ... either of a procedural or of a substantive nature". In regard to the last-mentioned "jurisdictional facts" he states that "it is impossible to give an exhaustive list of substantive jurisdictional facts".[30]

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24 Wiechers Administratiefreg at 215.

25 Wiechers Administratiefreg at 221.

26 Ibid.

27 Wiechers Administratiefreg at 221.

28 Ibid.

29 Rose Innes Judicial review at 100.

30 Rose Innes Judicial review at 109.

As far as the procedural requirements are concerned, Rose Innes gives a review of the following:[31]

. A proper application

In licensing matters there must be an applicant and a proper application before the licensing board before it may exercise its powers.

. Submission

In arbitration proceedings there must be a written agreement to submit present or future disputes to arbitration.

. A dispute

If an administrative organ is empowered to settle disputes between parties, then the existence of a dispute is "a jurisdictional fact without which the tribunal has no authority to exercise its powers".[32]

. Notice to the administrative organ within a specified time

When the enabling provision requires that notice of an application be given to the administrative organ concerned within a specified time "the requirement may or may not go to the jurisdiction depending upon whether it is mandatory and not merely in directory terms".[33]

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31 Rose Innes Judicial review at 100 et seq.

32 Rose Innes Judicial review at 103.

33 Rose Innes Judicial review at 104.

- Notice to a person affected by an administrative act

  Where the statute concerned imposes an imperative requirement that an administrative organ or official shall give notice to any person who is affected by its decision "it is ultra vires for the official or tribunal to act in the matter without giving such notice".[34]

- Consultation with other bodies

  When a statute empowers an official or organ to perform an act after consulting a specific body, failure so to consult is an irregularity and the act must be set aside as ultra vires.

(b) The decision or judgment of an administrative organ must be certain and final and must not direct the performance of impossible or illegal acts. A decision or judgment that is vague and incomplete, or that directs the performance of impossible or illegal acts, is ultra vires.[35]

(c) The rules of natural justice

When a quasi-judicial act is performed the rules of natural justice must be complied with unless they have been excluded either by the relevant statute, whether expressly or by necessary implication, or by common law.[36] The content of these rules is summed up in:

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34 Rose Innes Judicial review at 105; see also section 15 of the Interpretation Act 33 of 1957 which provides as follows: "When any act, matter or thing is by any law directed or authorized to be done by the State President, or by any Minister, or by any public officer, the notification that such act, matter or thing has been done may, unless a specified instrument or method is by that law prescribed for the notification, be by notice in the Gazette."

35 Rose Innes Judicial review at 98.

36 Wiechers Administratiefreg at 152-3. See also Rose Innes Judicial review at 144 where reference is made to the English case Government Board v Arlidge 1915 AC 120 at 132 in which Lord Haldane said: "...
(Footnote continued)

- The audi alteram partem rule in which the following requirements are laid down.[37] A party to an administrative hearing or inquiry must be given the opportunity to state his case if the hearing or inquiry is to result in the exercise of a discretion which could encroach upon the party's existing rights, privileges and freedoms. Furthermore, the person who may be affected by the administrative decision must be informed of potentially prejudicial facts and considerations to enable him to defend himself against such facts and considerations. The third aspect embraced by the audi alteram partem principle is that an administrative organ must give reasons for its decision in the exercise of a discretionary power.

- The requirement that the administrative organ exercising the discretion must be unbiased.[38] The rule that no one may be a judge in his own cause is also included in the requirement of absence of bias. An organ that has some personal interest in the matter in which it must exercise its discretion is deemed to be biased.

(Footnote continued)
they must deal with the question referred to them without bias, and they must give to each of the parties the opportunity of adequately presenting the case made". In his comments on this Rose Innes says: "The two principles enunciated in these dicta - that there should be no bias or partiality (nemo iudex in sua causa) and that both sides must be heard (audi et alteram partem) - are usually referred to as the principles of natural justice."

37 Wiechers Administratiefreg at 237 et seq. Cf Baxter Administrative law at 536 et seq.

38 Wiechers Administratiefreg at 241 states that "(t)his rule could just as well have been brought under the heading of the requirements ratione personae since it relates not so much to conduct or procedure, but rather to the character or attitude of the administrative organ. Since the requirement is, however, traditionally classified under the rules of natural justice, the content, application and nature of the requirement of absence of bias will also be discussed here." (Our translation.) Cf Baxter Administrative law at 557 et seq.

2.4.3 Requirements for validity relating to the purpose of the administrative act

The administrative organ must exercise its powers for a legitimate purpose.[39]

In Van Eck & Van Rensburg v Etna Stores Davis AJA, remarked, inter alia, as follows:[40]

> In the case of Sinovich v Hercules Municipality (1946, A.D. 783) the Chief Justice stated:
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> > Courts do sometimes interfere to protect an injured party against an abuse of power, for example in those well recognized cases in which powers, given to public bodies to be used for certain purposes, are wrongly used by them to achieve some other purpose (see Fernwood Estates Ltd v Cape Town Municipal Council (1933 C.P.D. 399), and the cases therein referred to).
>
> I can draw no distinction between a public body and a public official; indeed I can see no ground why the principle should even be confined to them. It seems to me that the principle is of far more general application and that private persons or corporations could certainly not be in a better position ... And I should add that, of course, if the person exercising the power avowedly uses it for some purpose other than that for which alone it has been given, he acts simply contra legem: where, however, he professes to use it for its legitimate purpose, while in fact using it for another, he acts in fraudem legis.

2.4.4 Requirements for validity relating to the consequences of the administrative act

After discussing relevant decided cases Wiechers comes to the following conclusion:[41]

> To sum up, it may be said that the requirement relating to the consequences of administrative acts means that, unless authorized to

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39 Wiechers Administratiefreg at 257.

40 1947 2 SA 984 (A) at 996 et seq.

41 Wiechers Administratiefreg at 278 et seq. Cf Baxter Administrative law at 475 et seq.

do so expressly or by necessary implication, an administrative organ may not bring about unreasonable or inequitable results by its acts. It is the unreasonable results that in themselves constitute the reason for the invalidity, and not the organ's failure to apply its mind or mala fides. The recognition of reasonableness as an independent requirement for validity is an essential prerequisite if the entire system of judicial control of administrative acts is to be rescued from impoverishment and legalism. If the unreasonableness of administrative acts were to be prohibited as such, the authors of the acts would not be able to hide behind good faith or formal compliance with investigation procedures, etc. Still less would ignorance, negligence or unreasonableness which is 'not so excessive that no reasonable man would have acted in such a way' serve as an excuse for the proven unreasonable and unfair results of administrative acts. (Our translation.)

2.4.5 The requirement of bona fides

All administrative acts must be performed in good faith. This means that, in performing its task, the administrative organ must apply its mind impartially to all the requirements for validity and, with due regard to the public interest, seek the most effective action possible for each case.[42]

Wiechers makes the following observations in connection with the concept of bona fides:[43]

> Strictly speaking, the requirement of bona fides relates to the subjective attitude of mind of the administrative organ. When an administrative organ does not have the necessary bona fides, in other words acts mala fide, it knows or should have known - but for its ignorance, recklessness or disregard of requirements for validity - that its act would be invalid because of excess of powers, non-compliance with formal requirements, use of powers for an

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42 Wiechers Administratiefreg at 286. At 290 he says: "Bona fides is not an independent requirement for validity, but is a state of mind which is required in the performance of all administrative acts".

43 Wiechers Administratiefreg at 286; See also Rose Innes Judicial review at 142: "The nullity of mala fide acts, so far as administrative law is concerned, is based upon the ultra vires doctrine, and is a matter of statutory implication. As has been indicated, mala fides and fraud include acts in fraudem legis, i.e where the person who is empowered to act professes and pretends to use the power for its legitimate purpose while in fact he uses it for some other purpose. Mala fides and fraud are, however, narrower than and not synonymous with the review ground improper purpose."

improper purpose or unreasonable result, but nevertheless persists in performing the invalid act. (Our translation.)

3. CONCLUDING OBSERVATIONS

3.1 Wiechers makes the following observations in regard to the concepts of "grounds for review" and "requirements for the valid performance of administrative acts".[44]

> To regard the requirements for the valid performance of administrative acts merely as grounds for review, is to put the cart before the horse. An administrative act is valid when certain legal requirements have been complied with. If the validity of the act is challenged before a court of law, the court will test whether these requirements have actually been complied with. If the court finds that the requirements have not been complied with, the act will be declared invalid. It is, of course, true that the validity of an administrative act is challenged in a court of law on the strength of the fact that one or more requirements for validity have not been complied with, so that the requirements for validity may be equated with grounds for judicial review. (Our translation.)

3.2 Because authorisation of administrative action as a rule takes place by way of statute, it stands to reason that the rules of interpretation of statutes play an important part in the determination of the content and ambit of the statutory authorisation.[45]

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44 Wiechers Administratiefreg at 194.

45 Wiechers Administratiefreg at 207. For more in this regard see L C Steyn Die uitleg van wette 5th edition by S I E van Tonder Juta 1981 at 192 et seq and especially 203 et seq.

CHAPTER 4

GROUNDS FOR THE REVIEW OF QUASI-JUDICIAL ACTS AND DECISIONS

1. EXERCISE OF DISCRETION

When we enter upon the domain of the review of quasi-judicial acts and decisions, we have to deal with those cases where an administrative organ has been granted a discretion to perform an act in a specific sphere, which often implies that a decision has to be made by which the rights of the subject are affected.

In modern society it is inevitable that the organisation of the state will be carried out by means of a host of administrative acts. It is also inevitable that the author of the act will be granted a discretion whether or not to exercise certain powers. The danger is ever present that this discretion will be exercised wrongly. Especially to be guarded against is the credo of a bureaucratic dictatorship, viz that the discretion to perform an administrative act is unfettered. As Wiechers rightly remarks:[1]

> An unfettered discretion, in the sense of a legally unrestrained freedom to do anything, is irreconcilable with the concept of a constitutional state and state administrative activities performed on a basis of legality ... An unfettered discretion is nothing but arbitrariness, which is not permitted by law. The exercise of a discretion is not a meta-legal disposition in the sense of an action taking place outside the sphere of law, but a form of application of law, viz the concretization of the general power within the particular relationship. (Our translation.)

As in the case of any other legal relationship, the interests of the subject and the state must be weighed up against each other, circumscribed and protected when the state acts by means of administrative action. In the

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1 Wiechers Administratiefreg at 325; cf Ismail v Durban City Council 1973 2 SA 362 (N) at 372B where it is aptly said that an "unfettered discretion" does not exist; at most a "wide discretion" should be spoken of.

nature of things this weighing up, circumscription and protection is done by the courts, usually by means of review. It is obvious that in doing so the courts perform a very important task. In this regard Henning rightly states:[2]

> The nature and scope of the administrative process in the modern state tend to overwhelm the individual and to lower him to the status of a mere layman instead of recognising him as a citizen. Modern technocracy and bureaucracy leave the individual bewildered and powerless in the face of prejudicial administrative interference in his domain. There can certainly be nothing more gratifying than the knowledge that our courts are ready to review discretionary administrative action in the most thorough and efficient manner, thus keeping the administration on the course laid down by the legislature and the common law. (Our translation.)

There should be no obstacles to the courts' being empowered to review discretionary administrative action "in the most thorough and efficient manner", especially in a country which, according to its State President, is committed to clean administration. The question is, however, whether the courts indeed have and exercise such power. In point of fact the eminent administrative lawyer, Professor M Wiechers, alleges that judicial control of the exercise of discretion is with us often superficial and formalistic.[3] The positive law will first be summarised below and then evaluated critically.

2. THE PRESENT LEGAL POSITION

The approach of our courts on review of quasi-judicial, or discretionary, acts is that the court does not go into the merits of the act or decision, but merely determines whether the administrative organ "duly and honestly applied itself to the question which has been left to its discretion". This formula was clearly applied for the first time by the Appellate Division in Shidiack v Union Government.[4] A recent clear exposition of the scope of

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2 P Henning "Administratiefregtelike diskresie-uitoefening en geregtelike hersiening" 1968 THRHR 155 at 164.

3 Wiechers Administratiefreg at 324.

4 1912 AD 642 at 651.

the courts' power of review is to be found in the judgment of Holmes J A in National Transport Commission v Chetty's Motor Transport (Pty) Ltd:[5]

> There is no appeal against the decision of the Commission. The Legislature has appointed it as the final arbiter in its special field and, right or wrong, for better or worse, reasonable or unreasonable, its decision stands - unless it is vitiated by proof on review in the Supreme Court that -
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> (a) the Commission failed to apply its mind to the issues in accordance with the behests of the statute and the tenets of natural justice: in other words that, de jure, it failed to decide the matter at all. Such failure could be established by reference to mala fides, improper motive, arbitrariness or caprice. The list is not exhaustive; or
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> (b) the Commission's decision was grossly unreasonable to so striking a degree as to warrant the inference of a failure to apply its mind as aforesaid - a formidable onus.

Each of the grounds for review as summarised in the formulation above will be analysed briefly.

2.1 The requirements of the relevant statutory provisions must be complied with

This ground for review implies that the person exercising the discretion must have performed a valid administrative act. We have already pointed out above the conditions for a valid administrative act and they will not be repeated here; they include, inter alia, compliance with the prescribed procedure.

But the said requirement also implies the existence of those facts and circumstances required as a condition for the exercise of discretion. We are referring here to jurisdictional facts. Error in respect of the existence and nature of jurisdictional facts is an error of law justifying the setting aside of the administrative act.[6]

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5 1972 3 SA 726 (A) at 735E.

6 Wiechers Administratiefreg at 327 and authority referred to there.

The said requirement also implies that the conditions laid down for the exercise of discretion must be strictly complied with. Thus, for instance, criteria may be laid down for the determination of rentals, the granting of liquor licences or motor transportation permits, the expropriation of land, etc. The conditions for refusal may also be laid down clearly. In all these cases an error in respect of the criteria or conditions or a wrong application thereof results in setting aside on review.[7]

This requirement also implies that the person exercising the discretion may only take facts and considerations permitted by law into consideration in exercising the discretion. An exercise of discretion based on considerations not permitted by law (which include the taking into consideration of irrelevant or inadmissible facts) is invalid.[8] In certain cases a wider discretion is granted to the person exercising it. In these cases there are no statutory criteria, but it is laid down that the discretion shall be exercised with due regard to undefined concepts such as general interest, public welfare, public policy, etc. In these cases it is customary to speak of a wide or free discretion in the sense that the person exercising it should on the strength of his own expertise or experience give content to undefined concepts serving as criteria. It is common cause that this exercise of discretion is based mainly on considerations of expediency or desirability. Wiechers points out that considerations of expediency and desirability are not subject to control by a court on review because such considerations are part of government policy.[9] But this does not mean that the exercise of discretion in such a case is unfettered. Considerations of expediency and desirability affect the exercise of a free discretion in so far as the administrative organ may take a variety of non-justiciable factors into consideration in coming to its decision, but this does not entitle it to ignore existing facts and circumstances, to disregard procedural and formal requirements, to subordinate its judgment to that of another, to disregard possibly unjust and unreasonable consequences of its decision, or to exceed

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7 Wiechers Administratiefreg at 326 and authority referred to there.

8 Wiechers Administratiefreg at 327 and authority referred to there.

9 Wiechers Administratiefreg at 328.

its powers. A court should not pronounce upon the desirability of the refusal of a residential permit, but the court should ensure that the refusal was preceded by a full consideration of existing facts and circumstances as well as the effect of the refusal on the applicant's rights, privileges, freedoms and powers.[10]

2.2 The rules of natural justice must be complied with

The rules of natural justice are, as the expression indicates, those "fundamental principles of fairness which underlie or ought to underlie every civilized system of law".[11]

The principles of natural justice are expressed historically in two maxims, viz audi alteram partem (hear the other side) and nemo iudex in propria causa (no one may judge in his own cause). The modern scope of the principles of natural justice is far wider than just these two maxims. Baxter believes that the principles of natural justice serve three purposes, viz "first, they facilitate accurate and informed decision-making; secondly, they ensure that decisions are made in the public interest; and, thirdly they cater for certain important process values".[12]

Baxter points out that both of the historical pillars of natural justice lie deeply imbedded in Roman law and English law and were recognised in Roman-Dutch law.[13] In our own law the principles of natural justice are the very fabric of judicial review. They are described by our courts as rules of equity, "fundamental principles of fairness" and "fair play in action".[14] To such an extent are they fundamental legal principles that a denial of natural justice is regarded as a denial of the law itself and that a

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10 Ibid.

11 Per Tindall ACJ in Minister of the Interior v Bechler 1948 3 SA 409 (A) at 451.

12 Baxter Administrative law at 538.

13 Baxter Administrative law at 537.

14 See Baxter Administrative law at 540 footnote 35.

decision in conflict therewith is null and void even if the same decision would have been arrived at had the principles been complied with.[15]

At the same time it is admitted that the concept of natural justice is and must be a flexible one because circumstances and opinions are continually changing.[16] This aspect must continually be borne in mind in law reform - it would be patently unwise to endeavour to codify or define the principles of natural justice. On the whole our courts have performed an excellent task in giving content and relevancy to the said principles. The courts are also eminently suited to perform this task in the future. The law reformer's task in this regard is clearly that of merely judging whether there are fundamental shortcomings in the present normative system and remedying them. For this reason it is unnecessary to analyse every rule of the total normative system; it is merely necessary to analyse the system and to determine where our courts and writers have criticism to offer or where they experience problems.

2.2.1 The audi alteram partem normative system

This group of rules comprises the following principles:[17]

- Notice of intended action

  The citizen concerned must receive notice of the intended action, what the motivating reasons therefor are, and where and when representations are to be submitted or heard.[18]

  The courts appear to deal adequately with the said principle and statutory intervention is unnecessary.

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15 Baxter Administrative law at 540.

16 Baxter Administrative law at 541-2.

17 See Baxter Administrative law at 544 et seq whose system in this regard is followed.

18 For details see Baxter Administrative law at 544-5.

. An opportunity to be heard

With regard to this requirement our courts adopt the attitude that the administrative organ may prescribe the procedure to be followed in regard to the representations or "hearing", provided this does not defeat the purpose of the empowering legislation and provided that it is fair.[19]

The requirement of an opportunity to be heard embraces the following principles:

+ Adequate disclosure of the nature of the complaint or the intended action and of the content of the information and the reasons giving rise thereto.

+ Discovery of the information or evidence which may be used against the person concerned.

  In our law discovery of relevant documents has in fact been ordered. The approach seems to be that should the circumstances justify it, discovery will be ordered.[20]

+ The person concerned must be allowed a reasonable time for preparation.

. Consideration of the representations of the person concerned

Although our courts have not gone so far as to demand that an oral hearing be held in all cases, unless the enabling statute requires it, it has been emphasised by the Appellate Division that

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19 Baxter Administrative law at 545.

20 Huyser v Louw 1955 2 SA 321 (T) at 325G-H.

such a hearing may sometimes appear to be necessary.[21] This approach is acceptable and no statutory intervention is necessary.

- The right of the affected party to be present at the consideration of the case and to rebut the evidence against him

The courts have generally insisted upon this right and there are no fundamental problems in this regard.

The right of cross-examination

Our courts have always held that natural justice as such does not entail a right of cross-examination. But our courts (like the courts in England) also recognise that it is sometimes a necessary and an essential right.[22]

The courts deal with this matter satisfactorily.

- Legal representation

> The approach of our courts is that the right to legal representation is not necessarily always a requirement. When circumstances and fairness demand it, however, our courts recognise such a right.[23]

This aspect is also controlled satisfactorily in practice.

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21 Oberholzer v Padraad van Outjo 1974 4 SA 870 (A) at 875F-H; Baxter Administrative law at 552.

22 See Baxter Administrative law at 554 for details.

23 See Smith v Beleggende Outoriteit van Kommandement Noord-Transvaal van die S A Weermag 1980 3 SA 519 (T) at 524; Baxter Administrative law at 555-6.

- Public hearing

Our courts take the view that a public hearing is not required by natural justice, unless the relevant statute requires it.[24] Baxter has the following to say in this regard:[25]

> As has previously been argued, publicity is an important means of structuring discretionary decision-making. Moreover, it is an important process value. So there seems much merit in the argument that fairness requires public access. This has been recognized in proceedings before tribunals in England. On the other hand, there might also be a need for confidentiality in certain circumstances, particularly in disciplinary cases and in security matters. Fairness would therefore appear to require a weighing of the conflicting interests at stake. The concept is flexible enough for the courts to do this, and we should not assume that a right to a public hearing is absolutely precluded.

We believe that the courts themselves will make the necessary adaptation as far as this aspect is concerned and that statutory intervention is not called for.

2.2.2 Nemo iudex in propria causa

This requirement embraces the following:

- That the adjudicator should not have a personal or pecuniary interest in the matter

Although Baxter argues that our courts are not always consistent in the application of the principle in question, it is also evident from his discussion that this is understandable because the decision as to whether there is a personal or pecuniary interest, especially of an indirect nature, is a very difficult one and

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24 See Baxter Administrative law at 556 for details.

25 Baxter Administrative law at 557.

depends on the facts of each case.[26] Basically, the courts deal satisfactorily with this requirement.

- Absence of bias and partiality

From Baxter's analysis of our administration of justice it appears that this requirement is dealt with satisfactorily by our courts.[27]

2.2.3 Should reasons for the decision be furnished?

This is one aspect of the way in which the courts deal with the normative system that is criticised by Baxter.[28] In spite of strong and repeated arguments that the right to be informed of the reasons for a decision is an integral part of natural justice, our courts do not recognise such a right, unless it is required by the relevant statute. Baxter also argues that confusion has arisen between the duty to disclose adverse information to the person concerned and to give reasons for a decision. Baxter argues strongly that the duty to give reasons should be laid down as a requirement:[29]

> Whatever might be implied from the detailed application of the audi alteram partem principle, the strongest case for arguing that natural justice implies a right to reasons is the fact that an unreasoned decision is arbitrary and unfair.

On the other hand it is also unfair to expect the person exercising the discretion to give reasons for a decision in every case - this should be recognised as a requirement only where the person concerned requests it. In both the Donoughmore and Franks reports this requirement is recognised.

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26 Baxter Administrative law at 563.

27 Baxter Administrative law at 564-7.

28 Baxter Administrative law at 568.

29 Baxter Administrative law at 569.

Statutory intervention is, therefore, called for here.

2.2.4 Other factors which are inconsistent with the principles of natural justice, such as mala fides, improper motives, arbitrariness, malice, caprice, fraud, etc.

These factors have been emphasised repeatedly by our courts and are dealt with satisfactorily. It is not necessary to name each of these factors, because the courts themselves have said that the number of factors is not limited.

2.3 That the decision or act should not be so grossly unreasonable that the inference may be drawn that the matter has not been properly considered

Although unreasonableness of an administrative act per se was recognised as a ground for the setting aside thereof until as late as 1913 in Ovenstone v Durban Licensing Board,[30] since 1894 with the decision in Clark v Town Council of Cape Town[31] our courts have progressively taken the view that unreasonableness per se is not a vitiating factor. It is only when the unreasonableness is symptomatic of another vitiating factor - for example, failure to consider the matter properly, or bias - that it becomes relevant. This construction is jokingly referred to as "symptomatic unreasonableness".[32]

The irony of the matter is, however, that our courts have recognised unreasonableness as a vitiating fact in respect of a very important subdivision of administrative law, viz the enacting of subordinate

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30 (1913) 34 NLR 104 at 110.

31 (1894) 4 CTR 42.

32 J Taitz "But 'twas a famous victory" 1978 Acta Juridica 109 at 111.

legislation, and that in the wide meaning as defined in the famous English decision - Kruse v Johnson.[33]

Unreasonableness as such is, moreover, recognised as a vitiating fact in the case of purely administrative decisions.[34]

The standpoint of our courts that unreasonableness in the exercise of discretion is not per se a ground for review is sharply criticised by our writers on administrative law, in our view justly so.

Wiechers makes the following points:[35]

- This reluctant, not to say inhibited attitude, of our courts is inexplicable in the light of the courts' opposition to any curtailing of their power of review.

- The said attitude has caused great confusion in the sphere of judicial control of administrative acts.

- As a result of the said attitude our legal rules relating to judicial review of administrative acts appear to be of an extremely formalistic nature. Litigants are hesitant to take such an act on review on the merits (because the court does not want to go into the merits), but on the other hand the court seeks a formal ground of challenge if it is of the opinion that the subject has been prejudiced. Review is thus of necessity a search for formal grounds for review (as, for instance, non-compliance with procedural requirements) and is therefore often superficial and formalistic.

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33 (1898) 2 Q.B 91 at 99-100; See Baxter Administrative law at 478-9 for details.

34 See Theron v Ring van Wellington van die NG Sendingkerk in Suid-Afrika 1976 2 SA 1 (A) at 17-20; Baxter Administrative law at 499.

35 Wiechers Administratiefreg at 324 et seq.

. The above-mentioned attitude of the courts can be traced back to the influence of English law, which in turn resulted from the limited sphere of application of the writs of certiorari and prohibition whereby administrative matters were brought for review before the English courts. They were only available in cases of excess of jurisdiction. The irony of the matter, however, is that in England itself the courts have in the past decade made an almost dramatic about-turn and are now prepared to test the excercise of discretion in all its elements, by inter alia acknowledging that an error of law (which will inevitably lead to an unjust result) is a ground for review.[36]

. The said approach overemphasises the good faith of the administrative organ:[37]

> Sometimes the grossest irregularities are committed in the greatest good faith - which may be nothing more than ignorance. The question to be answered in judicial control over the exercise of discretion is what the concept duly and honestly (in the sense of "duly and honestly applied himself to the question which has been left to his discretion") signifies as a legal criterion. (Our translation.)

If the concept is narrowed down to a mere test of the good faith or the good intentions of the one exercising the discretion, then, according to Wiechers[38] -

> ... the concept is clearly defective as a legal criterion for judging the exercise of administrative discretion. It would mean that the court would satisfy itself merely of the good faith of the administrative organ, leaving compliance with all the requirements for validity to the organ's discretion. Such an approach is completely wrong. An administrative

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36 Wiechers Administratiefreg at 330 footnote 135 refers to the judgments in Anisminic Ltd v The Foreign Compensation Commissioner 1969 1 All ER 208 (HL) and Padfield v Minister of Agriculture, Fisheries and Food 1968 AC 997.

37 Wiechers Administratiefreg at 330.

38 Ibid.

> organ - no matter how free its discretion - is not permitted a choice to dispense with the requirements for validity. No administrative organ ever has a discretion to disregard requirements for validity. (Our translation.)

- Wiechers labels the said approach of our courts as haphazard[39] and clumsy.[40] He also points out that it not only creates uncertainty, but that it also undermines confidence in the court's ability to control the exercise of discretionary powers in a consistent and thorough manner.[41]

Baxter makes the following points:

- The test applied by our courts, viz failure to apply one's mind to the matter, was originally meant to cover those instances where there had been an abdication of the exercise of discretion and was never intended to be the sole test on review. Over the years the formula was, however, extended to cover all cases, including abuse of discretion and violation of the principles of natural justice.[42]

- Originally there were in fact decisions which recognised unreasonableness per se as a ground for review.[43]

- At the very time that the English courts were adopting a broader approach and recognising unreasonableness as a ground for review, our courts were adopting an increasingly narrow

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39 Ibid.

40 Wiechers Administratiefreg at 335.

41 Ibid.

42 Baxter Administrative law at 476-7.

43 Baxter Administrative law at 477 for details.

approach.[44] The English writers and courts recognise unreasonableness as a ground for review.[45]

- In the common law our old writers recognised unreasonableness as a ground for review.[46]

- Baxter differentiates between dialectical and substantive reasonableness:[47]

> A proposition may be regarded as 'reasonable' in the dialectical sense if, in support of it, an appeal was made to factors, values and standards which the other party would recognize as legitimate given the context of the argument. The proposition would be regarded as 'reasonable' in the substantive sense if it is itself accepted by the other party as the conclusion to be drawn from the arguments used in its support.

He then proceeds to explain that dialectical reasonableness refers to the decision-making process and, therefore, to an evaluation of the considerations which are valid or relevant in arriving at a decision. Substantive reasonableness refers to the conclusion of the decision-making process, "... it is a conclusion that others will accept as one which, given all the (dialectically reasonable) arguments which have been invoked for and against it, may legitimately be drawn".[48] Seen in the light of this differentiation it is possible to judge whether a person acted reasonably or unreasonably in a dialectical sense without agreeing with his views on the (dialectical) relevant considerations. Such a judgment is altogether different from a judgment as to whether the person's standpoint is right or wrong, i.e. reasonable or

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44 Baxter Administrative law at 480 for details.

45 Baxter Administrative law at 482.

46 Baxter Administrative law at 480.

47 Baxter Administrative law at 485.

48 Baxter Administrative law at 487.

unreasonable in a substantive sense. If the test for unreasonableness is on review limited to the dialectical, then there is no overlapping of appeal and review because substantive reasonableness is tested on appeal.

Baxter points out that if unreasonableness in the dialectical sense were accepted as a ground for review, it would be compatible with the doctrine of ultra vires and would amount to a test of abuse of discretion.[49]

In our case law there are strong pointers, at least in the sphere of review of so-called purely judicial decisions, to unreasonableness per se as a ground for review, viz the extension of the "no evidence rule" to a "no reasonable evidence rule". Baxter then describes this process of extension. At first it was said that if there was no evidence on which to base a decision, the decision was null and void. In Mpemvu v Nqasala[50] De Villiers C J stated:

> Where the lower Court had some evidence before it to justify its verdict this Court will not disturb that verdict even although it should consider that its own verdict would have been different. But what is this Court to do if there is no evidence whatever to justify the finding? It appears to me that it is an irregularity which this Court is bound to correct.

This principle was applied to administrative tribunals.[51]

The principle was still later extended to cases where there was in fact evidence, but insufficient evidence upon which a specific

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49 Baxter Administrative law at 489.

50 (1909) 26 SC 531 at 533-4.

51 Baxter Administrative law at 498 for details.

decision could reasonably be arrived at. (Since 1931 in Bitcon v City Council of Johannesburg.)[52]

This view was acknowledged by J A Jansen in Theron v Ring van Wellington van die NG Sendingkerk in S A,[53] at least as far as purely judicial decisions were concerned. Baxter[54] is, however, of the opinion that the decision of the Appellate Division in W C Greyling & Erasmus (Pty) Ltd v Johannesburg Road Transportation Board,[55] is a clear instance in which the "reasonable evidence" test was in fact applied in the sphere of quasi-judicial decisions.

Baxter feels that the "reasonable evidence" test should be applied to those decisions (or aspects thereof) which are based on rules, principles and standards and which do not involve a choice between competing policies:[56]

- Baxter points out that there is a recognised ground for review when the decision-maker ignores relevant considerations or takes irrelevant considerations into account.[57] According to him one is dealing here with a subspecies of the test of reasonableness.[58]

- The administrative act must have an authorised object and a proper purpose. Powers granted for a specific purpose may not be employed for another purpose. Nor may the powers

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52 1931 WLD 273 at 295; See Baxter Administrative law at 498 for details.

53 1976 2 SA 1 (A).

54 Baxter Administrative law at 500.

55 1982 4 SA 427 (A).

56 Baxter Administrative law at 501.

57 Baxter Administrative law at 502.

58 Ibid.

be exercised for an ulterior motive, or in a dishonest manner, or mala fide, or in an arbitrary manner. These are all criteria of unreasonableness.

- Baxter's conclusion is that unreasonableness is in fact a ground for review, provided that the court may not judge the reasonableness or otherwise of policy considerations.[59]

- In conclusion Baxter submits a strong plea in favour of the doctrine of the duty to act fairly.[60] He points out that the doctrine was formulated by Lord Parker in In re H K (An Infant)[61] in England, where he stated that although an immigration officer in the case under consideration had not been required to act judicially, he nevertheless was required to act fairly. Lord Parker's formulation immediately proved popular with the Queen's Bench and the Court of Appeal, first because it eliminated the artificial classifications of the doctrine of natural justice, and secondly because it embraced the entire doctrine of natural justice and brought out its flexibility:[62]

> Furthermore, it has been suggested that this more flexible way of putting things is a manifestation of a trend which is developing in the direction of a less formal approach to judicial review: one which gives the judges greater room to manoeuvre in order to adjust to the evolving necessities of modern administration or, as some have argued, one which leads to greater judicial control (for better or worse) over the administrative process.

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59 Baxter Administrative law at 533.

60 Baxter Administrative law at 593.

61 1967 (2) Q B 617.

62 Baxter Administrative law at 594 with reference, inter alia, to De Smith Constitutional and administrative law 4th edition 1981 at 581-2.

Baxter points out that the said principle has been adopted in decisions in Australia, the Privy Council with reference to New Zealand, and the House of Lords. In Canada the Supreme Court has made the said principle applicable to all administrative acts. (Re Nicholson and Haldimand-Norfolk Regional Board of Commissioners of Police).[63]

Baxter[64] advocates the adoption of the latter approach and points out that the terminology of the new doctrine has already been adopted in two Cape decisions, Roberts v Chairman, Local Road Transportation Board (2),[65] and Lawson v Cape Town Municipality.[66]

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63 (1979) 88 DLR (3d) 671.

64 Baxter Administrative law at 595.

65 1980 2 SA 480 (C) at 495C.

66 1982 4 SA 1 (C).

CHAPTER 5

THE QUESTION WHETHER THE GROUNDS FOR REVIEW IN RESPECT OF ADMINISTRATIVE AND QUASI-JUDICIAL ACTS SHOULD BE EXTENDED OR RESTRICTED.

1. INTRODUCTION

The question whether the grounds for review in respect of administrative and quasi-judicial acts should be extended or restricted deserves serious attention in the light of the following observations:[1]

> The South African executive is increasingly being given greater and greater powers to bring about fundamental social, economic, political and legal change simply by administrative fiat. At the same time, no attempt is being made to provide for the necessary supervision of the way in which these powers are exercised. Indeed ... the reverse is true. Supervision of administrative action is, if anything, decreasing.

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1 WHB Dean "Whither the constitution?" 1976 THRHR 266 at 287, hereunder WHB Dean; see also JJ Ross "Die uitoefening van kontrole oor die uitvoerende mag in die staat" 1957 THRHR 1 where he observes at 1 and 2 as follows: "Even Aristotle described ... the attempts of man to rule over his fellow men with some pessimism: 'He who bids law rule, may be deemed to bid God and Reason alone rule, but he who bids man rule adds an element of the beast' ... In the modern state the problem resolves itself into a tension between the maintenance of the freedom of the individual on the one hand, and efficiency of public services where the criterion is primarily the public interest, on the other hand ... In its zeal for the provision of public services, however, an equally real problem has arisen in the modern state, namely, the possibility of the excess and/or abuse of power which jeopardises the legitimate personal interests of the subject." (Our translation.); JC Bekker "Die rol van die howe in 'n nuwe staatsregtelike bedeling" 1984 De Rebus 152 at 154, hereunder Bekker Staatsregtelike bedeling: "The South African community ... is experiencing an increase in bureaucratic activities as never before. But what makes the problems in this part of the world worse is that attempts are made to administer the various population groups separately. As Wiechers puts it, this has 'resulted in the enormous extension of administrative powers and the establishment of a great variety of administrative bodies. In the Western world South Africa, in proportion to its population, must have one of the most complicated and widely ramified Government administrations'". (Our translation.)

> If this continues larger and larger areas of government will fall under the exclusive and absolute control of the executive and the other organs of government will become increasingly insignificant, their rôle being reduced simply to the provision of support for the executive where the latter feels this necessary.

In order to find an answer to the question posed, the grounds for review as provided for in American legislation will be taken as a starting point. Then the development in this sphere in some other countries will be looked at. Lastly, the South African position will be examined carefully.

2. THE GROUNDS FOR REVIEW IN THE UNITED STATES OF AMERICA

2.1 After comparing section 10(e) of the Federal Administrative Procedure Act (U.S.A., 1946) with section 78 of the New York Civil Practice Law and Rules, Schwartz & Wade[2] point out that these two statutes "are essentially similar in their approach to the scope of judicial review". The four main grounds for review which emerge from the comparison are according to the writers:[3]

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2 B Schwartz & HWR Wade Legal control of government Clarendon Press Oxford 1972 at 227, hereunder Schwartz & Wade; Section 10(e) of the Administrative Procedure Act provides as follows: "Scope of review - So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

3 Schwartz & Wade at 228.

(a) Whether the challenged decision was supported by substantial evidence;

(b) Whether it was based upon an error of law;

(c) Whether the procedures required by law were followed; and

(d) Whether there was an abuse of discretion.

The two writers sum up the grounds for review by saying that "the review statutes under discussion thus provide expressly for review on fact, law, procedure and discretion".[4]

As far as "review on ... procedure and discretion" is concerned, American law shows a great deal of similarity to English law.[5] The position regarding questions of fact and questions of law is important to the question under discussion and will be discussed in greater detail.

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4 Schwartz & Wade at 228.

5 Schwartz & Wade at 241 et seq: "Natural justice is the British counterpart of the American due process clauses ... As a starting point, due process includes the two principles of natural justice ... that no man may be judge in his own case; and that no man may be condemned unheard". The exercise of discretion is according to the writers at 252: "... the common root from which both English and American courts derive their powers to require discretion to be exercised reasonably. In the United States these powers are now crystallized in the 'arbitrary and capricious' clause of the A.P.A. and corresponding state statutes. In Britain they still rest on the common law, and the term the courts normally employ is 'unreasonable'. But there are a number of other formulae which serve the same purpose, such as 'taking irrelevant consideration into account', 'acting for improper purposes', or 'asking oneself the wrong question', and sometimes 'acting in bad faith'. Any of these defects will render the discretionary decision ultra vires and void. Taken together they form a wide requirement that discretion must be exercised reasonably and in good faith."

2.1.1 Questions of fact

Schwartz & Wade give the following description of American administrative law in this regard:[6]

> The statutory provisions in this respect are a legislative restatement of the famous substantial evidence rule, which the American courts had developed to govern review of administrative findings of fact ... The Act re-establishes the meaning declared by Chief Justice Hughes in a leading case: 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' The substantial evidence test is therefore a test of the reasonableness of administrative findings of fact on the evidence taken as a whole. The American reviewing court can inquire into the rational basis of challenged administrative findings, in the light of the evidence in the entire record.

2.1.2 Questions of law

Section 10(e) of the Administrative Procedure Act provides that "the reviewing court shall decide all relevant questions of law". In practice use is made of the "rational basis test".[7] The test is therefore the same as in the case of questions of fact.[8] In American law no sharp distinction is made between questions of law and questions of fact.[9]

3. THE EXTENSION OF THE GROUNDS FOR REVIEW IN SOME OTHER COUNTRIES.

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6 At 228-31. See also Baxter Administrative law at 454, where he refers to the American approach as the "rational basis" approach.

7 Schwartz & Wade at 233.

8 Schwartz & Wade also say at 234 that: "Thus there is a single principle for both jurisdictional and non-jurisdictional questions, with the advantage that they need not be distinguished. In this way American law eliminates difficulties which British law, with its emphasis on jurisdiction, accentuates".

9 Schwartz & Wade at 235.

3.1 England

In England until recently a clearer distinction was made between questions of fact and questions of law than in the case of America. The reason for this appears from the following observations of Schwartz & Wade:[10]

> English judges are in general more tolerant of administrative findings of fact, and perhaps less tolerant of error on questions of law ... This differentiation between fact and law is emphasized by the absence of transcripts in British procedure, combined with the generally recognised duty to give reasoned decisions. A court reviewing a decision ... is well furnished with ... legal-reasoning but knows little of the actual evidence on which the facts of the case have been established ... Plainly this system demands a sharper distinction between law and fact than need be made in the United States.

In England use is made of the "jurisdictional fact doctrine".[11] The latest trend in the British courts is towards the American approach. Schwartz & Wade submit on the strength of Coleen Properties Ltd v Minister of Housing

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10 Schwartz & Wade at 235.

11 See Baxter Administrative law at 454. At 456 Baxter describes this doctrine as follows: "In terms of this approach the court would not interfere with the amount a rent board thought to be 'reasonable' after having taken into account all the factors listed in the Act; the court would, however, review the board's finding that the premises were 'controlled' ones ... The great difficulty with this approach is that there are no consistent grounds for distinguishing those issues of law and fact that are 'jurisdictional' from those that are not."; Schwartz & Wade at 236; Cf Theron v Ring van Wellington, N G Sendingkerk in S A 1976 2 SA 1 (A) where Jansen JA at 13F-H and 15C-D remarks as follows: "The general principle is therefore invoked that a court cannot go into the question of how a body vested with discretion exercised its power, but only into the question whether the body in fact exercised its discretion; the point at issue is the manner in which the act came into being and not the content of the act; or, to put it differently, that the court will not go into the 'merits' of a discretion. For the sake of convenience the criterion concerned will be referred to as ... the 'formal criterion' ... In the application of the formal criterion it therefore becomes necessary to distinguish between the 'merits' of the actions of a body, and decisions in respect of questions of law and questions of fact involved, but falling outside the scope of the 'merits'. It is sometimes said that the latter has a bearing on 'jurisdictional facts' or 'preliminary or collateral' issues". (Our translation.)

and Local Government[12] that it is a "development like that of the substantial evidence rule in the United States" and go on to say:[13]

> The contrary authorities were simply ignored, and the case is a good example of the present judicial determination to invalidate unjustified administrative findings. Lord Denning, M.R., laid down what appears to be a new doctrine of judicial review, saying that the court could intervene not only for 'no evidence' but also for any error of law, and that any of these errors made the decision ultra vires. The logical consequence of this would be that the old jurisdictional distinctions would in effect be abandoned, and the court would review errors of fact and law very much on American lines. Logical consequences do not always follow in legal evolution; but clearly Britain may be on the threshold of a broader and less technical reviewing power, closely comparable to that of the federal courts in the United States.

For the rest, it has been pointed out in Chapter 4 that the English legal rules relating to review have undergone a drastic change in many areas in recent times, and that these changes have been generally accepted.

3.2 Australia

The Law Reform Commission of Western Australia reports as follows:[14]

> The law relating to the review of Commonwealth administrative decisions has been reformed by the Administrative Decisions (Judicial Review) Act 1977-1980.

In terms of section 5(1) of the said Act an administrative decision or act may be taken on review on any of the following grounds:[15]

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12 1971 1 WLR.

13 At 239.

14 Working Paper on the judicial review of administrative decisions Project No 26 - Part 11 at 65, hereunder Project 26.

15 Project 26 at 66 et seq. Section 5(2) provides that section 5(1) shall be interpreted so as to include the following: "(a) taking an irrelevant consideration into account in the exercise of a power; (b) failing to take a relevant consideration into account in the exercise of a power; (c) an exercise of a power for a purpose other than a (Footnote continued)

(a) that a breach of the rules of natural justice occurred in connexion with the making of the decision;

(b) that procedures that were required by law to be observed in connexion with the making of the decision were not observed;

(c) that the person who purported to make the decision did not have jurisdiction to make the decision;

(d) that the decision was not authorized by the enactment in pursuance of which it was purported to be made;

(e) that the making of the decision was an improper exercise of the power conferred by the enactment in pursuance of which it was purported to be made;

(f) that the decision involved an error of law, whether or not the error appears on the record of the decision;

(g) that the decision was induced or affected by fraud;

(h) that there was no evidence or other material to justify the making of the decision;

(i) that the decision was otherwise contrary to law.

Paragraphs (f) and (h) correspond to paragraphs (a) and (b) of the American four main grounds for review referred to in paragraph 2.1.

(Footnote continued)
purpose for which the power is conferred; (d) an exercise of discretionary power in bad faith; (e) an exercise of a personal discretionary power at the direction or behest of another person; (f) an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case; (g) an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power; (h) an exercise of a power in such a way that the result of the exercise of the power is uncertain; and (j) any other exercise of a power in a way that constitutes abuse of power." (There is no paragraph (i).) See also Marion L Dixon "The new administrative law: Australia's novel approach" 1980 CILSA 291.

3.3 Canada

The Federal Court Act of Canada, which was placed on the statute book in 1971, provides as follows in section 28(1):[16]

> Notwithstanding section 18 or the provisions of any other Act, the Court of Appeal has jurisdiction to hear and determine an application to review and set aside a decision or order, other than a decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis, made by or in the course of proceedings before a federal board, commission or other tribunal, upon the ground that the board, commission or tribunal
>
> (a) failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
>
> (b) erred in law in making its decision or order, whether or not the error appears on the face of the record; or
>
> (c) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

In its report of March 1980 the Law Reform Commission of Canada makes the following recommendation with regard to the grounds for review:[17]

> The court should be enabled to review federal administrative authorities for action contrary to law, including without limiting the generality of the foregoing:
>
> . failure of procedures to conform to natural justice or basic procedural fairness including bias and reasonable apprehension thereof;
>
> . failure to observe prescribed procedures;
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> . error in law, including lack of jurisdiction, a wrongful failure to exercise jurisdiction, and abuse of discretion;
>
> . fraud;

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16 See Law Reform Commission of Canada Working Paper 18 federal court judicial review at 49.

17 Report judicial review and the federal court at 32, hereunder Report 14.

- failure to reach a decision or to take action where there is a duty to do so;
- unreasonable delay in reaching a decision or performing a duty;
- lack of any evidence to support a decision.

The report thus envisages an extension of the grounds for review. The retention of "error of law" as a ground for review is recommended. With regard to "erroneous finding of fact" the Commission remarks as follows:[18]

> Again, the reference to a lack of evidence to support a decision obviously refers to a lack of any evidence. It is intended to permit review of what section 28 of the Federal Court Act refers to as erroneous findings of fact made by an administrative authority in a perverse or capricious manner or without regard for the material before it.

For the purposes of answering the question under discussion the following comments of the Commission are important:[19]

> In the light of developments since the Working Paper, we should now underline a number of matters. One has to do with natural justice. At the time the Working Paper was issued, the courts had generally confined the application of that doctrine to decisions of a 'judicial' or 'quasi-judicial' character, and, of course, in relation to matters arising under section 28, the words of the section expressly excluded review of any 'decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis' ... In our view, the courts should attempt to articulate the policy grounds on which they decide to review or not to review without relying on almost meaningless rubrics like 'administrative' and 'judicial' or 'quasi-judicial'. These, we noted, have sometimes served as a cloak for quite adequate reasons for not reviewing, such as efficiency in government, adequacy of consideration within the administrative process, national security, the political nature of the question, and so on. These and other reasons afford good ground for judicial restraint, but not for the artificial, archaic and sometimes inflexible distinction between administrative and judicial decisions.

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18 Report 14 at 29.

19 Report 14 at 27, 31.

4. THE EXTENSION OR RESTRICTION OF THE GROUNDS FOR REVIEW IN SOUTH AFRICA

4.1 In South Africa there have been those who have advocated the extension of the grounds for review. In respect of -

. "errors of fact" it is argued that:[20]

> The 'jurisdictional fact' terminology was invented in the days when the finer principles relating to the review of discretionary power had not yet been developed. It creates the impression that once the court is confronted by the exercise of such power it becomes powerless to review the exercise of that power ... this impression is incorrect. As a result, use of the 'jurisdictional fact' terminology has led to arbitrary results as judges have tried to distinguish between discretionary 'facts' that are reviewable and those that are not. It would be better if the 'jurisdictional fact' terminology were now to be dispensed with altogether.

. "errors of law" the following observations are made:[21]

> Lawyers strongly incline to the view that the courts should have the final say in matters of law. But, as we have just seen, the courts have refused to go so far as to hold that all errors of law are reviewable ... There are signs that the more liberal English approach might be followed in South Africa. In Theron v Ring van Wellington van die NG Sendingkerk in Suid-Afrika ... two judges of appeal rejected the Anisminic approach while two suggested that it should be

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20 Baxter Administrative law at 461.

21 Baxter Administrative law at 470 & 472. The "Anisminic approach" refers to Anisminic v Foreign Compensation Commission 1969 2 AC 147; 1969 1 ALL ER 208 (HL), where the House of Lords according to Baxter at 471 "... opened up the possibility that all errors of law could be treated as reviewable". See Baxter at 472 fn 558 for the full dictum of Lord Wilberforce in the case concerned. Cf Wiechers Administratiefreg at 281 & 330. See also JA v S d'Oliveira "Diskresie, regsdwaling en die hersieningshof: redelikheid in die administratiefreg" 1976 THRHR 211. See In re HK (An Infant) 1967 2 QB 617 where the court according to Baxter at 593 "... held that even though an immigration officer was not required to act 'judicially', nevertheless he was required to act 'fairly'. This test "... and natural justice are one and the same thing" - Baxter at 596. See also Wiechers at 321 fn 111.

followed. We have yet to see which way the courts will move.

. the rules of natural justice it is argued as follows:[22]

> In South African law the courts were not confused at first. They made it clear that natural justice applied to all administrative acts, whatever their label, if these acts affected private individuals. The wisest judges warned us not to be carried away by labels of convenience, and one pointed without success to the beacon of English law, Ridge v Baldwin. But South African courts still insist that administrative acts should qualify for membership of the mysterious 'quasi-judicial' club before they will require these acts to comply with the principles of natural justice. They search for the trappings of a court in order to identify 'quasi-judicial' acts. They have even called administrative acts of devastating effect, such as expropriation, 'purely administrative', thereby relieving the expropriators of the duty to comply with natural justice ... The question is: for how long will they continue to apply a test which has been utterly discredited in the home of its birth (in Ridge v Baldwin 1964 AC 40; 1963 2 ALL ER 66 (HL) and almost everywhere else?

4.2 In contrast to the plea for an extension of the grounds for review Hutchinson issues the following warning:[23]

> The aim and rationale of judicial intervention in the administrative process is to avoid a monopoly of power with its tendency to corrupt and to curtail individual freedom. Yet, in so doing, the judges are open to the charge that this reinforces their own monopolistic position and power.

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22 Baxter Administrative law at 575-7. See also WHB Dean at 284 where he states that: "By making the 'quasi judicial' more 'judicial', the courts have severely limited the scope of the rules of natural justice in South African law and have thereby further limited their already limited power to ensure that a proper and fair decision is eventually reached."

23 AC Hutchinson "The rise and ruse of administrative law and scholarship" 1985 Modern Law Review 293 at 294, hereunder AC Hutchinson; this is stated even more forcefully at 314: "The rationale for judicial review is said to be the constitutional and democratic need to regulate and resist the monopolisation and arbitrariness of State power. Yet there is discernible within the cases

(Footnote continued)

Hutchinson then argues "that the retention of any form of judicial review cannot be justified if our democratic commitments and ambitions are taken seriously".[24] The problem according to him is that "the academic preoccupation with judicial review insulates and shields the real sources of bureaucratic maladministration from sustained exposure and eradication".[25] He suggests the following:[26]

> There must be 'a revolution in democratic consciousness'. A radical and substantive vision of a democratic society has to be imagined and pursued. Democracy must become a way of daily life and embrace the exercise of all social power, public or private: 'The idea of democracy is the cutting edge of the radical critique, the best inspiration for change toward a more humane world, the revolutionary idea of our time'.

4.3 It is doubtful whether Hutchinson's alternative provides the solution in the South African context and whether his argument for a restriction and even the removal of judicial review deserves serious attention. With reference to the Constitution of the Republic of South Africa Act 110 of 1983 Van der Vyver writes:[27]

(Footnote continued)
a less subtle and commendable sub-plot. In checking bureaucratic power, the courts have extended their own constitutional power."

24 AC Hutchinson at 295.

25 AC Hutchinson at 323.

26 AC Hutchinson at 323-4.

27 JD van der Vyver Die grondwet van die Republiek van Suid-Afrika Lex Patria 1984 at 6 & 7, hereunder Grondwet. See also G N Barrie "'n Ombudsman vir Suid-Afrika" 1984 TSAR 17 op 22, hereunder G N Barrie: "Every modern sophisticated industrial state such as South Africa has now reached the evolutionary stage where 'government' in effect means government by officialdom. Up to now we have avoided the expressions 'bureaucracy' and 'bureaucrat'. Such terms tend to denigrate conscientious and praiseworthy officials and to be totally misleading. Nevertheless, nobody can deny that we have to do with a bureaucracy. Bureaucracies are the outcome of bureaux or offices of governmental bodies which cease to be merely instruments of government and which in practice become the 'government' itself. This is a world-wide phenomenon. The unfortunate consequences of bureaucracy and its inherent tendencies towards arbitrary action are not the product of any sinister or dishonest intentions of individuals, but indeed of the system itself". (Our translation.)

> On the one hand the Constitution provides for a broadening of the principle of representative government in South Africa, but on the other hand the system of the sovereignty of parliament is exchanged for one in which the executive is dominant ... Without at this stage ... anticipating the analysis, it may be said by way of introduction that labelling the new constitutional dispensation as a dictatorship of the executive is not completely unfounded. (Our translation.)

Barrie states the following aim:[28]

> The aims of good government in modern times must, therefore, be to investigate the ways in which the increased powers of the executive fit into the whole constitutional and juridical system, and exactly how this may be reconciled with what passes for good democratic government. (Our translation.)

However, the problem is pointed out by Van der Vyver as follows:[29]

> Means of control for combating abuse of power are but few and far between in the Constitution. (Our translation.)

It is suggested that an extension of the grounds for review would be a method of controlling abuse of power by the executive. An extension of the grounds for review on the basis set out in paragraph 4.1 is recommended.

The importance of errors of fact, in particular, as a ground for review is stated as follows:[30]

> The substantial evidence rule enables the courts to play a virtual appellate role vis-à-vis the administrative process. The result is that judicial review tends to be assimilated to appeals from lower courts. To the American mind this broad doctrine of review is necessary for effective control by the courts. It is the power to find the facts, rather than the law, that is the decisive element in the vast majority of cases. As Chief Justice Hughes put it: 'The power of administrative bodies to make findings of fact which may be treated as conclusive ... is a power of enormous consequence. An unscrupulous

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28 G N Barrie at 23.

29 Grondwet at 7.

30 Schwartz & Wade at 231-2.

administrator might be tempted to say, 'Let me find the facts for the people of my country and I care little who lays down the general principles'.

Should it be decided to extend the grounds for review, then it is further suggested that consideration be given to the imposition of a duty upon administrative organs to give reasons for their decisions.[31] This inevitably poses the question of legislation. In their comparison of American and English administrative law, Schwartz & Wade remark as follows:[32]

> In the United States, and most notably in the federal law, there is legislation which sets out a catalogue of situations where the court is empowered to interfere. No need for this is felt in Britain, where there is entire reliance on the inherent jurisdiction of the court and on the court's ability to demonstrate that administrative action which it condemns is ultra vires and thus per se unlawful. This system works well enough so long as all the heads of ultra vires are well known. But it is not very long since the English courts seemed to have forgotten some of them, as is illustrated by the chequered post-war history of the principles of natural justice. There may therefore be much to be said for a 'scope of review' enactment of the American type, which to some extent serves the purpose of an administrative Bill of Rights. A statutory hand-list of the favourite forms of administrative illegality is a useful precaution against any weakening by the courts. What is certain, however, is that no such list can be

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31 Schwartz & Wade at 230 state the position in respect of the United States of America as follows: "Without such a record, it is in practice difficult for a reviewing court to determine whether an administrative finding of fact has the required evidentiary basis. With a full record, the court can deal with administrative proceedings brought before it as it would with an appeal from a lower trial court. Thus we find yet another basis for the American practice of having full records (including verbatim transcripts) in formal agency proceedings." The writers describe the position in England as follows at 238: "But almost concurrently with the resurrection of the old jurisdiction to quash came the general recognition of the duty to state reasons which was enforced by the Tribunals and Inquiries Act 1958, s.12. It is especially significant that the Act requires that the statement of reasons shall be taken to be incorporated in the record, for this provision (in itself no more than a statement of the obvious) clearly shows that Parliament approves the close review of the record which the courts have asserted." Baxter Administrative law at 227 "emphasizes the need for a general statutory duty, placed upon all administrative bodies, to articulate their findings and to state the reasons for their decisions". See also A Chaskalson "Legal control of the administrative process" 1985 SALJ 419 at 428-32.

32 At 226.

exhaustive. It must always leave the door open to the infinite variety of possible abuses.

4.4 To sum up, the following conclusions may be drawn concerning the grounds for review in South Africa:

4.4.1 There is an urgent need for law reform since it is clear that our law has lagged behind other Western systems in this respect.

4.4.2 As far as grounds for review are concerned, the distinction between administrative and quasi-judicial acts may be dropped.

4.4.3 It is suggested that a general list of grounds for review be included in legislation, without thereby constituting a codification, since the door must be left open for the retention of recognised common law grounds.

4.4.4 The following are essential extensions to the grounds for review:

- A general requirement that the principles of natural justice are to be complied with.

- A general rule that unfairness shall be a ground for review.

- A general duty to furnish full reasons for an act or a decision upon request.

- Unreasonableness of the decision, including errors of law and fact, shall be a ground for review, but excluding review of policy considerations.

CHAPTER 6

ADMINISTRATIVE APPEALS : CONTROL OF ADMINISTRATIVE ACTS BY OTHER ADMINISTRATIVE ORGANS

1. INTRODUCTION

1.1 The importance of administrative appeals appears from the following observation made by Rabie:[1]

> The best satisfaction to be afforded persons who are aggrieved by the performance of administrative acts, is surely that the actions of the administrative organ concerned may be reconsidered by another body. (Our translation.)

1.2 With a view to the recommendations at the end of this chapter it is of interest to note the following observations concerning the nature of the complaints of persons who are aggrieved by the actions of administrative organs:[2]

> In the early stages of our Inquiry, it became apparent that the complaints with which we are concerned fall into two categories. First, there are complaints against discretionary decisions where the citizen disagrees with the way in which an official has exercised his discretion but has no formal means of challenging it. The citizen's complaint in these cases is not that the official has abused his power but that the decision he has reached is not, in all the circumstances,

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1 A Rabie "Administratiefregtelike appèlle: kontrole van administratiewe handelinge" 1979 De Jure 128, hereunder A Rabie. Baxter Administrative law at 255 says in this regard that: "Since the executive branch of government exists in order to administer, it seems appropriate that the wisdom of its actions should be left in its hands. But neither departmental supervision nor procedural safeguards are sufficient to guarantee that administrative discretion will be exercised wisely. Hence provision is often made for an administrative appeal against particular administrative decisions."

2 JUSTICE (British section of the International Commission of Jurists) A report on the citizen and the administration Stevens & Sons 1961 at 51, hereunder Justice.

appropriate. There may be no allegation of bias, negligence or incompetence but merely the charge that the decision is misguided. In essence this type of complaint is a complaint that there is no right of appeal to an independent body which can substitute its own discretionary decision for that of the official who made the original decision. Secondly, there are complaints against acts of maladministration. These are, broadly speaking, complaints aimed at official misconduct. In this type of complaint, it is a question, not of appealing from, but of making an accusation against, authority.

In their investigation JUSTICE[3] came to the conclusion that the most effective method of combating maladministration is the "appointing of an officer to investigate complaints of maladministration". Wiechers[4] mentions three events that had a major influence on English state administration. One of these was the appointment of a parliamentary commissioner in 1967 to investigate charges of maladministration made in depositions by members of parliament.[5] In South African administrative law the Advocate-General Act 118 of 1979 must be viewed in this context.

1.3 There are in principle two types of bodies that perform the function of reconsidering the acts of administrative organs, namely, administrative organs and the civil courts. Reconsideration can thus take place either by means of administrative control or by means of judicial control.[6] In this chapter reconsideration by means of administrative control will be examined.

2. ADMINISTRATIVE CONTROL

A right of appeal exists only if it is provided for by statute.[7] In South Africa there is a variety of laws containing provisions relating to appeals.

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3 At 11.

4 Administratiefreg at 21.

5 Wiechers Administratiefreg at 22.

6 See A Rabie at 128.

7 See Baxter Administrative law at 255; Rose Innes Judicial review at 18 & 32.

These provisions are dealt with below under the headings "Appeals to Ministers", "Appeals to other administrative organs", "Appeals to administrative tribunals" and "Appeals to administrative courts".[8] The Acts dealt with serve only as examples and the list does not purport to be complete. All designations are those that appeared in the Acts at the time of their commencement.

2.1 Appeals to Ministers

The following Acts provide for appeals to the minister concerned from the decision of -

- the Industrial Registrar, an industrial council or an inspector - sections 16(1), 51(6)(a) and 57(5) of the Labour Relations Act 28 of 1956;

- the Director-General:Manpower - section 31(6)(a) of the Unemployment Insurance Act 30 of 1966;

- the Registrar of Manpower Training - section 41 of the Manpower Training Act 56 of 1981;

- the Chief Inspector of Factories or any other inspector - section 42 of the Factories, Machinery and Building Work Act 22 of 1941;

- a designated person or officer - section 9(3) of the National States Citizenship Act 26 of 1970;

- the Electricity Control Board - section 45 of the Electricity Act 40 of 1958;

- the Council of the South African Bureau of Standards - section 22 of the Standards Act 30 of 1982;

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8 See A Rabie at 141 et seq.

- the Director-General:Industry, Commerce and Tourism - section 24(9) of the Fishing Industry Development Act 86 of 1978;

- the Registrar or Deputy Registrar of Building Societies - section 3(1) of the Building Societies Act 24 of 1965;

- the Registrar of Banks - section 3(1) of the Banks Act 23 of 1965;

- the Registrar of Financial Institutions - section 14 of the Stock Exchanges Control Act 7 of 1947;

- the Registrar of Insurance - section 2(1) of the Insurance Act 27 of 1943;

- a slums clearance court - section 6(9)(a) of the Slums Act 76 of 1979;

- the Director-General:Health, Welfare and Pensions - section 6 of the Hazardous Substances Act 15 of 1973;

- the Chief Meat Hygiene Officer - section 13 of the Animal Slaughter, Meat and Animal Products Hygiene Act 87 of 1967;

- the Registrar of Brands - section 16 of the Livestock Brands Act 87 of 1962;

- certain officers - section 22 of the Animal Diseases and Parasites Act 13 of 1956;

- the Director-General:Agriculture and Fisheries - section 10 of the Agricultural Produce Agency Sales Act 12 of 1975;

- the Registering Officer - section 6 of the Seeds Act 28 of 1961;

- the Registrar of Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies - section 6 of the Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act 36 of 1947;

- the executive officer - section 11 of the Agricultural Pests Act 36 of 1983;

- the Director-General:Mineral and Energy Affairs - section 11 of the Tiger's-Eye Control Act 77 of 1977;

- the Mining Commissioner - section 29 of the Precious Stones Act 73 of 1964;

- the Mining Commissioner - sections 124 and 137 of the Mining Rights Act 20 of 1967;

- the council of a university - section 13 of the Universities Act 61 of 1955;

- the Commissioner of the South African Police - section 22 of the Arms and Ammunition Act 75 of 1969;

- the South African Tourism Board - section 22 of the Hotels Act 70 of 1965;

- the Registrar of Tour Guides - section 10 of the Tour Guides Act 29 of 1978;

- the National Transport Commission - section 27 of the National Roads Act 54 of 1971; and

- the Administrator of a province - section 13 of the Advertising on Roads and Ribbon Development Act 21 of 1940.

2.2 Appeals to other administrative organs

In the -

- Road Transportation Act 74 of 1977, section 8(1) provides for an appeal to the National Transport Commission against any act, direction or decision of a local road transportation board;

- Rent Control Act 80 of 1976, section 22 provides for review by the Rent Control Board of decisions of rent boards;

- Labour Relations Act 28 of 1956, section 51(5) provides for an appeal to an industrial council from decisions of a committee of the industrial council;

- Unemployment Insurance Act 30 of 1966, section 27(1) provides for an appeal to an unemployment benefit committee against decisions of claims officers; and section 21(1) provides for an appeal to the Unemployment Insurance Board against decisions of an unemployment benefit committee; and

- Heraldry Act 18 of 1962, section 9 provides for an appeal to the Heraldry Council against decisions of the State Herald or the Heraldry Committee.

2.3 Appeals to administrative tribunals

Provision is often made in legislation for appeals from an administrative organ to a body that is appointed specifically to hear appeals. Usually this body is referred to as an appeal board, although sometimes it is also known as an appeal committee, review board or court of review.[9]

In the -

- Community Development Act 3 of 1966, section 33(4)(a) and (5) provides for an appeal to a revision court against the determination by valuators of the basic value of any affected property. Such revision court consists of a magistrate or retired

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9 See Rabie at 146.

magistrate and two assessors appointed by the Minister of Community Development;

. Atmospheric Pollution Prevention Act 45 of 1965, section 13 provides for an appeal to the Air Pollution Appeal Board from decisions of the chief officer; section 22 provides for an appeal to a local authority against certain actions of a committee of the local authority; section 25 provides for an appeal to a regional appeal board against a decision of a local authority in terms of section 22; and sections 35 and 38 provide for an appeal to the Air Pollution Appeal Board against certain actions under the Act.

In terms of section 5 the Minister of Health and Welfare must establish a board known as the Air Pollution Appeal Board to hear and determine appeals in terms of section 13, 35 or 38 or in terms of section 25 from decisions of any regional appeal board, and establish so many regional appeal boards as he may consider necessary to hear and determine appeals against decisions of local authorities in terms of section 25.

The Air Pollution Appeal Board and every regional appeal board consist of three members who are appointed by the Minister after consultation with the National Air Pollution Advisory Committee and shall be persons who in the opinion of the Minister are suitably qualified to perform the functions devolving upon them under this Act;

. National Building Regulations and Building Standards Act 103 of 1977, section 9 provides for an appeal to a review board against decisions of a local authority. Such review board consists of a chairman designated by the Minister of Industries, Commerce and Tourism and two persons appointed for the purpose of any particular appeal by the said chairman from persons whose names are on a list compiled in the manner prescribed by regulation;

. Workmen's Compensation Act 30 of 1941, section 25 provides for an appeal to the Workmen's Compensation Commissioner assisted

by two assessors. In terms of section 13 the Minister of Manpower may appoint assessors to assist the Workmen's Compensation Commissioner;

- Admission of Persons to the Republic Regulation Act 59 of 1972, section 6 provides for an appeal to a board for the summary determination of appeals against actions of an immigration officer or a police officer. Such a board consists of three or more members appointed by the State President. The Chairman of the board is designated by the State President and he shall be a magistrate;

- Stock Exchanges Control Act 7 of 1947, section 10 provides for an appeal to a board for the hearing of appeals against decisions or actions by the committee of a licensed stock exchange. Such a board consists of an advocate of not less than ten years' standing, who shall be the chairman of the board, an accountant of not less than ten years' standing, and a person selected for his knowledge of stock exchange matters;

- Medicines and Related Substances Control Act 101 of 1965, section 24(1) provides for an appeal to the Medicines Control Appeal Board against decisions of the Medicines Control Council. This Appeal Board consists of four members appointed by the State President of whom one shall be a retired judge or an advocate and shall be the chairman of the board, one shall be a medical practitioner who has a speciality in medicine, one a veterinarian and one a pharmacologist;

- Livestock Improvement Act 25 of 1977, section 27 provides for an appeal to a board against decisions or actions of the Registrar of Livestock Improvement or decisions of the Stud Book Association. The Minister of Agriculture appoints the members of the board and it consists of one person designated as chairman on account of his knowledge of law and two persons who in the opinion of the Minister have expert knowledge of the subject of the appeal;

- Plant Improvement Act 53 of 1976, section 32 provides for an appeal to a board against decisions or actions of the Registrar of Plant Improvement. The members of such board are appointed by the Minister of Agriculture and consist of one person designated as chairman on account of his knowledge of law and two persons who in the opinion of the Minister have expert knowledge of the subject of the appeal;

- Plant Breeders' Rights Act 15 of 1976, section 42 provides for an appeal to a board against decisions or actions of the Registrar of Plant Breeders' Rights. The members of such board are appointed by the Minister of Agriculture and consist of one person designated as chairman on account of his knowledge of law and two persons who in the opinion of the Minister have expert knowledge of the subject of the appeal;

- Military Pensions Act 84 of 1976, section 14 provides for an appeal to a medical appeal board against a decision of the Director-General:Health and Welfare relating to the degree of the appellant's pensionable disability or previous pensionable disability and to an Appeal Tribunal against any other decision of the Director-General.

  A medical appeal board is appointed by the Minister of Health and Welfare and consists of not fewer than three medical practitioners.

  The Appeal Tribunal is appointed by the Minister and consists of an advocate of at least five years' standing who shall be the president and two members who have had military service;

- Merchant Shipping Act 57 of 1951, section 274 provides, inter alia, for an appeal by the owner or the master of a vessel to a court of survey against the report of inspection of a ship surveyor, engineer surveyor or radio surveyor or against the finding of any surveyor that the vessel is not loaded or fitted as prescribed.

A court of survey consists of a magistrate and either two or four members. The members of the court are appointed by the Minister of Transport Affairs and all members other than the presiding officer shall be persons of suitable nautical, engineering or other special skill, knowledge or experience;

- Publications Act 42 of 1974, sections 13, 14, 23, 24, 31 and 32 provide for appeals to the Publications Appeal Board against certain actions and decisions of committees appointed in terms of section 4.

  The Appeal Board consists of not fewer than three members of whom the chairman shall be a person who in the opinion of the State President is fit to serve as chairman by reason of his tenure of a judicial office or through experience as an advocate or attorney or as a lecturer in law at any university for a period of not less than 10 years. The other members shall be persons whose names appear on a list of names compiled by the Director of Publications and designated by the State President;

- Population Registration Act 30 of 1950, section 11 provides for an appeal to a board against classification by the Director-General: Internal Affairs. Such board consists of not fewer than three persons, including the chairman, constituted for the purpose by the Minister of Internal Affairs, and presided over by a person appointed by the Minister, who is or was a judge or a magistrate;

- Wine and Spirit Control Act 47 of 1970, section 7 provides for an appeal to a board of appeal against decisions of the Ko-operatieve Wijnbouwers Vereniging van Zuid-Afrika, Beperkt. Such board of appeal consists of three members appointed by the Minister of Agriculture, one of whom is nominated by the appellant, one is nominated by the Vereniging, and one is chairman of the board, nominated by the Minister;

- National Welfare Act 100 of 1978, section 15 provides for an appeal to an appeal committee against decisions of a regional

welfare board. Such appeal committee is constituted by the Minister concerned and consists of a magistrate with at least 10 years' experience as a magistrate, who shall be the chairman, and two persons who are not members of the regional welfare board concerned or of a committee of that board and who, in the opinion of the Minister, have experience and knowledge of the functions of welfare organizations and who have no direct interest in the affairs of the appellant and are not in the employ of the appellant or in the Public Service;

- Fund-raising Act 107 of 1978, section 10 provides for an appeal to an appeal committee against the decisions of the Director of Fund-raising. Such appeal committee is appointed by the Minister concerned and consists of a magistrate with not less than 10 years' experience as a magistrate, who shall be the chairman, and two persons who, in the opinion of the Minister, have experience and knowledge of the activities of fund-raising organizations and who have no direct interest in the affairs of the appellant or are not in the service of the appellant or the State; and

- Internal Security Act 74 of 1982, section 35(1) provides for the establishment of a board of review. This board consists of three members, who shall be appointed by the State President on the recommendation of the Minister of Justice and of whom one shall be a judge of the Supreme Court of South Africa or a person who has held office as such a judge, or a person who has held office as a magistrate of the rank of chief magistrate or as a magistrate of a regional division or any other person, except a person in the service of the State, who by virtue of his qualifications is entitled to be admitted and authorized to practise and be enrolled as an advocate and who, after obtaining such qualifications, was concerned in the application of the law for a continuous period of not less than ten years, who shall also be the chairman of the board of review. One of the remaining two shall be a person holding a degree or diploma in law.

The Minister shall, whenever he has in terms of section 18(1), 19(1) or (2), 20 or 28(1) taken steps in respect of a particular person, submit the matter to a board of review for investigation and consideration

2.4 Appeals to administrative courts

There are also examples of appeals from decisions of administrative organs to a body that might be called a type of administrative court.[10] These types of "courts" represent a further step in the evolutionary process of the establishment of full-fledged administrative courts.[11] Such a court is usually presided over by a judge of the Supreme Court as president or chairman, assisted by assessors who have specialised knowledge and experience of the subject in question. These courts largely function like the ordinary civil courts.[12]

In the -

- Maintenance and Promotion of Competition Act 96 of 1979, section 15(1) provides for an appeal to a special court against a notice in terms of section 14(1)(c) of the Minister of Industries, Commerce and Tourism. In terms of a notice under section 14(1)(c) the Minister declares a restrictive practice or acquisition to be unlawful and requires any person who is a party to the restrictive practice to take steps to ensure the discontinuance or prevention of the restrictive practice.

  A special court is constituted by the State President by proclamation in the Government Gazette with jurisdiction throughout the Republic or in one or more specified areas, for the hearing of all or any one or more appeals. The court

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10 See A Rabie at 148.

11 Ibid.

12 See A Rabie at 149.

consists of a judge, who shall be the president of the court, and two other members, of whom one shall be the holder of a university degree in economics who in the opinion of the State President has a thorough knowledge of economics. The other one shall be a person who in the opinion of the State President has wide experience of industrial, commercial or financial matters or, where the State President in his discretion upon application by an appellant so directs, is a professional engineer.

- Income Tax Act 58 of 1962, section 83(1) provides for an appeal to a special court for the hearing of income tax appeals from decisions of the Commissioner for Inland Revenue. A special court is constituted by the State President by proclamation in the Government Gazette for such area or areas as he may think fit. Every court so constituted shall consist of a judge who shall be the president of the court, an accountant of not less than ten years' standing and a representative of the commercial community. In all cases relating to the business of mining such third member shall if the appellant so desires be a qualified mining engineer;

- Sales Tax Act 103 of 1978, section 22 provides for an appeal to a special court from any decision of the Commissioner for Inland Revenue. The special court is constituted in terms of section 83 of the Income Tax Act 58 of 1962;

- Estate Duty Act 45 of 1955, section 24 provides for an appeal to the special court for the hearing of income tax appeals constituted under section 83 of the Income Tax Act 58 of 1962 from decisions of the Commissioner for Inland Revenue;

- Patents Act 57 of 1978, section 75 provides for an appeal to the Commissioner of Patents from decisions of the Registrar of Patents. In terms of section 8 the Judge President of the Transvaal Provincial Division of the Supreme Court shall from time to time designate one or more judges or acting judges of that

Division as commissioner or commissioners of patents. Such Commissioner of Patents sits as a court;[13] and

- Water Act 54 of 1956, section 98 provides for an appeal to a water court against an order, act or decision of an irrigation board.

Section 34 establishes several water courts. In terms of section 35 a session of a water court shall take place before a water court judge who shall be a judge of the Supreme Court which exercises jurisdiction in the area of that water court. In terms of section 36 a water court judge may in any proceedings before a water court invoke the assistance of not more than two persons who are skilled and experienced and are prepared to sit as assessors in an advisory capacity.

3. CRITICISM OF THE PRESENT SYSTEM OF ADMINISTRATIVE CONTROL

In 1968 the Public and Administrative Law Reform Committee of New Zealand, pursuant to an investigation (of appeals from administrative tribunals), reported, inter alia, as follows:[14]

> Taking the broad view, there seems little justification for the inconsistency of the present arrangements. There is a bewildering variety of appeal rights (or lack of them), of types of appellate bodies, of constitutions, procedure and jurisdiction. The present complexity appears to have been unplanned, or possibly the result of different plans at different times.

Criticism of the present system of administrative control will be discussed with reference to the types of rights of appeal, the types of appellate bodies, their constitution, procedures and powers.

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13 Gentiruco AG v Firestone SA (Pty) Ltd 1972 1 SA 589 (A) at 600H.

14 First report of the Public and Administrative Law Reform Committee of New Zealand on appeals from administrative tribunals at 12, hereunder First Report.

3.1 Types of rights of appeal

Baxter writes as follows in this regard:[15]

> This confusion is not surprising if one considers how terminology is used: one 'appeals' to the tribunal to 'review' or 'revise' a previous decision. For legal purposes some clarification has been obtained by drawing technical distinctions between three rough categories of 'appeal': 'reviews', 'ordinary appeals' and 'wide appeals'. Where the statute creates a power of 'review', the appellate body is limited to a consideration of the legality or validity of the decision under examination. New evidence may be led, if this is necessary, to determine the existence of illegalities. If, on the other hand, the right of appeal is an 'ordinary' or 'wide' appeal, the wisdom of the decision may be considered. An 'ordinary' appeal involves 'a re-hearing on the merits but limited to the evidence or information on which the decision under appeal was given, and in which the only determination is whether that decision was right or wrong'. Such an appeal is referred to as an 'ordinary' appeal because it corresponds to the normal appellate jurisdiction of the courts. A 'wide' appeal involves 'a complete re-hearing of, and fresh determination on the merits of, the matter with or without additional evidence or information'. ... The kind of 'appeal' intended is not always apparent from the applicable legislation. Usually, however, a 'wide' appeal is intended.

3.2 Types of appellate bodies

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15 At 256-7. See also Tikly v Johannes 1963 2 SA 588 (T) at 590F-591A: "The word 'appeal' can have different connotations. In so far as is relevant to these proceedings it may mean:

(i) an appeal in the wide sense, that is, a complete re-hearing of, and fresh determination on the merits of the matter with or without additional evidence or information ...;

(ii) an appeal in the ordinary strict sense, that is, a re-hearing on the merits but limited to the evidence or information on which the decision under appeal was given, and in which the only determination is whether that decision was right or wrong ...;

(iii) a review, that is, a limited re-hearing with or without additional evidence or information to determine, not whether the decision under appeal was correct or not, but whether the arbiters had exercised their powers and discretion honestly and properly."

3.2.1 In 1978 the Law Reform Commission of Western Australia referred to the following observation made by the Law Society of Western Australia:[16]

> At the present time there are many statutes of the State which give to a person or body a right of appeal against the decision of a Board, a corporate body or a Minister to some tribunal but the choice of tribunal varies from statute to statute and often varies in the same statute.

3.2.2 In 1982 the same Commission reported as follows:[17]

> The Commission's Survey of Western Australian legislation confirms the view expressed by the Society. At present there are approximately 257 administrative decisions which are subject to a statutory right of appeal to more than forty-three appellate bodies. A study of the Survey suggests that the present arrangements are the result of ad hoc legislation over a long period of time without an apparent overall plan. As a result, the present arrangements incorporate inconsistencies and, in the Commission's view, variations in the rights of appeal from the decisions of bodies with similar responsibilities which are difficult to justify.

3.2.3 In this connection Baxter observes as follows:[18]

> Practical necessity, if nothing else, has led to the creation of the wide array of tribunals of appellate jurisdiction ... Yet in South Africa, as in Britain, these bodies have been created on an ad hoc basis. In some cases no appeal against an administrative decision exists at all. Even where it might be accepted by the executive that a right of appeal should exist, the importance of the decisions involved or their infrequency may not justify the establishment of special appellate machinery. In the result there is no coherent system.

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16 Working paper and survey: review of administrative decisions Part 1 - Appeals at 4, hereunder Working paper.

17 Report on review of administrative decisions Appeals Project No 26 - Part 1 at 13, hereunder Project No 26.

18 Baxter Administrative law at 267-8.

3.2.4 In 1984 the Law Reform Committee of South Australia pointed out, inter alia:[19]

> That administrative appeal or review bodies have been created haphazardly, as a particular need arose, over the years and without any philosophy of pattern or structure.

3.2.5 Rabie also refers to a trend towards the proliferation of administrative tribunals and quotes Wade as follows:[20]

> When legislation is in preparation the line of least resistance is usually to create new tribunals rather than to reorganize those already existing. This tendency, if unchecked, leads to a jungle of different jurisdictions which are as inconvenient to the citizen as they are bewildering.

3.3 Constitution of appellate bodies

3.3.1 In this regard it is instructive to note the following observations of the Administrative Law Reform Committee of New Zealand:[21]

> We have been impressed with the criticisms made by one of our members, Mr G S Orr, of the constitution and status of the present appeal authorities. While no-one questions the ability of the persons holding office as the appeal authorities, it is clear that their status is not readily understood and this tends to create a wrong impression in parties to the proceedings. No matter what may be the quality of the decision, some of those involved think they have received less than justice.

3.3.2 In this report the Committee also refers to the following observation of a special committee of the New Zealand Law Society:[22]

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19 Eighty-second report of the Law Reform Commitee of South Australia to the Attorney-General relating to administrative appeals at 4, hereunder Eighty-second report.

20 A Rabie at 154.

21 First report at 12.

22 First report at 8.

But, over and above this, we believe that there is quite a deep-rooted feeling in the community that justice administered by bodies other than the ordinary courts tends, from the point of view of fairness and care, to be an inferior brand of justice. We do not think this view wholly without foundation, although we recognize that at times administrative tribunals attain a high standard and we are far from making any universal criticism of them.

3.3.3 Rabie makes the following observations:[23]

It is clear that the higher organ exercising internal control, or to which appeal is made internally, is not detached in its attitude towards the matter it has to decide. Where the appeal is made to an administrative tribunal, the detachment from the body whose decision is appealed against is indeed greater. Since the tribunal is, however, usually appointed by the Minister whose department is concerned in the matter, there is always a suspicion that the tribunal is not really independent. (Our translation.)

3.3.4 If it is true that the administrative organ to which the appeal lies is not detached in its approach to the matter it has to decide, the following observations of the Law Reform Commission of Canada are illuminating:[24]

No democratic country has yet been able to satisfactorily resolve the problems of how to assess the effectiveness of government programs and how to monitor the content and direction of policy developed by government agencies ... The lack of specificity of goals in all the statutory mandates of agencies is a matter requiring attention, yet specificity of goals in legislation is not, in itself, a sufficient insurance that those goals actually motivate agency behaviour. The phenomenon of 'goal substitution', which is well documented in the literature on organizational theory, has taught the lesson that the articulated goals, or even the goals administrators believe to be their controlling goals, are frequently not the actual organizational goals. Goal substitution results because any activity an organization pursues produces either strains or rewards. The tendency of organizations to seek the minimization of strains and maximization of rewards is the dynamic that generates new goals. An important element in the production of strains and rewards is often efficiency. When legitimate organizational goals are pursued with maximum efficiency, little complaint can be made but when efficiency itself becomes a controlling goal, the legitimate goals of an organization can become no more than an institutional mythology that contributes little to the understanding

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23 At 153.

24 Council on Administration: Administrative law series: Study paper at 12, 18, hereunder Study paper.

of what the organization actually does ... Agencies are as subject to goal substitution as any organization. Thus, the task of ensuring effective supervision of agency goals and policy development requires the ongoing study and evaluation of the daily activities of agencies.

3.4 Procedures to be followed by appellate bodies

3.4.1 The Law Reform Committee of South Australia identified the problem in this regard as follows:[25]

> There has been no recognized standard to which various administrative procedural provisions, including appellate or review procedures, have to conform.

3.4.2 Rabie's view of this matter is as follows:[26]

> On the whole administrative tribunals fall far short in all these respects: the procedure to be followed by these tribunals, as well as the rules relating to evidence, is seldom clearly set forth. It is usually not laid down that sittings are to take place in public, or that reasons for decisions are to be furnished ... Nor is it always stated clearly when parties are entitled to legal representation. (Our translation.)

3.5 Powers of appellate bodies

3.5.1 The powers of statutory appellate bodies are briefly summarised as follows:[27]

> An Appeal Board ... is a purely statutory body and its appellate jurisdiction must be found within the four corners of the legislation which created it.

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25 Eight-second report at 4.

26 A Rabie at 154.

27 L & B Holdings v Mashonaland Rent Appeal Board 1959 3 SA 466 (SR) at 468G-H.

3.5.2 The problems experienced in this regard are stated by Baxter as follows:[28]

> Thus the precise form that the appeal must take and the powers of the appellate body will always depend on the terms of the relevant statutory provisions. But these provisions are often ambiguous. In the first place terminology is used quite inconsistently, with the words 'appeal', 'review' and 'revision' sometimes being confused. Moreover, many administrative decisions are subject to a complex, double-instance procedure in which the original decision is perhaps no more than tentative, being subject to reconsideration by the same or a superior authority. Secondly, the procedural machinery established to facilitate appeal may influence the scope of the appeal since the ability of an appellate body to decide a matter is dependent upon the facilities available to it. Finally there is a wide variety of appellate bodies to which administrative appeals lie: their powers, functions and purposes often differ and these naturally influence the shape of their decisions given on appeals.

4. STEPS TO IMPROVE THE SYSTEM OF STATUTORY APPELLATE BODIES

A survey of investigations into administrative law in several other countries shows that consideration was given to two methods of improving the system of statutory appellate bodies, namely, the establishment of either a supervisory or control body or a single appellate body.

It appears from the survey that the emphasis fell on the establishment of a central appellate body. With a view to the recommendations that follow the establishment of a control body will be looked at briefly.

4.1 The establishment of a control body

The purpose of this type of body appears from the following:[29]

> Several common law jurisdictions have sought to deal with some or all of the problems ... by creating permanent institutions charged with monitoring, assessing, evaluating and supervising administrative

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28 Baxter Administrative law at 255-6.

29 Study paper at 21.

agencies. For the most part, these bodies are not chiefly concerned with the resolution of grievances with respect to individual decisions, nor are they appeal forums. Rather, they are 'process' or 'procedure' oriented institutions, seeking to encourage widespread improvement in the administrative process across substantive jurisdictional lines.

4.1.1 The Council on Tribunals: United Kingdom

The Council on Tribunals was established by the Tribunals and Inquiries Act 1958. This Act was a direct outcome of the recommendations contained in the 1957 report of the Committee on Administrative Tribunals and Inquiries, also known as the Franks Committee.[30] The functions of the Council on Tribunals are defined in section 1 of the Act as follows:[31]

> (a) to keep under review the constitution and working of the tribunals specified in the First Schedule to this Act ... and, from time to time, to report on their constitution and working;
>
> (b) to consider and report on such particular matters as may be referred to the Council under this Act with respect to tribunals other than the ordinary courts of law, whether or not specified in the First Schedule to this Act, or any such tribunal;
>
> (c) to consider and report on such matters as may be referred as aforesaid, or as the Council may determine to be of special importance, with respect to administrative procedures involving, or which may involve, the holding by or on behalf of a Minister of a statutory inquiry, or any such procedure.

The Council on Tribunals consists of not more than fifteen and not fewer than ten members.[32] As far as the activities of the Council on Tribunals are concerned, the Law Reform Commission of Canada quotes the writers Benjafeld and Whitmore as follows:[33]

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30 Ibid; See also Law Reform Commission of New South Wales Report on appeals in administration LRC 16 at 42, hereunder LRC 16.

31 The Tribunals and Inquiries Act 1958 was replaced by the Tribunals and Inquiries Act 1971, section 1 of which contains similar provisions to those of section 1 of the repealed Act.

32 The functions of the Council on Tribunals: Special report by the Council at 4, hereunder Special report.

33 Study paper at 27.

> The activities of the Council, since its establishment, indicate that it is concerned to bring into operation as soon as possible the Committee's more detailed recommendations: the Franks Report is the Council's 'Bible'.

The recommendations of the Franks Committee are summarised by the Council on Tribunals as follows:[34]

> The basic theme of the Franks Committee - that tribunal and inquiry procedures should be conducted with openness, fairness and impartiality - found expression, in relation to tribunals, in detailed recommendations on such subjects as the formulation of statutory rules of procedure for each type of tribunal; the method of appointment and dismissal of chairmen and members; their qualifications; publicity of hearings; the right to be represented; the giving of reasoned decisions; and the provision of further rights of appeal.

The shortcomings of the Council on Tribunals are summed up by the Law Reform Commission of New South Wales as follows:[35]

> The Council on Tribunals has no real powers though it must make annual reports and it may, if it thinks fit, make other reports. It is an advisory and consultative body only. It is in no sense a super tribunal or a court of appeal from tribunals.

4.2 The establishment of a central appellate body in other countries

In the survey that follows, the civil law systems and the common law systems are dealt with separately.

4.2.1 Central appellate bodies in civil law systems

(a) Sweden

In 1909 the Swedish parliament passed legislation for the establishment of a body the name of which is translated either as Supreme Administrative

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34 Special report at 3.

35 LRC 16 at 42.

Court or as Government Court.[36] There are two factors that prompted this step.[37] It had been felt since the second half of the nineteenth century that the Swedish executive was overburdened with appeals against administrative action. Furthermore, the increasing influence of politics on the Swedish executive created the feeling that administrative appeals should preferably be considered by a body acting independently of political considerations.

The relevant Act defines the types of appeals that may be heard by the Supreme Administrative Court and empowers the Court to substitute its own decision for the decision that is the subject of the appeal.[38] The Swedish Department of Justice sends a circular annually to all state departments inviting suggestions for the amendment of the list of subjects which come within the Court's competence.[39] The departments thereupon investigate the matters dealt with during the year concerned and then come forward with suggestions. On the basis of the survey by the departments the said list is continually revised and brought up to date. It is said that the two features of the court, namely, the annual amendment of the said list and the power to substitute its own decision for the decision appealed against make it unique.[40]

The Swedish government is of the opinion that the appeal facilities provided by the Court are one of the reasons for the comparatively small number of complaints submitted to the Ombudsman.[41] In this regard the Law Reform Commission of New South Wales quotes Professor Gelhorn as follows:[42]

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36 JUSTICE at 32; LRC 16 at 47.

37 See LRC 16 at 47.

38 JUSTICE at 32.

39 Ibid.

40 Ibid; Cf LRC 16 at 47.

41 JUSTICE at 32.

42 LRC 16 at 47.

> Swedes do like the idea behind the Ombudsman and are happy to have his office as a protection in reserve. But a general bureau of complaints is an inefficient means of dealing with modern government's many complexities. Sweden's sophisticated citizenry chooses to use sophisticated review procedures when they are available.

The functioning of the Court is neatly summed up as follows:[43]

> All cases before the Supreme Administrative Court are in the form of appeals against official actions of public authorities. No appeal lies however to the Court against decisions reached by the King in Council. The Court's powers conform to those of an administrative reviewing authority. It may consider questions of fact as well as issues of law. It is not limited to reversing an official action or remitting an official action to a public authority; it can modify an official action directly. Another feature of the Court deserves emphasis. Its procedure conforms on the whole with that used by public authorities. It is at this point that the Court diverges sharply from the general concept of a court; its judicial character stems not from its procedure but from the independence of its members. Cases are presented solely in writing and in closed court. The appellant cannot submit oral arguments and no witnesses are heard on oath. Litigation is uncomplicated. The appellant need not to be represented and often he is not; his submissions do not have to be in any special form. To some extent the Court is expected to examine the issues on its own motion and to consider arguments that the appellant may not have presented. Appeals are frequent and because of its somewhat summary procedure the Court disposes of some 4,000 cases each year.

The following criticism has been levelled against the Supreme Administrative Court:[44]

> The Court and its functions are not without critics. It is said that a greater requirement of general judicial procedure is desirable for some difficult cases and that the Court might well rid itself of a mass of cases of minor importance and so overcome backlogs.

(b) France

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43 LRC 16 at 47-8.

44 LRC 16 at 48.

The Conseil d'Etat has a long history.[45] It was established by Napoleon in 1799. Its predecessor, the Conseil du Roi, was established in 1525. The Conseil d'Etat originally had advisory powers only. In 1790 legislation was passed prohibiting the hearing by the civil courts of cases in which the state administration was involved. The Conseil d'Etat had to fill this gap. The Conseil d'Etat is constituted as indicated in the diagram on p 81 and functions as follows:[46]

. Judicial function

The Section du Contentieux is the supreme administrative court of France and it hears appeals from the lower administrative courts. Members of the Section take part in the activities of the four administrative sections, and the members of those sections have a share in the decisions of the Section du Contentieux. The Section du Contentieux consists of nine subsections, three of which specialise in financial matters. Decisions are usually taken by two subsections, but important cases are heard by the full meeting.

. Advisory function

The Conseil d'Etat exercises its function of advising the state on original and delegated legislation through the four administrative sections. The Conseil d'Etat also functions as an adviser to the state. The procedure before the Conseil d'Etat is summarised as follows:[47]

> Three special features of procedures before the Conseil d'Etat are that they are inquisitorial, adversarial and basically in writing. The procedures are inquisitorial in the

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45 Study paper at 50-1. See also Howard Marchin's contribution on France in Government and administration in Western Europe ed F R Ridley Martin Robinson 1979 at 67, hereunder Ridley Government.

46 Ibid.

47 See LRC 16 at 45.

Constitution of the Conseil d'Etat. The French Prime Minister is the President of the Conseil.

Assemblée Générale Plénière

Assembleé Générale Ordinaire

Judicial Section	Administrative Sections			
Section du Contentieux Full meeting	Section de l'Intérieur (Internal Affairs)	Section des Travaux Publics (Public Works)	Section Sociale (Social Matters)	Section de Finance (Finance)

Section du Contentieux Complete — Assembleé Générale Plénière - Vice-President of Conseil and all members of 5 sections

9 sous-sections — Assemblée Générale Ordinaire - Vice-President of Conseil and 28 members

ADMINISTRATIVE SECTIONS - PRESIDENT OF SECTION + 6 or 7 members + 1 member of Section du Contentieux

Section du Contentieux - (Full meeting) - As above + Vice-President of Section + 1 member of each of 4 administrative sections + all members of sous sections.

Section du Contentieux - (Complete) as above + only 1 member of administrative sections

Section du Contentieux - (Sous-sections) - Pres. of sous-section + 2 assessors + 6 or 7 reporters (rapporteurs) + 1 member of administrative section.

sense that once the Conseil d'Etat is seized of a complaint, it addresses, through its own officers, such inquiries as it thinks fit to the public authority concerned and to the complainant; it may order each party to serve on the other his complete statement of fact and law and it may order that particular witnesses be heard and that written reports be made by specialists; and, it may compel the public authority concerned to produce evidence and thus relieve the complainant from doing so. The procedures are adversarial in the sense that a party may reply in writing to the case of another party and they are basically in writing in the sense that parties are allowed to make only short verbal comments on their written statements and only in so far as they arise out of the written text; with limited exceptions, developing a new argument is not permitted. Documents produced are available only to the parties and only the parties are present in the court.

The advantages of the French system may be summarised as follows:[48]

(1) The composition of the administrative courts. Their members are not only judges but they are also expert administrators. Full confidence in their expertise has prevented the proliferation of ad hoc tribunals and as new issues arise in the field of public administration they automatically come within the jurisdiction of the administrative courts.

(2) The flexibility of the law. Although the courts seek logic and consistency in their decisions, they are not bound by their previous decisions. They have proved successful in balancing the needs of public administration in times of economic and social change with the rights of individuals.

(3) The simplicity of the remedies available in the administrative courts. The few conditions to which the private plaintiff must conform compare more than favourably with the complexities of common law judicial review.

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48 LRC 16 at 45.

(4) The special procedures evolved by the administrative courts. Proceedings are inexpensive for the plaintiff.

(5) The character of the substantive law applied by the administrative courts. Administrative judges have been able to demarcate between legality and policy without trespassing on the latter, and in doing so to penetrate to the core of an administrative decision in a way hardly possible under the common law. The law has a systematic and cohesive quality which contrasts with the disconnected character of the corresponding common law.

The disadvantages of the French system are the following:[49]

(1) The jurisdictional conflicts caused by the existence of two separate court systems.

(2) The persistent slowness of the process (an average of eighteen months is required for each case).

(3) The difficulties of ensuring obedience to a judgment when it is delivered.

The following observations of the Law Reform Commission of Canada are illuminating as far as the success of the French system is concerned:[50]

> The reason why the administration can satisfactorily police itself in France cannot be understood merely by studying the structures of the Tribunaux Administratifs and the Conseil d'Etat or the substantive principles they employ. Central to the success of the French system is the respect accorded the members of the Conseil d'Etat. As Brown and Garner put it, the Conseil 'is composed of the cream of the French civil service'. This, together with the strong esprit de corps within the Conseil, sets it both apart from and above the civil service. In

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49 LRC 16 at 46.

50 Study paper at 54-5.

most common law jurisdictions, only the superior courts have this respect and status. Any move to shift supervision of the administration away from the regular courts in Canada would have to recognize and deal with this phenomenon.

(c) The Netherlands

In discussing administrative justice in the Netherlands Viljoen[51] suggests that consideration be given to the establishment of an independent administrative judicial organ in South Africa which could take over some of the work which at present falls under the civil courts.

As far as Dutch administrative justice is concerned, the Wet Administratieve Rechtspraak Overheidsbeschikkingen, 1975, known as the Wet-Arob, is important.[52] For the purposes of the Wet-Arob it was necessary to amend the Wet op de Raad van State, 1962, in order to create an "Afdeling rechtspraak" of the Council of State. This division consists of not fewer than five members, including the chairman who is appointed by the Crown for life.[53] The Council of State advises the Crown, that is, the Queen and her ministers, inter alia, concerning all bills, administrative measures, and international treaties.[54]

In terms of section 7 of the Wet-Arob anyone whose interests are directly affected by a decision of an administrative organ may appeal against it to the Council of State. A decision ("beschikking") is defined in section 2 of the Wet as "het schriftelijk besluit van een administratief orgaan, gericht op enige rechtsgevolg", or what is known in South African administrative law

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51 H P Viljoen "'n Administratiewe regbank volgens Nederlandse voorbeeld" 1980 De Jure at 334, hereunder H P Viljoen.

52 See H P Viljoen at 334.

53 See H P Viljoen at 335.

54 Ibid.

as a unilateral administrative act.[55] An "administratief orgaan" is any person or any organ vested with public authority in the Netherlands.[56]

In order to prevent the Council of State from being overburdened with appeals, section 7 of the Wet-Arob provides that any person whose interests are affected by a decision of an organ which does not belong to the central government, may submit a petition setting out objections and reasons to that organ.[57] The organ concerned therefore has to review its own act. The procedure amounts to a screening process.[58] Section 11 of the Wet provides that the Council of State may refer an appeal against a decision of an organ of the central government to the Minister concerned inviting him to state in writing within 14 days whether he is prepared to regard the appeal as a petition of objection and to treat it as such.[59] If the appellant is not satisfied with the outcome of the review, he may appeal to the Council of State. The appeal must be in writing and accompanied by reasons.[60]

The procedure of appeal is prescribed in the Wet op de Raad van State.[61] In this Wet provision is made for a preliminary investigation, the public hearing of the appeal and judgment. The appellant may petition the Council of State to review its own judgments if new facts or circumstances should come to light which, had they been known previously, would have led to a different judgment. The Council of State can quash the decision wholly or in part. There is no further interference with the exercise of the

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55 H P Viljoen at 336.

56 Ibid.

57 Ibid.

58 H P Viljoen at 337.

59 Ibid.

60 Ibid.

61 H P Viljoen at 338.

discretion of the administrative organ. It is left to the organ to decide the case de novo.[62]

Viljoen, inter alia, comes to the following conclusion:[63]

> In the first place the judicial division of the Council of State is a good example of an independent administrative court ... The court will gradually become more specialised in administrative cases and that will influence the measure of protection enjoyed by the subject against decisions of the government. The grounds of appeal will develop into a set of well-elaborated rules which will afford subjects the greatest degree of protection. (Our translation.)

(d) West Germany

The Federal Republic of Germany came into being on 21 September 1949.[64] There are three tiers of government, namely, the federal government, state government, and local government.

A subject who feels aggrieved by an administrative decision must first have recourse to the decision-taker concerned with a request that he reconsider his decision. The decision-taker is obliged by law to consider the subject's representations and to reply to them.[65] If the subject is not satisfied with the decision-taker's reply to his representations, he may approach the head of the section in which the decision-taker is employed.[66] Should the subject not be satisfied with the action of the head concerned, he may approach the administrative court.[67]

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62 Ibid.

63 At 342.

64 Ridley Government at 107.

65 Ridley Government at 150.

66 Ibid.

67 Ibid.

The administrative courts function at three levels, namely, district courts, state courts, and the federal court.[68]

An appeal lies from the decision of a district court to a state court, and thereafter to the federal court. The seat of the federal administrative court is West Berlin. This court came into being in 1952. The federal administrative court also hears suits between different states among themselves and between states and the federal government.[69]

In order to alleviate the work load of the administrative courts, special administrative courts were established. In 1965 a special court was established to hear tax appeals. Courts martial are classified as special administrative courts.[70]

Unlike the Conseil d'Etat, the federal administrative court is not a law adviser to the federal government.[71]

The German administrative law is not codified. The grounds on which an administrative decision may be contested are "very generally - that it contravenes some legal norm or that it constitutes an improper exercise of discretion".[72]

As soon as the complainant has made out a prima facie case, the court, with the co-operation of a state attorney, takes over the investigation of the case.[73]

4.2.2 Administrative appellate bodies in common law systems

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68 Ibid.

69 Ibid.

70 Ibid.

71 Ibid.

72 Ridley Government at 151.

73 Ibid.

From a study of several reports on administrative adjudication in the common law systems it emerged that consideration had been given, inter alia, to the following possibilities:[74]

- an administrative division of an existing court of justice;
- an administrative court;
- a general appeal body; and
- specific appeal tribunals.

With these possibilities in mind a survey will now be given of the administrative adjudication in some other countries.

(a) England

The Law Reform Committee of South Australia quotes Garner as follows in reply to his own question "what then are the commonest defects of our administrative tribunals as they exist at present?":[75]

> First, one could argue that the lack of a system leads to complication and therefore a lack of comprehension on the part of the ordinary public. There are so many tribunals sitting in different places at different times, and each subject to different procedural rules that it needs an expert to say when, or whether, there may be a remedy ...

Notwithstanding the alleged disadvantages of the administrative adjudication in force in England, the alternative of a general appellate body was rejected after consideration by the Franks Committee.[76] The reasons for the decision of the Franks Committee are illuminating and are quoted in full:[77]

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74 Project No 26 at 14.

75 Eighty-second report at 6.

76 Ibid.

77 Eighty-second report at 6-7.

... Professor Robson advocated the establishment of a general administrative appeal tribunal, with jurisdiction to hear not only appeals from tribunals or from decisions of Ministers under the second part of our terms of reference but also appeals against harsh or unfair administrative decisions in that considerable field of administration in which no special tribunal or enquiry procedure is provided. The main objects of this proposal appear to have been to provide a high level appellate tribunal outside the framework of the ordinary courts, and to provide some formal machinery for redress of cases of alleged maladministration.

We have much sympathy with the desire to provide machinery for hearing appeals against administrative decisions generally. As we have already explained in part 1, however, our terms of reference do not cover all administrative decisions but only those reached after a special statutory procedure involving an enquiry or hearing. It is therefore in relation to our limited terms of reference that any proposal for a general administrative appeal tribunal must be considered. On this basis the proposal seems to us to have several disadvantages. First a general tribunal could not have the experience and expertise in particular fields which, it is generally accepted, should be a characteristic of tribunals. Appeals would thus lie from an expert tribunal to a comparatively inexpert body, and we see little advantage in this. If, to meet this objection, it were proposed that the general administrative appeal tribunal should sit in several divisions corresponding to the main subjects within the jurisdiction of tribunals, the general effect would in practice, we think, differ little from the existing arrangements, and the essence of the proposal, a unified appellate body, would be largely lost.

A second disadvantage is that the establishment of a general appellate body would seem inevitably to involve a departure from the principle whereby all adjudicating bodies in this country, whether designated as inferior courts or as tribunals, are in matters of jurisdiction subject to the control of the superior courts. This unifying control has been so long established and is of such fundamental importance in our legal system that the onus of proof must clearly lie upon the advocates of change. We are satisfied that the case for change has not been made out.

There is a third disadvantage. Quite apart from questions of jurisdiction, final determinations on points of law would be made by the general administrative appeal tribunal in relation to tribunals but by the superior courts in relation to matters decided by the courts. Thus two systems of law would arise, with all the evils attendant by this dichotomy.

The observations of the Franks Committee must be viewed in the light of the following words of the chairman, Sir Oliver Franks:[78]

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78 JUSTICE at xi.

> This Committee ... was limited by its terms of reference to those disputes between individual citizens and authority in which formal machinery for appeal or for review before final decision already existed: our function was to examine and suggest improvements in that machinery.

An ensuing investigation in 1961 began "at the point where the Franks Committee, because of its limited terms of reference, left off".[79]

In the 1961 investigation the Conseil d'Etat of France was not considered, inter alia, for the following reasons:[80]

> And in regard to both the judicial and the advisory functions of the Conseil d'Etat, it is important to bear in mind the fact, emphasised by a leading English authority on the Conseil d'Etat, that its successful working depends on the corporate unity of its judicial and advisory sections, for which there is no real parallel in the English dichotomy of an Executive under Ministers responsible to Parliament on the one hand and an independent judiciary on the other.

Therefore, after the investigation it was recommended that a general appellate body be instituted in England on the model of the Swedish Supreme Administrative Court. In 1971 it was suggested that an administrative division of the British High Court be instituted.[81] In 1977 a simplified method of judicial review was established in England.[82] It contributed to a considerable increase in reviews. The accumulation of reviews resulted in the Lord Chief Justice's issuing an instruction that all administrative cases be brought before one court. The effect of this action is clear from the following observation:[83]

> A specialised administrative court - albeit one which lacks the distinctiveness and constitutional status of a body like the French Conseil d'Etat has been established, even if it has been achieved by

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79 JUSTICE at 41.

80 JUSTICE at 8.

81 Eighty-second report at 7.

82 Eighty-second report at 8.

83 Blom-Cooper as quoted in Eighty-second report at 9.

administrative stealth rather than by the democratic process of legislation.

(b) New Zealand

Shortly after the publication of the report of the Franks Committee attention was given in New Zealand to a possible review of administrative law.[84] In 1964 one G S Orr suggested the establishment of an administrative court.[85] The Public and Administrative Law Reform Committee of New Zealand rejected this proposal in 1968 and came to the conclusion that an "Administrative Division of the Supreme Court was the logical and acceptable step in New Zealand".[86] The Committee accordingly recommended as follows:[87]

> (1) That the Administrative Division of the New Zealand Supreme Court ... hear appeals from certain administrative tribunals and also exercise the existing jurisdiction of the Supreme Court in administrative law.
>
> (2) The Judges of the Administrative Division should be assigned thereto by the Governor-General and should also perform other Supreme Court work when required.
>
> (3) Persons appointed to the Administrative Division should have a full appreciation of the need to give effect to the economic and social policies which the legislation they are considering was designed to implement, as well as possessing the other qualities appropriate to Supreme Court Judges.
>
> (4) There should be no bar to the appointment of lay members or assessors to sit with the Court if and when desirable.
>
> (5) The proceedings in the Administrative Division should not be more expensive than proceedings before the existing appellate administrative tribunals.
>
> (6) The atmosphere in the New Division should not be more formal than that of appellate administrative tribunals.

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84 Eighty-second report at 9.

85 Ibid.

86 Ibid.

87 Eighty-second report at 10.

(7) There should be a degree of specialisation among the Judges so that the virtue of consistency is not lost.

(8) In cases of special importance a full court of the Administrative Division should be able to sit.

(9) Where an appeal on a point of law from the Administrative Division is appropriate, it should lie to the Court of Appeal.

It is important to note the view of the minority of the Committee as represented by G S Orr. He adhered to his 1964 view. His arguments against the establishment of an administrative division of the supreme court are briefly as follows:[88]

(a) Over judicialisation; proceedings would tend to be assimilated more closely to the adversary system which is not always suited to the adjudication of matters of social and economic policy. Procedures and evidentiary rules would tend to be strict and relevant statutes less likely to be adequately construed and applied.

(b) Judges of the Supreme Court would understandably be less inclined to make decisions which on occasions are necessarily controversial. Instead they would tend to adopt a more passive role in keeping with the tradition of the Supreme Court rather than implement social, economic or industrial policy in a constructive way.

(c) With relatively few exceptions all the powers likely to be vested in the Administrative Division would be value judgments on matters of social or economic policy. This is at a variance with the traditional and invaluable role of the Supreme Court of disinterestedness and impartiality which should be preserved.

(d) There would be a marked loss in informality and freedom of access to the Court and a likely increase in costs to litigants.

(e) There would be less likelihood of specialisation in particular areas and of the development of consistency in approach.

(f) The Court's relative inflexibility limits its usefulness in the wide field of administrative justice.

The majority recommendation of the Committee was embodied in the Judicature Amendment Act, 1968. The administrative division of the

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88 Ibid.

Supreme Court consists of not more than four judges designated from time to time by the chief justice. Provision is made for the appointment of assessors.

(c) Australia: Federal legislation

The Administrative Appeals Tribunal Act was placed on the statute book by the federal legislature in 1975.[89] This Act provides for the establishment of an Administrative Appeals Tribunal, and an Administrative Council of Review.

When the relevant draft bill was introduced the then Attorney-General made the following observation:[90]

> The intention of the present Bill is to establish a single independent tribunal with the purpose of dealing with appeals against administrative decisions on as wide a basis as possible.

The Administrative Appeals Tribunal consists of a president and such deputy presidents and other members as may be appointed. No one is appointed as president or deputy president unless he is or was a judge, or was admitted as a legal practitioner of the Federal Supreme Court, any other federal court, or the supreme court of a state or area, and has at least five years' experience. The reason for these requirements appears from the following further observations by the Attorney-General when the draft bill was introduced:[91]

> The Bill accords them this status because it is considered by the Government to be essential to the successful operation of the Tribunal that it should enjoy a high standing in the Australian community. It will be called upon to review decisions by Ministers and of the most senior officials of Government. In the words of the Franks Committee on Tribunals and Enquiries, the Tribunal is not to be an appendage of government departments. The Tribunal is to be regarded as

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89 Working paper at 24.

90 Ibid.

91 Working paper at 25.

machinery provided by Parliament for adjudication rather than as part of the machinery of departmental administration. Nothing less than a tribunal of full judicial status would be satisfactory for these purposes.

The Tribunal consists of a general administrative division, a medical appeal division, a valuation and compensation division and such other divisions as may be prescribed.[92]

The tribunal may exercise all the powers which the relevant Act confers on the administrative organ whose decision is on appeal, and it may confirm, amend or set aside the decision and substitute its own in its stead, or refer the matter back to the administrative organ concerned with directives or recommendations made by the Tribunal.[93]

The Administrative Council of Review consists of the President of the Administrative Appeals Tribunal, the federal ombudsman, the Chairman of the Commonwealth Law Reform Commission, and not fewer than three and not more than ten other members appointed by the Governor-General.[94]

The functions of the Administrative Council of Review are the following:[95]

(a) to ascertain, and keep under review, the classes of administrative decisions that are not the subject of review by a court, tribunal or other body;

(b) to make recommendations to the Minister as to whether any of those classes of decisions should be the subject of review by a court, tribunal or other body and, if so, as to the appropriate court, tribunal or other body to make that review;

(c) to inquire into the adequacy of the law and practice relating to the review by courts of administrative decisions and to make recommendations to the Minister as to any improvements that might be made in that law or practice;

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92 Ibid.

93 Working paper at 26.

94 Ibid.

95 Working paper at 27.

(d) to inquire into the adequacy of the procedures in use by tribunals or other bodies engaged in the review of administrative decisions and to make recommendations to the Minister as to any improvements that might be made in those proceedings;

(e) to make recommendations to the Minister as to the manner in which tribunals engaged in the review of administrative decisions should be constituted;

(f) to make recommendations to the Minister as to the desirability of administrative decisions that are the subject of review by tribunals other than the Administrative Appeals Tribunal being made the subject of review by the Administrative Appeals Tribunal; and

(g) to make recommendations to the Minister as to ways and means of improving the procedures for the exercise of administrative discretions for the purpose of ensuring that those discretions are exercised in a just and equitable manner.

(d) Western Australia

In 1982 the establishment of an administrative division of the Supreme Court and a review council was suggested for Western Australia.[96] In a recommendation for the establishment of an administrative division of the Supreme Court the Law Reform Commission of Western Australia remarked, inter alia, as follows:[97]

> Having considered the existing appellate arrangements, the Commission considers that a more coherent and rational system can be developed by making greater use of the ordinary courts. The Supreme Court, in particular, can play an important role in the application of general legal principles to administrative decision-making. The courts already play an important role in the determination of appeals from administrative decisions and have the advantage that they are seen by the community as being independent of the Executive Government. An appeal to a court need not involve undue delay or expense, particularly if a code of procedure is developed which is sufficiently flexible to enable the appellate court to deal with each appeal in a way which is the most appropriate in the circumstances of the case.

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96 Project No 26 at 24 and 60.

97 Project No 26 at 24.

The appeal system as envisaged by the Commission consists of the Supreme Court, an administrative division of the Supreme Court, an administrative division of the local court (magistrate's court), and a restricted number of specialised appellate bodies.[98]

The functioning of the system is outlined as follows:[99]

> In the proposed system, where an appeal lies to the Administrative Law Division of the Local Court or to a specialist appellate tribunal there should be a further appeal on a question of law to the Administrative Law Division of the Supreme Court. There should be provision for a further appeal to the Full Court of the Supreme Court on a question of law.

Schematically the system can be represented as follows:

SUPREME COURT

Questions of law

Administrative Division of the Supreme Court

Questions of law		Questions of law
ADMINISTRATIVE DIVISION OF THE LOCAL COURT, (MAGISTRATE'S COURT)		SPECIALISED APPELLATE BODIES including MINISTERS
ADMINISTRATIVE DECISION TAKER	ADMINISTRATIVE DECISION TAKER	ADMINISTRATIVE DECISION TAKER

98 Ibid.

99 Project No 26 at 25.

The Chief Justice should be empowered to assign judges of the Supreme Court to the administrative division of the Supreme Court; the Chief Magistrate should be empowered to assign magistrates to the administrative division of the local court.

The said Commission also made a recommendation for the establishment of a council of review similar to the federal administrative council of review. In support of their recommendation the Commission remarked as follows:[1]

> The Council is, however, required to consider at least one matter which does not appear to be within the Commission's terms of reference, namely, ways and means of improving procedures for the exercise of administrative discretions for the purpose of ensuring that those discretions are exercised in a just and equitable manner. Review on a continuous basis of this sort would best be carried out by an expert body. A council could also monitor the operation of the administrative appeal system should such a system be established and recommend any changes to the law and procedure which might be necessary to overcome any difficulties which might become apparent once the system was in operation. A council would also have the advantage that it could readily be consulted on proposed legislation to determine whether or not a right of appeal should be created from any decisions authorised to be made in the legislation and, if so, the selection of the most appropriate appellate body.

5. A CENTRAL APPELLATE BODY FOR THE REPUBLIC OF SOUTH AFRICA?

5.1 From the survey of administrative appellate bodies in other countries it appears that four possibilities present themselves as alternatives to counter the criticism against the present system of administrative control:[2]

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1 Project No 26 at 61.

2 Eighty-second report at 15.

1. The present system could be left basically as it is, but some rationalization could be carried out as in England, for example an attempt could be made to amalgamate tribunals if practicable, and also the procedure used for the various tribunals could be standardized as much as possible.

2. An administrative division of the Supreme Court (and perhaps also the Local Court) could be established as was done in New Zealand and was recently recommended in Western Australia.

3. An Administrative Court could be established, as was recommended to the Franks Committee by Mr Robson, and to the New Zealand Public and Administrative Law Reform Committee by Mr Orr.

4. An Administrative Appeals Tribunal along the lines of that recommended by the Victorian Statute Law Revision Committee, the Law Reform Commission of New South Wales, and the Commonwealth Administrative Review Committee, which in the case of the Commonwealth was later implemented by the Administrative Appeals Tribunal Act 1975.

5.2 The following observations of the Law Reform Commission of Canada with regard to the English Council on Tribunals put a damper on the first possibility referred to in paragraph 5.1 above:[3]

> The second, and substantive, impediment to the Council's work is that it is not only a child of the Franks Committee Report, it is also a prisoner of that Report. In making its recommendations the Committee rejected the notion that a general administrative appeal tribunal was required in Britain. This, according to some commentators, has 'frozen' the lines of development of administrative law in Britain.

5.3 The effectiveness of the third possibility referred to in paragraph 5.1 may be questioned in the light of the following objections:[4]

(i) Whether or not a new Administrative Court was deemed by statute to have the status of the present Supreme Court, many would inevitably regard it as inferior. Its status in fact would tend to be little higher than that of the present appeal authorities. There would be difficulty in attracting suitable persons to sit as judges of the Court. Members of the public involved as parties would continue to suspect, rightly or wrongly, that they had

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3 Study paper at 30.

4 First report at 13-4.

been accorded second-class justice. Appeals from administrative tribunals raise issues of first-class importance in modern society. So far as humanly possible, they should be dealt with, and manifestly be seen to be dealt with, by a court of appropriate stature both in fact and in theory.

(ii) The establishment of a separate Administrative Court would raise problems as to its relationship with the Supreme Court. If an attempt were made by statute to give it theoretically equal status, there would be a danger that the two courts would give conflicting and irreconcilable decisions.

5.4 In 1980 it was proposed that South Africa establish an administrative appeals tribunal as envisaged in the Australian Federal Administrative Appeals Tribunal Act 1975, that is, the fourth possibility referred to in paragraph 5.1.[5] However, there were the following considerations that prompted the Australian federal legislature to decide upon an administrative appeals tribunal:[6]

> The Commonwealth Government has created a general appellate tribunal outside the court system, by the establishment of the Administrative Appeals Tribunal. The Tribunal was established by the Administrative Appeals Tribunal Act 1975-1981 following reports by the Administrative Review Committee in 1971 and the Committee on Administrative Discretions in 1973. For constitutional reasons, relating to the separation of judicial and executive functions, the Commonwealth could not vest administrative power in a judicial body. For this reason, a tribunal outside the courts and exercising non-judicial power was necessary unless the discretions given to administrative officers were converted to discretions which raised justiciable issues. The Kerr Committee concluded that no such attempt should be made and, partly for constitutional reasons and partly because the Committee did not regard a court as being the most appropriate body to review administrative decisions on the merits, recommended that a superior court should not be used, except in special cases, to review administrative decisions on the merits.

5.5.1 It would appear that the second possibility mentioned in paragraph 5.1 partly provides the answer to the criticism against the present system of administrative control in South Africa.

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5 M L Dixon "The new administrative law: Australia's novel approach" 1980 CILSA 291 at 292; see also Baxter Administrative law at 269.

6 Project No 26 at 20-1.

5.5.2 The objections to an administrative division of the Supreme Court are set out in paragraph 4.2.2 above.

5.5.3 In answer to these objections the Law Reform Commission of Western Australia, observed, inter alia, as follows:[7]

> The arguments in favour of setting up a general appellate tribunal or an administrative court appear to be mainly of the negative sort. Although the established courts are seen as being appropriate to determine issues within the private sphere, they are considered to be inappropriate to determine disputes which have a public or administrative element, particularly in matters involving discretion. ... However, the Commission is not at present satisfied that the existing courts are not suitable bodies to deal with administrative appeals ... In this connection, it is to be noted that in Western Australia, the existing courts already play an important role in the determination of administrative appeals ... The use of the courts as appellate bodies in the administrative sphere is accordingly well established in this State and there seems much to be said for retaining this use, while instituting reform by way of rationalisation ... Having weighed the arguments and the experience elsewhere the Commission is not convinced that it would be desirable to set up a completely new appellate body, with the attendant difficulties of defining its relationship to the ordinary court system. There would be a danger of the growth of conflicting systems of jurisprudence. This may be to some extent limited if an appeal on questions of law were provided to the Full Court from the appellate body's decisions, but ultimate reconciliation in any case would depend on whether a party wished to incur the expense of appealing to the Full Court.

5.5.4 The observations of the Law Reform Commission of Western Australia are to a great exent applicable to the South African situation. That the South African Supreme Court succeeds in maintaining a balance between the interests of the subject on the one hand, and the interests of the State on the other, is evident from the following:[8]

> Firstly it is perhaps necessary to remind oneself, from time to time, that the first and most sacred duty of the Court, where it is possible to do so, is to administer justice to those who seek it, high and low, rich and poor, Black and White; to attempt to do justice between man

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7 Working paper and survey: Review of Administrative decisions: Part 1 - Appeals at 35, hereunder Survey.

8 Hurley v Minister of Law and Order 1985 4 SA 709 (D & CLD) at 715F-716A.

and man and man and State. Secondly one should bear in mind, I think, the famous, great, and dissenting speech of Lord Atkin in Liversidge v Anderson (1942) AC 206 (HL), where the learned Law Lord said at 244: 'I view with apprehension the attitude of Judges who on a mere question of construction when face to face with claims involving the liberty of the subject show themselves more Executive minded than the Executive. Their function is to give words their natural meaning ...'

Later, after referring to certain cases, his Lordship went on to say this, 'In this country, amid the clash of arms, the laws are not silent. They may be changed but they speak the same language in war and in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority, we are now fighting, that the Judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the Executive, alert to see that any coercive action is justified in law'. Thirdly, and most importantly, we are authoritatively enjoined in construing this kind of legislation not to lean towards one side or the other. The correct approach which must be adopted was laid down in Rossouw v Sachs 1964 (2) SA 551 (A) at 563 in fine - 564 A as follows: 'I accordingly conclude that in interpreting s17 this Court should accord preference neither to the 'strict construction' in favour of the individual indicated in Dadoo's case supra nor to the 'strained construction' in favour of the Executive referred to by Lord Atkin in Liversidge's case supra, but that it should determine the meaning of the section upon an examination of its wording in the light of the circumstances whereunder it was enacted and of its general policy and object'.

5.5.5 The fundamental objection to the establishment of a division of the Supreme Court, whether by converting one of the existing divisions, or by establishing an Administrative Division, is that the Supreme Court would become an appellate body in the case of administrative and quasi-judicial acts - which in turn means that the Court would obtain a say in political policy considerations. There is no one who advocates such a system - all lawyers are agreed that this is precisely the sphere into which the Court should not move.[9]

5.5.6 It, therefore, follows that the present system of appeal, as embodied in existing legislation, may be retained because it must be

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9 Baxter Administrative law at 49 et seq; Wiechers Administratiefreg at 334-5.

accepted, in the light of what has just been said, that the said bodies are the most suitable to reconsider the applied policy considerations on appeal.

5.5.7 The rectification of the whole system, which is at present manifestly deficient, is not to be found in the sphere of appeals, but in the extension of the powers of review of the courts as has already been proposed above.

5.5.8 The said extension must, however, also necessarily be coupled with the guarantee of the possibility of review, the subject to be discussed in the next Chapter.

CHAPTER 7

GUARANTEE OF THE POSSIBILITY OF REVIEW

1. As has been shown above, the defects and shortcomings in our law with regard to review of administrative and quasi-judicial acts can be rectified by extending the Supreme Court's existing powers of review.

2. Such an extension would, however, serve no purpose if the Supreme Court's powers of review could be excluded every time by the Legislature. The rights of the citizen to have recourse to the Supreme Court by way of review - and not appeal - should, therefore, be guaranteed.

3. It may be conceded that there is one, and only one, valid consideration for the exclusion of the court's powers of review, and that is the public interest. This has in fact been recognised, inter alia, in R v Radsha.[1]

4. There are, however, many public authorities which endeavour to have the courts' powers of review excluded where considerations of public interest are not involved, advancing all kinds of unconvincing arguments, as for instance:

- that the act is of such minor importance that review is not worthwhile - as if it is not up to the citizen to decide whether he is prepared to incur costs and go to the trouble of protecting his rights;

- that the costs of review are excessive in relation to the effects of the act - once again as if this should not be left to the choice of the citizen;

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1 1923 AD 281 at 304.

- that "secret" information would have to be divulged to the court in the course of review - as if the courts are not responsible enough to deal with secret information and to arrange for secrecy; in any case, an appeal in which policy, and, therefore, considerations of secrecy, are involved is not in issue;

- that judges are not capable of dealing with technical matters - as if judges are not eminently trained to deal with the most technical and complicated problems; in any case, it is not a matter of appeals, but of review of the fairness of the act or decision.[2]

5. It is clear that the only sound arrangement would be to provide in the proposed legislation that, notwithstanding the provisions of any other law, all administrative and quasi-judicial acts and decisions may be taken on review in the Supreme Court by any interested person. The only justifiable exception is section 18(2) of the Republic of South Africa Constitution Act 110 of 1983 in respect of a decision by the State President regarding the question as to whether a matter is an "own" or a "general" affair.

The provisions of the Internal Security Act 74 of 1982 will be reviewed in a separate report or working paper.

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2 Baxter Administrative law at 725-6.

CHAPTER 8

SUMMARY OF RECOMMENDATIONS

1. It is recommended that the recommendations at the end of Chapters 5 and 7 be accepted, viz:

1.1 There is an urgent need for law reform in the sphere in question in South Africa, since it is clear that our law has lagged behind other Western legal systems in this respect.

1.2 As far as grounds for review are concerned, the distinction between administrative and quasi-judicial acts may be dropped.

1.3 A general list of grounds for review should be included in legislation, without thereby constituting a codification, since the door must be left open for the retention of recognised common law grounds.

1.4 Essential extensions to the grounds for review are:

1.4.1 A general requirement that the principles of natural justice are to be complied with.

1.4.2 A general rule that unfairness shall be a ground for review.

1.4.3 A general duty to furnish full reasons for an act or a decision upon the request of any interested party.

1.4.4 Unreasonableness of an act or a decision, including errors of fact and law, shall be a ground for review, but excluding review of policy considerations.

1.4.5 A provision that, notwithstanding the provisions of any other law, but subject to section 18(2) of the Republic of South Africa Constitution Act 110 of 1983, all administrative and quasi-judicial acts and

decisions may be taken on review in the Supreme Court by any interested person.

ANNEXURE: DRAFT LEGISLATION

BILL

To provide for the extension of the powers of review of the Supreme Court of South Africa and for matters incidental thereto.

Introduced by the Minister of Justice

BE IT ENACTED by the State President and the Parliament of the Republic of South Africa, as follows:-

Definitions.

1. In this Act, unless the context otherwise indicates -

(i) "administrative organ" means a minister, officer, committee or any other person or body who makes a decision in terms of the provisions of any law;

(ii) "court" means a provincial or local division of the Supreme Court of South Africa;

(iii) "decision" means a decision based upon an administrative or quasi-judicial act which an administrative organ makes in terms of or by virtue of any statutory power or duty.

Application for reasons for decision and review.

2. (1) Notwithstanding the provisions of any other law, but subject to the provisions of section 18(2) of the Republic of South Africa Constitution Act, 1983 (Act 110 of 1983), any person [who is aggrieved by]* a decision of an administrative organ may -

(a) within 30 days after having become aware of such decision, request such organ to furnish reasons for the decision;

(b) within 30 days after having been furnished with reasons or, in the case of the refusal or failure by the administrative organ to furnish reasons on request, within 30 days from the expiry of the period referred to in subsection (2), apply to a court within whose jurisdiction the decision was made for the review of the decision.

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* Alternative wording: "whose interests are affected by".

(2) An administrative organ to whom a request has been submitted in terms of subsection (1)(a) shall furnish the reasons for the decision within 30 days after the receipt of the request.

Grounds for review.

3. (1) Notwithstanding the provisions of any law or the common law, but subject to subsection (2), a court may review a decision on any of the following grounds:

(a) that the rules of natural justice have not been complied with in connection with the making of the decision;

(b) that any procedure required by law has not been complied with in connection with the making of the decision;

(c) that the administrative organ which made the decision was not by law authorised to make the decision;

(d) that the decision is not authorised by the provisions of the law in terms of which it purports to have been made;

(e) that the act constitutes an improper exercise of a power;

(f) that the decision is based on an error of law or fact;

(g) that there were no sufficient grounds or evidence for the making of the decision;

(h) that the decision was unfair or unreasonable;

(i) that duress, fraud, undue influence, unlawful motive, arbitrariness, or bias played a part in the making of the decision;

(j) that the decision was made without taking relevant considerations into account or by taking irrelevant considerations into account;

(k) that the decision was on any other ground not in accordance with law;

(l) that the administrative organ which made the decision refuses or fails to furnish the reasons for the making thereof.

(2) The provisions of subsection (1) shall not permit a review of state policy.

Short title.

4. This Act shall be called the Judicial Review Act, 1987.