

ADMINISTRATIVE DISCRETION, ADMINISTRATIVE RULE-MAKING AND JUDICIAL REVIEW

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Introduction

What is variously referred to as administrative, informal, or tertiary rule-making, administrative quasi-legislation, or soft law – in other words, the adoption by government agencies of rules, policies, or guidelines without express statutory authorisation – is a pervasive feature of contemporary governance. Described by Megarry in 1944 as a ‘recent accretion’,¹ by 1986, Baldwin and Houghton detected a ‘discernible ... retreat from primary legislation in favour of government by informal rules,’² such rules being used to perform a multiplicity of functions.³ Since then, administrative rule-making has continued to proliferate – fuelled by the increasing scale and complexity of modern government, the influence of ‘New Public Management’ techniques, the demands of information technology, and greater concern for equality and transparency.⁴

Increased administrative rule-making was famously advocated by the American jurist Kenneth Culp Davis in his seminal text *Discretionary Justice: A Preliminary Inquiry*, first published in 1969.⁵ Whilst recognising the frequent necessity and desirability of administrative discretion, Davis nevertheless regarded *unnecessary* discretion as the major source of bureaucratic injustice, and therefore argued that steps should be taken to confine, structure, and check discretionary powers wherever possible. His key recommendation was for administrators themselves to confine and structure their discretion through the adoption of plans, policy statements, rules, open precedents and so on, even in the absence of delegated legislative powers, and that the courts should encourage them to do so.⁶

Davis’ argument has been influential in United States (US) administrative law.⁷ In the United Kingdom (UK), however, academics have tended to be critical of a presumption in favour of rules,⁸ while the starting point in legal *doctrine* for the analysis of administrative rule-making has been the insistence that discretion must be *retained*. This finds expression in the rule that administrative decision-makers exercising discretionary powers must not fetter their discretion (the ‘no-fettering rule’).

The no-fettering rule does not mean that administrative rule-making is not permitted at all. Since the landmark case of *British Oxygen Co Ltd v Minister of Technology*,⁹ the courts have generally been tolerant of the adoption of policies, or even rules, provided that the decision-maker is prepared to depart from them in appropriate cases. This in turn has paved the way for judicial regulation of rule-making and rule-application, particularly (though not exclusively) through the doctrine of legitimate

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¹ RE Megarry, ‘Administrative Quasi-Legislation’ (1944) 60 LQR 125, 126.

² Robert Baldwin and John Houghton, ‘Circular Arguments: the Status and Legitimacy of Administrative Rules’ [1986] PL 239, 239.

³ See *ibid* at 241 – 245.

⁴ See Carol Harlow and Richard Rawlings, *Law and Administration* (3rd edn, Cambridge University Press, 2009) 195 – 200.

⁵ KC Davis, *Discretionary Justice: A Preliminary Inquiry* (University of Illinois Press, 1971).

⁶ *Ibid*, chs 3 and 4.

⁷ See, eg, Colin S Diver, ‘Policy-Making Paradigms in Administrative Law’ (1981) 95 Harv LR 393; W West, ‘Administrative Rule-Making: An Old and Emerging Literature’ (2005) 65 Pub Admin Review 655.

⁸ See particularly Robert Baldwin and Keith Hawkins, ‘Discretionary Justice: Davis Reconsidered’ [1984] PL 570.

⁹ [1970] 3 WLR 488.

expectations. Nevertheless, the no-fettering rule is still applied by the courts, albeit in a somewhat unpredictable fashion, and despite its apparent inconsistency with the protection of legitimate expectations. Regulation of rule-making is similarly patchy and incomplete, and largely parasitic upon other administrative law doctrines, rather than being subject to comprehensive control as an administrative activity in its own right.

In fact, control of administrative rule-making has long been regarded as one of the least satisfactory aspects of UK administrative law.¹⁰ In 1994, Baldwin claimed that ‘the judicial response to tertiary rules [has been] marked by a failure to develop guiding principles of real utility,’¹¹ producing serious legitimacy problems and clear potential for unfairness. In recent years, however, there have been signs of a significant shift in judicial attitudes. There have been important developments in two main respects. First, judicial *regulation* of rule-making is becoming increasingly elaborate, and is beginning to break free of its conceptual anchors in other administrative law doctrines. Second, in isolated cases, judges have been prepared to follow Davis’ advice and *mandate* the adoption of rules. Indeed, according to Elliott and Varuhas, ‘instead of speaking of a “no fettering rule” we should now speak of “fettering rules” or the “law of policy” more broadly.’¹² This, however, seems premature, since – as I argue below – the case law still lacks coherence, and a clear, principled account of the conditions of legitimate administrative rule-making.

The time thus seems ripe to re-examine legal control of administrative rule-making – a topic which, despite some important contributions,¹³ has been relatively neglected by academics. This article has two aims. First, it analyses the development of the case law since *British Oxygen Co*, identifying the ways in which judicial control has changed, and where gaps in the law still remain. Second, it proposes an alternative approach to the judicial control of administrative rule-making. This approach distinguishes (a) the question whether administrative decision-makers should adopt rules and (b) the regulation of rules once the decision has been made to employ them, arguing that the no-fettering rule should be abandoned, and that instead much greater emphasis should be placed on regulating administrative rules. In making that distinction, I attempt to deal with the tension between the desire for general standards of judicial control (both to guide decision-makers and to constrain judicial intervention), on the one hand, and the need for sensitivity to the variety of forms that administrative decisions may take and contexts in which they may arise, on the other hand. The difficulty of striking the right balance between generality and contextual sensitivity is one which arises throughout judicial review, but it seems to occur in a particularly acute form in relation to administrative rule-making.¹⁴

¹⁰ See, e.g., Streatfield J’s criticism of a government circular as being ‘four times cursed’ in *Patchett v Leathem* (1949) 65 TLR 69 at 70.

¹¹ Robert Baldwin, ‘Governing with Rules: the Developing Agenda’, in Genevra Richardson and Hazel Genn (eds), *Administrative Law and Government Action* (Clarendon Press, 1994) 168.

¹² Mark Elliott and Jason NE Veruhas, *Administrative Law: Text and Materials* (5th edn, Oxford University Press, 2016) 181.

¹³ See in particular DJ Galligan, ‘The Nature and Function of Policies Within Discretionary Power’ [1976] PL 332; *Discretionary Powers: A Legal Study of Official Discretion* (Clarendon Press, Oxford 1990); Baldwin and Houghton, above n2; Baldwin, above n11, Baldwin, *Rules and Government* (Oxford University Press, 1995); Christopher Hilson ‘Judicial Review, Policies and the Fettering of Discretion’ [2002] PL 239.

¹⁴ Cf Baldwin’s warning that ‘[t]here are so many different forms and varieties of rule that generalising is best done under sedation’ – above n11 at 187.

Judicial Control of Administrative Rule-Making: the Current Law and its Development

The No-Fettering Rule

In their classic comparative study of US and UK administrative law, Schwartz and Wade wrote that:

The American conception is that discretion, whether judicial or administrative, should in all possible cases be exercised in accordance with rules ascertainable in advance and that the policy to be applied should somehow be fixed or standardised. The British conception is that within its legal limits administrative discretion must be free, and that the object of policy should be to produce the best solution as it may appear at any particular time.¹⁵

The British presumption in favour of retaining discretion is expressed in the no-fettering rule, which in its classic form performed two distinct, though related functions. First, it sought to ensure that individual cases were treated on their merits; second, it promoted administrative flexibility, enabling decision-makers to adapt to changing circumstances and priorities (subject only to general constraints of legality and reasonableness). While the rule did not preclude the adoption of policies or guidelines for the exercise of discretionary powers, it meant that they could only have limited legal significance. For administrators, policies could not be treated as rules to be applied in an automatic fashion; it was necessary to keep an open mind about their application to particular cases. For citizens, administrative pronouncements could not be relied upon, as it was open to administrative agencies to change their mind.

Both aspects of the no-fettering rule have come under pressure as a result of developments in judicial review, with the consequence, I argue, that its role has changed from being a doctrine which *preserves* administrative discretion to one which *regulates* the development and application of administrative rules.

1. Individuation

The classic statement of the no-fettering rule is Bankes LJ's dictum in *R v Port of London Authority ex p Kynoch*:¹⁶

There are on the one hand cases where a tribunal in the honest exercise of its discretion has adopted a policy and, without refusing to hear an applicant intimates to him what its policy is, and that after hearing him it will in accordance with its policy decide against him, unless there is something exceptional in his case.... On the other hand, there are cases where a tribunal has passed a rule, or come to a determination, not to hear any application of a particular character by whomsoever made. There is a wide distinction to be drawn between these two classes.

The significance placed on hearing the applicant emphasises the distinction being drawn between a power to legislate and the exercise of discretion.¹⁷ In the latter situation, 'the official should not simply

¹⁵ B. Schwartz and H. W. R. Wade, *Legal Control of Government: Administrative Law in Britain and the United States* (Clarendon Press, 1972) 106.

¹⁶ [1919] 1 KB 176 at 184. The rule itself is, however, older: see K Costello, 'The Scope of the Application of the Rule Against Fettering in Administrative Law' (2015) 131 LQR 355.

¹⁷ Galligan (1976), above n13, at 346-7.

formulate rules of decision-making and then apply them rigorously to situations as they arise, but must maintain a special relationship between the general standard and the particular case.¹⁸ Indeed, on some accounts, the no-fettering rule was treated as an aspect of the right to a fair hearing.¹⁹

Kynoch suggests that, short of adopting a binding rule, administrators could give considerable weight to their policy pronouncements. But in fact, in the case law both before and after *Kynoch* and in the academic literature, there was disagreement on this question. Attitudes ranged from a complete rejection of the legitimacy of placing conditions on the exercise of free discretions,²⁰ via the view that a policy was acceptable, but to be treated as no more than a relevant consideration to be taken into account in reaching a decision in an individual case,²¹ to the position that decision-makers were entitled to have and apply their policies provided that they were prepared to consider making an exception in an appropriate case.²²

This uncertainty was largely laid to rest by *British Oxygen Co*, which is now regarded as the leading authority on the no-fettering rule. After quoting Bankes LJ's dictum in *Kynoch*, Lord Reid went on to say:

I see nothing wrong with that. But the circumstances in which discretions are exercised vary enormously and that passage cannot be applied literally in every case. The general rule is that anyone who has to exercise a statutory discretion must not 'shut his ears to an application' I do not think there is any great difference between a policy and a rule. There may be cases where an officer or an authority ought to listen to a substantial argument reasonably presented urging a change in policy. What an authority must not do is refuse to listen at all. But a Ministry or large authority may have had to deal already with a multitude of similar applications and then they will have almost certainly evolved a policy so precise that it could well be called a rule. There can be no objection to that, provided the authority is always willing to listen to anyone with something new to say – of course I do not mean to say that there need be an oral hearing.²³

Perry has recently suggested that 'there has been no substantial change to the content of the flexibility rule in the past century.'²⁴ However, *British Oxygen Co* is rightly regarded as a landmark case for several reasons. First, it laid to rest any lingering doubts about the legitimacy – indeed the inevitability – of administrative rule making. Second, it confirmed that officials were entitled to apply their policies,

¹⁸ Galligan (1990), above n13, at 22.

¹⁹ See, eg, Galligan (1976) above n13, at 347, who notes that in some early cases the characterisation of the decision as judicial, and therefore carrying a duty to hear, was more important than the analysis of discretion and policies. See also Costello, above n16, at 355. This conceptual linkage is rare in modern discussions, but for exceptions see Lord Woolf et al, *de Smith's Judicial Review* (7th edn, Sweet and Maxwell, 2016) para 9.003; and Adam Perry, 'The Flexibility Rule in Administrative Law' (2017) 76 CLJ 375; and see further below at ???.

²⁰ eg *Hyman v Rose* [1912] AC 623; and see RFV Heuston, 'Policy and Discretion in Licensing Cases' (1952) 15 MLR 353 at 354.

²¹ *R v Rotherham Licensing JJ ex p Chapman* (1939) 55 TLR 718; *Stringer v Ministry of Housing and Local Government* [1970] 1 WLR 1281; *Lavender & Sons Ltd v Ministry of Housing and Local Government* [1970] 1 WLR 1281.

²² eg *Boyle v Wilson* [1907] AC 45; *Kynoch*, above n16; *R v Torquay Licensing JJ ex p Brockman* [1951] 2 KB 784; and see SA de Smith, 'Policy and Discretion in Licensing Functions' [1952] 15 MLR 73.

²³ Above n9, at 625.

²⁴ Perry, above n19, at 379.

subject only to considering whether an exception ought to be made in a particular case. Third, it significantly downplayed the requirement to hear cases individually, even where an exception was being sought.²⁵ *British Oxygen Co* thus represents an important shift away from an insistence upon individuated decision-making towards a system in which, as Lord Reid put it, ‘if the Minister thinks that policy or good administration requires the operation of some limiting rule, I find nothing to stop him.’²⁶ In other words, it marks a shift from an assumption that the existence of discretion *prohibits* administrative rule-making to an essentially *permissive* approach.

Lord Reid’s dictum is, however, also important in a fourth respect; namely, in emphasising the varying circumstances in which discretions are exercised. Indeed, while the no-fettering rule has continued to be applied since *British Oxygen Co*, and policies are sometimes struck down for excessive rigidity – either on their face or, more challengingly, because of the way in which they are applied in practice²⁷ – its operation remains highly variable.²⁸ In fact, I suggest that, *in practice*, the no-fettering rule now operates, not as a general presumption either for or against the legitimacy of administrative rule-making, but rather than a means of judicial control over the *degree of structuring* of discretion that is appropriate in particular contexts. At times, a high degree of flexibility and a genuine consideration of the merits of particular cases is required; at other times, rules are allowed, even where they permit of few or no exceptions.

In assessing the degree of structuring that is permissible, courts appear to be influenced both by the substantive nature of the decision to be made and by its administrative context. As to the former, for instance, cases involving child welfare seem to demand a high degree of individuation, because of the overriding importance of ensuring that decisions are made in the best interests of the child. Thus, in *Attorney General ex rel Tilley v Wandsworth BC*,²⁹ the Court of Appeal struck down a council resolution that no assistance with housing was to be provided under the Children and Young Persons Act 1963 to families with children where the parents were intentionally homeless. Indeed, Templeman LJ considered that even a policy which had been hedged around with exceptions would not have been entirely free from attack.³⁰ By contrast, the courts have accepted that certain policy objectives would be undermined if policies could not be applied strictly. For example, in *R v Nottingham CC ex p Howitt*,³¹ a policy of banning taxi-drivers who had been found guilty of plying for hire without a licence

²⁵ See in particular per Viscount Dilhorne, [1971] AC 610 at 631.

²⁶ Above n9, at 624.

²⁷ See CJS Knight, ‘A Framework for Fettering’ [2009] *Judicial Review* 73, at pp 78 – 80, who distinguishes between fettering *in law* and fettering *in fact*.

²⁸ See PP Craig, *Administrative Law* (8th edn, Sweet and Maxwell, 2016) 537 – 538; HWR Wade and CF Forsyth, *Administrative Law*, (11th edn, Oxford University Press, 2014) 270 – 276.

²⁹ [1981] 1 WLR 854.

³⁰ See also *R (Q) v Secretary of State for the Home Department* [2001] EWCA Civ 1151, [2001] 1 WLR 2002 (policy of separating female prisoners from their babies when the latter reached 18 months had to be applied flexibly); *R v Secretary of State for the Home Department ex p Venables and Thompson* [1998] AC 407 (sentencing tariff policy for child murderers too inflexible). A high level of individuation has also been required in relation to the exercise of judicial discretion to grant extensions of time on equitable grounds (*Dunn v Parole Board* [2008] EWCA Civ 374) and in relation to the calculation of discretionary housing payments for disabled people (*R (Hardy) v Sandwell MBC* [2015] EWHC 890 (Admin)), both of which are contexts involving considerable fact-sensitivity.

³¹ [1999] COD 530.

could lawfully be enforced strictly with few exceptions because this was necessary to provide an effective deterrent.³²

As to administrative context, Wade and Forsyth note a distinction between situations involving a high volume of similar cases, and those where applications are fewer and more variable.³³ We see in *British Oxygen Co* itself an acceptance that in areas of high volume decision-making it is simply unrealistic to expect administrators to act other than through rules, and that to insist on the possibility of making an exception is likely to become a mere formality.³⁴ Thus in *R (S) v Chief Constable of South Yorkshire*,³⁵ an 11 year old boy who had been charged with, but subsequently acquitted of, an offence was unable to challenge a general policy of retaining fingerprint and DNA samples because it was regarded as unrealistic and impractical to require each case to be examined individually. Harlow and Rawlings also note that the no-fettering rule is particularly difficult to apply in the context of automated decision processes.³⁶ By contrast, in *R v Greater London Council ex p Bromley LBC*,³⁷ the GLC had unlawfully fettered its decision by regarding itself as being bound to implement a promise contained in the majority party's election manifesto to reduce public transport fares, since this prevented it taking account of the full range of factors relevant to what was an important, one-off policy decision.

As the *Bromley* case indicates, assessments of the appropriateness of following rules or policies perhaps inevitably shade off into assessments of the substantive merits of the decisions or policies under challenge themselves. For example, *R (S) v Home Secretary*³⁸ involved a Home Office decision to delay consideration of older asylum applications in order to meet targets set for handling more recent applications. The Court of Appeal held this to be a 'textbook case' of unlawful fettering, as the policy precluded individual cases from being considered on their merits. However, the policy might equally have been attacked for irrationality, since the aim of setting a target was to speed up decision-making, not to introduce further delays in dealing with cases not subject to the target. Similarly, Galligan criticises the decision in *Sagnata Investments Ltd v Norwich Corp*,³⁹ that a policy of refusing to license amusement arcades was an unlawful fettering of discretion, as confusing the substantive legality of the policy (for negating the statutory power conferred upon the council) with the question whether the policy had been applied correctly.⁴⁰

This tendency to fuse the question of the appropriate degree of structuring of discretion with the substantive merits of the decision under attack is reinforced by the fact that cases attacking policies for excessive rigidity now often do so both under the common law no-fettering rule and under the Human Rights Act (HRA), as amounting to a disproportionate interference with Convention rights. The proportionality principle has been said to reinforce the no-fettering principle where human rights are engaged.⁴¹ The European Court of Human Rights (ECtHR) has sometimes condemned so-called

³² See also *Nicholds v Security Industry Authority* [2007] 1 WLR 2067 (a policy of refusing to license as security guards people found guilty of certain offences was necessary to achieve the relevant statutory purposes).

³³ Above n28, at 276.

³⁴ See above n9, per Viscount Dilhorne at 631.

³⁵ [2004] UKHL 39.

³⁶ Above n4, at 218.

³⁷ [1983] 1 AC 768, *per* Lord Wilberforce at 829E-F and Lord Brandon at 853A-B.

³⁸ [2007] EWCA Civ 546.

³⁹ [1971] 2 QB 614.

⁴⁰ Galligan (1976), above n13, at 352 – 353.

⁴¹ Elliott and Varuhas, above n12, at 178; Wade and Forsyth, above n28, at 275 – 276.

'blanket policies' as involving disproportionate interferences with Convention rights as they may fail to secure a fair balance between rights and other legitimate aims in the circumstances of particular cases. Strasbourg's condemnation of the UK's blanket ban on voting by convicted prisoners in *Hirst v UK*⁴² is a very well-known example.⁴³ But the ECtHR clearly does sometimes accept that rules are appropriate,⁴⁴ and recent decisions in the UK courts have been reluctant to condemn them. In fact, as with other aspects of the proportionality assessment, what seems to matter is, not how the decision-maker has *approached* the decision, but rather the substantive proportionality of the decision itself. Thus, in *R (Bibi) v Secretary of State for the Home Department*,⁴⁵ the Supreme Court held that, although the *application* of guidance concerning when the non-British spouses of foreign-born British citizens who were entitled to reside in the UK should be entitled to accompany them could lead to violations of the Convention, this did not make the rule itself unlawful.⁴⁶

More generally, the balance struck by a rule or policy between Convention rights and competing legitimate aims may itself be regarded as proportionate even if it draws 'bright line' distinctions between situations which are included or excluded. Moreover, decision-makers will be entitled to a degree of deference in deciding how and where the balance is to be struck.⁴⁷ For example, in *R (Tigere) v Secretary of State for Business Innovation and Skills*,⁴⁸ the Supreme Court held unanimously that a rule requiring students to be lawfully ordinarily resident in the UK for three years before being eligible for student loans was *not* in breach of Article 2 of the First Protocol to the Convention. However, the court was split on the proportionality of a further requirement that the applicant be 'settled' in the UK on the date of application; 'settlement' being defined as having indefinite and not merely temporary leave to remain. The majority thought that the inflexible application of the settlement rule was not proportionate on the facts of the case, because Tigere had been living in the UK since the age of six and was unaware of, and not responsible for, the fact that her mother had never sought to regularise their immigration status, whereas the minority were inclined to defer to the immigration authorities. All the judges nevertheless seemed to be aware of the necessity and value of having rules, and both Lord Hughes in the majority, and Lords Reed and Sumption in the minority, pointed out that to describe a rule as a 'blanket rule' was tautologous and not in itself a reason for condemnation.⁴⁹

Thus, the HRA does not appear to have reversed the tendency since *British Oxygen Co* for judges to emphasise the benefits of structuring discretion through rules. Indeed, as will be discussed further below, it may in fact have encouraged it.

⁴² (2006) 42 EHRR 41.

⁴³ See also *S and Marper v UK* (2008) 48 EHRR 1169; *R (GC) v Commissioner of Police for the Metropolis* [2011] UKSC 21.

⁴⁴ See, eg, *Animal Defenders International v UK* (2013) 57 EHRR 21.

⁴⁵ [2015] UKSC 68.

⁴⁶ See also *R (MM) (Lebanon) v Secretary of State for the Home Department* [2017] UKSC 10; *R (Agyarko) v Secretary of State for the Home Department* [2017] UKSC 11.

⁴⁷ See *R (T) v Greater Manchester CC* [2013] EWCA Civ 25; *R (Tigere) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 57. N.b., the Court of Appeal in *T* warned that a rule which was not proportionate in substance would not be saved just because it was convenient.

⁴⁸ *Ibid.*

⁴⁹ Above n 47 at paras 60 and 88.

2. Flexibility

Changing judicial attitudes to the legitimacy of administrative rule-making have also had implications for the second aspect of the no-fettering rule: the preservation of administrative flexibility. The distinction between legislative and discretionary powers which underpinned the classic conception of the no-fettering rule implied that administrative rules or policies could not, of themselves, create binding legal effects. If pre-determined policies were only permitted to play a limited role in decision-making, and the interests of affected parties were in any case protected by the requirement to treat each case on its merits, then policies could not reasonably be regarded as generating any expectations about the content of decisions such as to justify an obligation to follow them.⁵⁰ However, if officials are allowed to rely on administrative rules or policies as sufficient justification for their decisions, with only limited opportunities for affected parties to dispute their application, there is an obvious imbalance if the latter are not entitled to enforce them. As Ahmed and Perry put it, '[it] is unfair for the public body to act as if it alone is entitled to ignore the rules governing your interaction.'⁵¹

At one time, the legal effect of administrative rules largely⁵² depended upon whether or not they were classified as legislative in character. This was a somewhat elusive distinction, which turned not only upon their source in an explicit grant of rule-making power, but also upon their drafting and content,⁵³ and which gave rise to an inconsistent and unsatisfactory body of cases.⁵⁴ Today, however, the importance of the legislative/administrative distinction has been substantially undermined by the development of the doctrine of substantive legitimate expectations. This in turn has had significant implications for the scope and function of the no-fettering rule.

The earliest cases to uphold substantive, as distinct from procedural, legitimate expectations made relatively limited incursions into administrators' freedom to depart from their policies. In *R v Liverpool Corporation ex p Liverpool Taxi Fleet Operators Association*⁵⁵ and *R v Home Secretary, ex p Khan*,⁵⁶ although the courts were prepared to protect the applicants' legitimate expectations that previously-announced policies would be followed, the protection afforded was procedural only; namely a duty to hear the applicants before departing from the policy (and, in *Khan*, an obligation to justify the decision through reasons). This approach could be regarded as being compatible with at least the spirit of the no-fettering rule insofar as it forced the decision-maker to confront and to justify a decision to depart from pre-announced policy in the circumstances of the particular case. In other words, it reinforced the pre-*British Oxygen Co* concern to ensure that cases are treated on their merits, and the earlier conceptual linkage between the no-fettering rule and the right to a hearing.

However, as *Ruddock*⁵⁷ demonstrated, procedural protection for substantive legitimate expectations was not always sufficient. Here, although the case failed on its facts, it was held that the applicants'

⁵⁰ Cf Elliott & Varuhas, above n12, at 175.

⁵¹ FA Ahmed and A Perry, 'The Coherence of the Doctrine of Legitimate Expectations' (2014) CLJ 61.

⁵² They could sometimes be given some effect as a relevant consideration which the decision-maker was not entitled to ignore – eg *JA Pye (Oxford Estates Ltd) v West Oxfordshire DC and Secretary of State for the Environment* [1982] JPL 557.

⁵³ P Cane, *Administrative Law* (5th edn, Clarendon Press, 2011) 52.

⁵⁴ See Galligan (1976), above n13, at 344 – 345; Baldwin and Houghton, above n2, at 246 – 252.

⁵⁵ [1972] 2 QB 299. Nb, the terminology of legitimate expectation was not used in this case.

⁵⁶ [1984] 1 WLR 1337 (CA).

⁵⁷ *R v Secretary of State for the Home Department ex p Ruddock* [1987] 1 WLR 1482.

legitimate expectation that telephone tapping would be authorised only in line with criteria set out in published guidance was *not* limited to the right to a hearing, since it would be inconsistent with the purpose of the telephone tap to require the Home Secretary to give notice that he was contemplating departing from the guidelines. There was some judicial doubt about the compatibility of substantive protection for legitimate expectations with the no-fettering rule; indeed, Hirst LJ in *Hargreaves* described it as ‘heresy’.⁵⁸ Nevertheless, the Court of Appeal in *Coughlan*⁵⁹ confirmed that, where administrators had by their own actions created substantive legitimate expectations, these would in some circumstances receive substantive protection. While the need for administrative flexibility was recognised, it was held that it was for the court to decide whether the public interest in making a different decision outweighed the applicant’s legitimate expectation that the agency would honour its undertakings in the circumstances of the particular case. However, the court held that the level of protection provided would vary depending on the circumstances, ranging from full substantive protection in a situation like that in *Coughlan* itself (involving a clear promise to a small number of individuals, upon which they had clearly relied and breach of which would cause them significant detriment), through procedural protection, to protection merely on *Wednesbury* grounds, as a relevant consideration to be taken into account by the decision-maker.

This created some doubt as to whether expectations arising merely from the existence of some policy or guidance, without a clearer representation that they would apply to the applicant’s case, could or should be regarded as attracting substantive protection.⁶⁰ It is apparent from the subsequent cases that they can do so, but two types of situation, which receive different levels of protection, need to be distinguished.

The first is where an agency seeks to *change* a policy or rule, and the applicant is trying to insist that the original policy or rule be applied to her case. In *Niazi*,⁶¹ the Court of Appeal held that legitimate expectations would *not* normally arise in such situations. According to Laws LJ, although ‘[o]nce set in place, every policy of a public authority, not subject to a stated terminal date or terminating event, may no doubt be expected to continue until rational grounds for its cessation arise’, this could not always give rise to a substantive legitimate expectation.⁶² On the contrary,

a public authority will not often be held bound by the law to maintain in being a policy which on reasonable grounds it has chosen to alter or abandon. Nor will the law often require such a body to involve a section of the public in its decision-making process by notice or consultation if there has been no promise or practice that effect. There is an underlying reason for this. Public authorities typically, and central government *par excellence*, enjoy wide discretions which it is their duty to exercise in the public interest. They have to decide the content and the pace of change. Often they must balance different, indeed opposing, interests across a wide spectrum. Generally they must be the masters of procedure as well as substance; and as such are generally entitled to keep their own counsel. All this is involved in

⁵⁸ *R v Secretary of State for the Home Department ex p Hargreaves* [1997] 1 WLR 906 at 921. See also *In Re Findlay* [1985] AC 318 HL(E); *Hughes v Department of Health and Social Security* [1985] AC 776.

⁵⁹ *R v North and East Devon Health Authority ex p Coughlan* [2001] QB 213.

⁶⁰ See, eg, R Clayton, ‘Legitimate Expectations, Policy and the Principle of Consistency’ (2003) 62 CLJ 93; Ahmed and Perry, above n51.

⁶¹ *R (Niazi) v Secretary of State for the Home Department* [2008] EWCA Civ 755.

⁶² *Ibid*, paras 34 – 35.

what Sedley LJ described (*BAPIO* [2007] EWCA Civ 1139 paragraph 43) as the entitlement of central government to formulate policy. This entitlement – in truth a duty – is ordinarily repugnant to any requirement to bow to another’s will, albeit in the name of a substantive legitimate expectation. It is repugnant also to an enforced obligation, in the name of a procedural legitimate expectation to take into account and respond to the views of particular persons whom the decision maker has chosen not to consult.⁶³

Nevertheless, ‘the court will (subject to the overriding public interest) insist on such a requirement, and enforce such an obligation, where the decision-maker’s proposed action would otherwise be so unfair as to amount to an abuse of power, by reason of the way in which it has earlier conducted itself’, bearing in mind that the categories of unfairness are not closed.⁶⁴ Thus, substantive legitimate expectations *may* be upheld to prevent rules or policies being changed, but only exceptionally and usually only where the applicant has specifically relied upon them.⁶⁵ For instance, in *R (Patel) v General Medical Council*,⁶⁶ the Court of Appeal quashed the application of new rules on recognition of overseas medical qualifications to the applicant. He had undertaken training following a clear, unambiguous, and unqualified representation to him that his qualification would be recognised. Moreover, the rule change had been made with immediate effect, without considering its necessity or likely impact, and without making transitional provision for people in the applicant’s position.

By contrast, the courts are much more willing to hold administrators to their policies in the second situation, namely where, without seeking to change an existing policy, the decision-maker nevertheless *departs* from it in relation to a particular case. In such cases, the applicant *is* normally entitled to insist that the policy be followed,⁶⁷ subject to an overriding justification for not doing so, and this will apply *irrespective* of any reliance by the applicant upon the policy, or even whether she was aware of it.⁶⁸ In fact, the Supreme Court has now held in *Mandalia*⁶⁹ that such cases are not properly to be regarded as falling within the legitimate expectations doctrine at all. Rather, affirming the dictum of Laws LJ in *Nadarajah*,⁷⁰ the court said that they involve the application of a free-standing principle of good administration ‘by which public bodies ought to deal straightforwardly and consistently with the public.’

Thus, whereas the no-fettering rule seeks to preserve administrators’ ability to change their minds, substantive legitimate expectations and related doctrines sometimes prevent them from doing so.

⁶³ *Ibid*, para 41.

⁶⁴ *Ibid*, para 42.

⁶⁵ *Ibid*, per Sedley LJ at para 68. And see generally R Williams, ‘The Multiple Doctrines of Legitimate Expectations’ (2016) 132 LQR 639 at 654 – 9.

⁶⁶ [2013] 1 WLR 2801.

⁶⁷ *ie*, subject to the usual requirements that the policy is *intra vires* (see *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245 per Lord Dyson at para 35) and that it is reasonable to rely on it. Eg, citing *R (Davies and Gaines-Cooper) v Revenue and Customs Commissioners* [2011] 1 WLR 2625, Williams notes that rules will need to be sufficiently clear to establish whether the agency is indeed acting inconsistently with them (above n65, at 660). In *Davies and Gaines-Cooper*, the inclusion of a ‘health warning’ in a tax guidance document was also a factor in holding that it did not create enforceable obligations.

⁶⁸ See: *R (Rashid) v Home Secretary* [2005] EWCA Civ 744; *Oxfam v HMRC* [2010] STC 686; *Mandalia v Secretary of State for the Home Department* [2015] UKSC 59; *R (O) v Secretary of State for the Home Department* [2016] 1 WLR 1717.

⁶⁹ Above n68.

⁷⁰ *R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363 at para 68.

Can these apparently contradictory imperatives be reconciled, either in practice or in principle? Attempts to do so typically involve one of two approaches. The first is to restrict the scope of the no-fettering rule; the second is to reconceptualise it. An example of the former is Craig's argument that the operation of the legitimate expectations doctrine does not in fact unduly inhibit public authorities' freedom to develop policy, particularly because many cases are concerned with the timing of the new policy rather than precluding policy change altogether.⁷¹ Similarly, Cane points out that legitimate expectations can be overridden if there are good reasons of public policy why they should not be upheld.⁷²

Although it may well be correct to say that legitimate expectations and related doctrines do not unduly inhibit administrative flexibility, it is important to recognise that they do *constrain* it in a way which seems to restrict the application of the no-fettering rule. For one thing, the rule appears to be limited to a freedom to *change* policy, rather than freedom to decide how much weight should be given to policy in any particular case. In the policy departure cases, the presumption underpinning the no-fettering rule – that discretion must be preserved – seems to have been turned on its head: discretion must *not* be exercised unless it can be justified in the particular case. Secondly, although in both policy change and policy departure cases, the obligation to follow policy may be overridden if there is good reason to do so, it is the *court* rather than the administrative agency which is the ultimate judge of that question. In policy change cases, Hilson has argued that there is in reality no conflict between legitimate expectations and the no-fettering rule because the existence of a legitimate expectation effectively operates to require the decision-maker to make an exception to the *new* policy rather than rigidly implementing it.⁷³ However, whereas the *British Oxygen Co* principle requires the decision-maker to *leave open the possibility* of making an exception, the substantive legitimate expectations doctrine *forces* them to do so. Again, therefore, rather than preserving administrative discretion, substantive legitimate expectations operate to control the merits of particular decisions.

The second strategy for reconciling the no-fettering rule and judicial enforcement of policies – the reconceptualization approach – is most relevant to the policy departure cases. It is commonly argued that the free-standing principle being protected in these cases is the principle of consistency,⁷⁴ and – far from being incompatible with the no-fettering rule – Galligan has argued that the principle of consistency ought to be regarded as its 'positive side'.⁷⁵ In other words, while the principle of consistency requires that like cases be treated alike, and therefore that policies should be followed, it also requires unlike cases to be treated differently, which is what the no-fettering rule aims to ensure by preventing over-rigid application of policies.

There are, however, also problems with this approach. First, since the requirement to treat unlike cases differently is part of the principle of consistency, it is not clear why it requires to be expressed in a separate doctrine. Secondly, as Galligan acknowledges, the no-fettering rule has *not* historically been concerned with ensuring consistency:⁷⁶ quite the opposite – consistency has been expressly

⁷¹ Craig, above n28, at 674 – 675.

⁷² Cane, above n53, at 156.

⁷³ C Hilson, 'Policies, the Non-Fetter Principle and the Principle of Substantive Legitimate Expectations: Between a Rock and a Hard Place' [2006] *Judicial Review* 289.

⁷⁴ See, eg, Clayton, above n60; Craig, above n28, at 540; Y Dotan, 'Why Administrators should be Bound by Their Policies' (1997) 17 *OJLS* 23, 28; Williams, above n65, at 659 – 662.

⁷⁵ Above n13 (1990), at 283.

⁷⁶ *Ibid.*

regarded as less important than doing justice in the individual case.⁷⁷ In order to achieve doctrinal consistency between the no-fettering rule and the policy-departure cases, therefore, it appears to be necessary to reconceptualize it – again not as a rule concerned with preserving administrative flexibility, but rather as a principle of rational decision-making.⁷⁸ Once more, this shifts the focus of judicial attention away from the decision-making *process* towards the *substantive merits* of the decision.

Regulating Administrative Rule-Making

The argument made so far is that the no-fettering rule has evolved from its original function as means of preserving administrative discretion into a technique for regulating the degree to which administrative agencies *may* or *must* act in accordance with rules. However, this does not exhaust judicial intervention in administrative rule-making. As the courts have become more willing to permit administrators to structure their discretion through rules, they have also become more willing to regulate rules and rule-making in other ways, both substantive and procedural. The general trend is for greater judicial intervention, but the extent of regulation remains patchy and uncertain in some respects, and its conceptual basis is sometimes unclear.

1. Substantive Controls

Clearly, administrative agencies cannot unilaterally expand the scope of their legal authority. Accordingly, it is uncontroversial that where decisions are made in reliance on informal rules or policies, those rules or policies will be vulnerable to attack if they are in substance *ultra vires* or otherwise unlawful. More problematic, however, is whether policies are reviewable *directly*, rather than in the context of their application to particular cases. Direct rather than purely collateral attack extends both the opportunities for, and the reach of, judicial control, but judges may be wary of being drawn into deciding hypothetical points, especially in politically controversial areas.

*Royal College of Nursing v Department of Health and Social Security*⁷⁹ involved an attempt to challenge the legality of advice on the performance of abortions by medical induction contained in a letter sent by the Department of Health and Social Security (DHSS) to health officials. Without addressing the jurisdictional point, the House of Lords was prepared to grant a declaration that the advice was legally correct. Subsequently, in *Gillick v West Norfolk and Wisbech AHA*,⁸⁰ their Lordships confirmed that the courts did have jurisdiction to correct errors of law in government documents – in this case, a DHSS circular on the provision of contraceptive advice. However, Lord Bridge of Harwich noted that the document under attack had no legal force, and that to accept jurisdiction to review it would significantly extend the court's power. Accordingly, review should be exercised with restraint, particularly in areas with political, social or moral overtones, and should be limited to correcting clearly-defined errors of law. Questions as to whether 'the advice tendered in such non-statutory

⁷⁷ See eg *R v Flintshire CC County Licensing (Stage Plays) Committee ex p Barrett* [1957] 1 QB 350 per Singleton LJ at 359; *Merchandise Transport Ltd v British Transport Commission (No 1)* [1962] 2 QB 173, per Devlin LJ at 193. And *de Smith* notes (above n19, at para 9.014) that the no-fettering rule at one time precluded the use of precedent in tribunal decision-making.

⁷⁸ See, eg, *Matadeen v Pointu* [1997] 1 AC 98, per Lord Hoffmann at 109.

⁷⁹ [1981] AC 800.

⁸⁰ [1986] AC 112.

guidance is good or bad, reasonable or unreasonable' could not 'as a general rule, be subject to any form of judicial review'.⁸¹

Subsequent practice is not entirely consistent. While judicial review is regularly permitted,⁸² there are occasions on which courts have declined to review non-legally binding rules or policies, and in particular, they may be unwilling to make rulings where the legality of the advice contained in them is heavily fact dependent.⁸³ In addition, it is unclear why in principle there should be a distinction between review for error of law and review on other grounds. If policies may be struck down on irrationality grounds in the context of their application to particular cases,⁸⁴ there is no obvious reason why this should be less appropriate in the context of abstract review. As Craig says, 'agency choices should not ... be immune from such oversight merely because they assume the form of a rule.'⁸⁵

When it comes to the *interpretation* rather than the legality of administrative rules, courts appear to have no qualms about intervening. It has been clear since the 1970s that courts will review the meaning given to non-statutory rules,⁸⁶ but until recently there was some dispute about the standard to be applied.⁸⁷ However, in *R (Raissi) v Secretary of State for the Home Department*,⁸⁸ the Court of Appeal held that the appropriate test was not whether the interpretation adopted by the minister was a reasonable one, but rather to ask what 'the reasonable and literate man's understanding of it would be'. Quoting the dissenting opinion of Lord Steyn in *In Re McFarland*,⁸⁹ Hooper LJ held that interpretation of non-statutory guidance was a matter of law for the courts:

In my view ... in respect of the many kinds of 'soft laws' with which we are now familiar, one must bear in mind that citizens are led to believe that the carefully drafted and considered statements truly represent government policy which will be observed in decision-making unless there is good reason to depart from it. It is an integral part of the working of a mature process of public administration. Such policy statements are an important source of individual rights and corresponding duties. In a fair and effective public law system such policy statements must be interpreted objectively in accordance with the language employed by the minister. The citizen is entitled to rely on the language of the statement, seen as always in its proper context. The very reason for making the statement is to give guidance to the public. The decision-maker, here a minister, may depart from the policy but until he has done so, the citizen is entitled to ask in a court of law whether he fairly comes within the language of the publicly announced policy. That question, like all questions of interpretation, is one of law. And on such a question of law it necessarily follows that the court does not defer to the minister: the court is bound to decide such a question for itself, paying, of course, close attention to the reasons advanced for the competing

⁸¹ Ibid, at 192 – 194; see also Lord Templeman at 206.

⁸² See, eg, Wade and Forsyth, above n28, at 486; Elliott and Varuhas, above n12, at 524 – 528.

⁸³ Elliott and Varuhas, above n12, at 527. See, eg, *Bibi*, above n45, in which the Supreme Court was split on whether it was appropriate to give a ruling declaring circumstances in which guidance would be incompatible with Convention rights.

⁸⁴ See eg *R v NW Lancashire HA ex p A* [2000] 1 WLR 977; *R (Limbu) v Secretary of State for the Home Department* [2008] HRLR 48.

⁸⁵ Craig, above n28 at 469.

⁸⁶ See *HTV v Price Commission* [1976] ICR 170 CA (Civ Div).

⁸⁷ See Wade and Forsyth, above n28, at 277.

⁸⁸ [2008] QB 836.

⁸⁹ [2004] 1 WLR 1289 at para 24.

interpretations. This is not to say that policy statements must be construed like primary or subordinate legislation. It seems sensible that a broader and wholly untechnical approach should prevail. But what is involved is still an interpretative process conducted by a court which must necessarily be approached objectively and without speculation about what a particular minister may have had in mind.

This approach – endorsed by the Supreme Court in *Mandalia* – significantly undermines the distinction between binding legal rules and non-binding policy or guidance. However, as far as the *application* of policy to the facts of particular cases is concerned, the Court of Appeal has held that the appropriate test remains one of rationality.⁹⁰ It was argued before the Supreme Court in *R (O) v Secretary of State for the Home Department*⁹¹ that such cases should equally be decided according to a correctness standard, but the court considered it unnecessary to decide this point.

Finally, there is continuing uncertainty about whether the courts may review administrative rules or policies for lack of precision. There have been suggestions that policies which are unclear or ambiguous may be struck down for irrationality.⁹² However, in *R (Gurung) v Secretary of State for the Home Department*,⁹³ the Court of Appeal refused to hold a policy concerning the right of resettlement in the UK for the adult dependents of former Gurkhas to be unlawful on grounds of uncertainty merely because different decision-makers applying the policy might treat the same facts differently.

2. Procedural Controls

Perhaps surprisingly, procedural control of administrative rule-making is currently less extensive than substantive control. Nevertheless, the law does seem to be moving towards the general position that policies and so on may not be relied upon unless they have been published. But the legal basis for a duty to publish, and whether it involves publication to the world at large or only to those directly affected, is unclear.

Various legal foundations for a duty to publish have been suggested. One argument is that such a duty is inherent in the no-fettering rule itself, given that, without knowing the usual policy, it is impossible to make the case for an exception.⁹⁴ A similar obligation to disclose a policy to affected persons might also be derived from the right to notice under the rules of natural justice.⁹⁵ However, in *R (Reilly) v Secretary of State for Work and Pensions*,⁹⁶ the Supreme Court refused to hold that the Home Secretary was obliged to publish information about the Workfare scheme generally, since what mattered was whether the claimant had *in fact* been given all the information she required about the scheme, not the form that the notice took. Publication in writing or via the department's website was nevertheless recognised to be desirable, both in principle and because otherwise it would be harder evidentially for the Department to prove that the notice requirement had been met. There may also

⁹⁰ *R (ZS) (Afghanistan) v Secretary of State for the Home Department* [2015] EWCA Civ 1137.

⁹¹ [2016] UKSC 19

⁹² See, eg, *Limbu*, above n84, [2008] HRLR 48 at paras 69 – 70.

⁹³ [2013] 1 WLR 2546 (CA).

⁹⁴ See Baldwin and Houghton, above n2, at 277; Craig, above n28, at 539 – 540; de Smith, above n19, at para 9.004; and see eg *Brockman*, above n22, at 788.

⁹⁵ de Smith, above n19, at para 9.010.

⁹⁶ [2014] AC 453.

be a duty to publish in Convention rights cases, deriving from the requirement that interferences with rights must be authorised by law which is clear and accessible.⁹⁷

The broadest statements of a duty to publish are found in *Salih*⁹⁸ and *Lumba*,⁹⁹ both of which involved deliberate concealment of government policies. *Salih* concerned a scheme to provide ‘hard cases’ support for failed asylum seekers. The Home Secretary had decided not to inform failed asylum seekers of the availability of support in order to deter applications, the scheme being intended for exceptional cases only. Stanley Burton J considered that this decision was irrational, because not informing those who might be eligible for support of its existence was inconsistent with the purpose of the scheme. However, he also made the broader statement of principle that ‘[I]eaving aside contexts such as national security, it is in general inconsistent with the constitutional imperative that statute law to be made known for the government to withhold information about its policy relating to the exercise of power conferred by statute.’¹⁰⁰

In *Lumba*, the Home Secretary had applied an unpublished policy of blanket detention of all foreign national prisoners on completion on their sentences, which was inconsistent both with her published policy and with the underlying legal power to detain. Again, a deliberate decision had been taken to continue with the unpublished policy despite concerns about its legality, and caseworkers had been instructed to conceal its existence by giving reasons which conformed with the published policy. As well as condemning the policy in substance as *ultra vires* and an unlawful fetter on discretion, the Supreme Court by a majority held that applying an unpublished policy was an unlawful exercise of the Home Secretary’s detention power. According to Lord Dyson:

The rule of law calls for a transparent statement by the executive of the circumstances in which the broad statutory criteria will be exercised. ... The individual has a basic public law right to have his or her case considered under whatever policy the executive sees fit to adopt provided that the adopted policy is a lawful exercise of the discretion conferred by the statute There is a correlative right to know what that currently existing policy is, so that the individual can make relevant representations in relation to it.¹⁰¹

As Elliott and Varuhas note, although the duty to publish ‘has so far been limited to cases concerning basic aspects of well-being, the rationales given for it suggest it is likely to be of more general application.’¹⁰²

By contrast, the courts remain very unwilling to impose consultation obligations in relation to rule-making. The general position remains as stated in *Bates v Lord Hailsham*¹⁰³ that the rules of natural justice do not apply to decisions of a legislative character; a position confirmed by the Court of Appeal in *R (BAPIO) v Secretary of State for the Home Department*¹⁰⁴ essentially on grounds of practicality. Thus, consultation obligations may arise only exceptionally as the result of a procedural or substantive

⁹⁷ See further below at text accompanying nn 111 – 121.

⁹⁸ *R (Salih) v Secretary of State for the Home Department* [2003] EWHC 2273 (Admin).

⁹⁹ Above n67.

¹⁰⁰ *Salih*, above n98, at para 52.

¹⁰¹ *Lumba*, above n67, at paras 34 – 35.

¹⁰² Above n12, at 183.

¹⁰³ [1972] 1 WLR 1373.

¹⁰⁴ [2007] EWCA Civ 1139 *per* Sedley LJ at paras 33 – 47.

legitimate expectation. Moreover, in *Niazi*, the Court of Appeal rejected an argument that the government's Code of Practice on Consultation could give rise to such an expectation, holding that the Code applied wherever the government decided as a matter of public policy to have a consultation; not that a public consultation was required before every policy change.¹⁰⁵ Nevertheless, where an administrative agency does choose to consult, it must do so properly and fairly.¹⁰⁶

Mandating Administrative Rules

The story told so far has been one of increased judicial acceptance of the legitimacy of administrative rule-making, which is now regarded as a normal part of the administrative process and therefore properly the subject of legal control. Indeed, recent cases are full of statements as to the benefits of administrative rule making,¹⁰⁷ and there is also a notable unwillingness to extend the scope of the no-fettering rule. Thus, it has been held to be inapplicable to statutory rule-making powers,¹⁰⁸ and to the exercise of common law and prerogative powers.¹⁰⁹ This sets the scene for a further nascent development in judicial control of administrative rule-making, namely an obligation in some circumstances actually to adopt rules or policies.

In fact, such an obligation might be thought to be implicit in the way the no-fettering rule has developed since *British Oxygen Co.* Although Lord Reid emphasised the administrator's freedom to choose whether or not to have rules, once one sees the no-fettering rule as concerned, not with the retention of discretion, but rather with the appropriate degree of structuring of discretion, there is no logical reason why judges should be concerned only with *excessive* and not with *inadequate* structuring. Indeed, it has been suggested *obiter* in a no-fettering case that it might sometimes be irrational *not* to have a policy.¹¹⁰

However, the major catalyst for change has been the Human Rights Act. In 2009, in *Purdy*,¹¹¹ the House of Lords ordered the Director of Public Prosecutions (DPP) to formulate and publish guidelines as to the factors to be taken into account in determining whether it would be in the public interest to prosecute someone for assisting another person to commit suicide contrary to section 2(1) of the Suicide Act 1961. Mrs Purdy, who suffered from a terminal illness, had complained that her Article 8 right had been infringed because she was uncertain whether her husband would face prosecution if he assisted her in travelling abroad to commit suicide. The ECtHR in *Pretty v United Kingdom*¹¹² had accepted that a ban on assisted suicide was not a disproportionate interference with Article 8. Nevertheless, any restriction had to be 'in accordance with the law', 'law' being construed broadly by the Strasbourg court to include both formal law and informal guidance.¹¹³ Moreover, to satisfy the Convention requirement of legality, the rules in question had to be sufficiently accessible to affected individuals and sufficiently precise to enable them to be able to foresee the consequences of their

¹⁰⁵ Above n61, at paras 53 – 54.

¹⁰⁶ See, eg, *R (Easyjet Airline Co Ltd) v Civil Aviation Authority* [2009] EWCA Civ 1361.

¹⁰⁷ See, eg, *Nicholds*, above n32, at paras 56 – 57; *Tigere*, above n47, per Lord Hughes, and per Lords Sumption and Reed.

¹⁰⁸ *Nicholds*, above n32.

¹⁰⁹ *R (Elias) v Secretary of State for Defence* [2006] EWCA Civ 1293; [2006] 1 WLR 3213; *R (Sandiford) v Secretary of State for Foreign and Commonwealth Affairs* [2014] UKSC 44; [2014] 1 WLR 2697.

¹¹⁰ *Ex p A*, above n84, per Auld LJ at 991.

¹¹¹ *R (Purdy) v Director of Public Prosecutions* [2010] 1 AC 345.

¹¹² (2002) 35 EHRR 1.

¹¹³ *Kafkaris v Cyprus* (2008) 25 BHRC 591 at para 139.

actions, and not applied in an arbitrary manner.¹¹⁴ The House of Lords considered that these requirements were not satisfied in *Purdy* because there was a gap between the letter of the 1961 Act and the DPP's practice of rarely prosecuting assisted suicide cases, the principles governing which were unclear.

Purdy is in fact a good example of the double-edged implications of Convention rights for the structuring of administrative discretion. While the existence of discretion in deciding when to prosecute cases of assisted suicide had been a key element in persuading the ECtHR in *Pretty* that s2(1) of the 1961 Act did not *in practice* amount to a blanket ban and therefore was not disproportionate, the exercise of discretion could not be 'in accordance with law' unless there was greater clarity about the factors which the DPP would take into account.¹¹⁵

Purdy is a controversial case,¹¹⁶ and there has clearly been unwillingness to push the ruling further in the assisted suicide context. In *Nicklinson*,¹¹⁷ the Supreme Court refused to order the DPP to further clarify his guidelines to deal with the position of paid carers (rather than family members) assisting suicide. Although some judges hinted that the DPP *should* amend his guidelines,¹¹⁸ powerful dissents by Lord Hughes and Lord Kerr, who criticised *Purdy* as having blurred the line between prosecutorial guidance and amendment of the law, persuaded the court that they should not seek to dictate to the DPP the content of his policy. An attempt to force the Lord Advocate to issue similar guidance on the prosecution of assisted suicide in Scotland also failed.¹¹⁹ While the Inner House distinguished both the scope of the offence and prosecutorial practice in Scotland from the situation in England, Lord Drummond-Young also argued that it was wrong in principle to seek to confine prosecutorial discretion too closely, and endorsed the view of the minority in *Nicklinson* that to require the prosecutor in effect to give guarantees of immunity from prosecution to certain categories of people would be 'an affront to the principle of democratic rule'.¹²⁰

Nevertheless, the reasoning in *Purdy* is potentially applicable in other contexts. For instance, in *The Christian Institute v Lord Advocate*,¹²¹ albeit in the context of statutory guidance, the Supreme Court held that, in order for the Scottish Parliament's Named Persons scheme to satisfy the requirement that it be 'in accordance with law' for the purpose of Article 8(2,) clearer guidance was required regarding when it would be proportionate to share information about young persons under the scheme.

Also potentially very significant beyond the Convention rights context is *Nzolameso v Westminster CC*,¹²² in which the Supreme Court appeared to found a duty to adopt a policy upon the duty to give reasons. Quashing a decision to rehouse a homeless woman with five children outside the local authority's area, the court emphasised the need for the council to have policies for the procurement

¹¹⁴ *Gillan and Quinton v United Kingdom* 2013) 57 EHRR SE 17.

¹¹⁵ Above n111, *per* Lady Hale at para 63.

¹¹⁶ See, eg, R Nobles and D Schiff, 'Disobedience to Law – Debbie Purdy's Case' (2010) 73 MLR 295; J Montgomery, 'Guarding the Gates of St Peter' (2011) 31 Leg Studs 644.

¹¹⁷ *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38; [2016] AC 657.

¹¹⁸ See *ibid*, *per* Lord Neuberger at para 146 and Lady Hale at para 323.

¹¹⁹ *Ross v Lord Advocate* [2016] CSIH 12; 2016 SC 502.

¹²⁰ *Ibid* at para 86.

¹²¹ [2016] UKSC 51.

¹²² [2015] UKSC 22.

and allocation of temporary accommodation in order to be able adequately to explain its decisions as to the location of properties offered. Although it stopped short of ruling that this was the *only* way in which the duty to give reasons could be satisfied, the court nevertheless went to some lengths to outline what it considered to be desirable.

It is not yet clear how far a duty to structure discretion in this manner will extend. Nevertheless, in being prepared to mandate the adoption of administrative rules or policies, judicial attitudes to administrative rule-making appear to have turned full circle. Admittedly, mandating the *adoption* of policies is arguably not technically inconsistent with the no-fettering rule insofar as any policy must still be *applied* flexibly. Nevertheless, this again reduces the no-fettering principle to a residual rule about rational decision-making, and makes the court, not the administrator, the master both of the degree of structuring that is appropriate and the application of policy in any particular case. Thus the orientation of judicial control has moved a very long way from the initial concern to ensure that discretion is retained.

Rethinking Judicial Control of Administrative Rule-Making

In 1986, Baldwin and Houghton complained that '[t]he British way of dealing with informal administrative rules has been to sweep the problem under the carpet.'¹²³ This is no longer a fair characterisation. Since the early 1970s, judicial attitudes to the control of administrative rule-making have been transformed – from a position which, without prohibiting administrative rule-making, certainly deprived it of any significant legal status or effect, through an essentially *permissive* approach ushered in by *British Oxygen Co*, to increasing judicial *regulation* of administrative rules since the 1980s, to the situation today in which the adoption of rules or policies may sometimes be *mandatory*.

Nevertheless, the current law is still far from satisfactory. One problem is the evolutionary nature of the change that has occurred. As so often in the development of the common law, new attitudes and doctrines have emerged without making a decisive break with the past. The old way of thinking, as encapsulated in the no-fettering rule, has not been completely dislodged, and continues to frame and shape judicial intervention. Yet it exists in considerable tension with new doctrines, and its scope and functions appear to have changed significantly. Secondly, the growth of new judicial controls has largely been indirect; parasitic upon other legal doctrines, which may struggle fully to accommodate administrative rule-making, and which may require the identification of something exceptional to justify judicial intervention. But there is, of course, nothing exceptional about administrative rule-making; it is a routine aspect of the administrative process which should not be beyond the reach of judicial control. Recent developments suggest that judges are beginning to recognise this and to attach free-standing obligations to the use of administrative rules. However, the conceptual basis for these new obligations is not always clear. What 'principle of good administration' requires that administrators follow their own rules, and why should departing from rules be treated so differently from changing rules? Why should the standard for judicial interpretation of rules be one of correctness rather than reasonableness, and why does this not also apply to the application of rules? Why should administrators be under an obligation to publish their rules, but not to consult over their development?

¹²³ Above n2, at 269.

The time therefore seems ripe for re-evaluation and reconceptualization of judicial control of administrative rule-making. In the remainder of this article I sketch the outlines of an alternative, I believe more coherent approach. This starts by distinguishing two logically separate issues which, because of the influence of the no-fettering rule, are not always clearly differentiated. The first is whether administrators should have rules – *ie*, how far should they be permitted or required to confine and structure their discretion? The second concerns the regulation of rules – *ie*, what are the conditions of legitimate rule-making? On the former issue, I suggest that the courts should play only a residual role: the law should abandon any lingering presumption in favour of retention of discretion, but should not replace it with a duty to make rules. On the latter issue, however, I argue for a more rigorous approach to the regulation of administrative rules where a decision has been taken to employ them.

Structuring Discretion

1. Retention of Discretion?

The starting point for a more rational approach to judicial control of administrative rule-making is to abandon the no-fettering rule. This is not to suggest that the rule as it currently operates performs no useful functions: it enables courts to insist, where appropriate, that rules or policies are not applied in an unduly rigid fashion; and it preserves administrators' flexibility to change their rules or policies as necessary. However, these functions can be performed more satisfactorily through a combination of rationality review and direct regulation of the conditions of legitimate rule-making, without needing to be expressed as a general presumption in favour of retaining discretion. There is, I argue, no doctrinal or principled basis on which to justify such a presumption.

The doctrinal basis of the no-fettering rule is in fact somewhat obscure. The most common assumption is that it is based on the intention of Parliament: where Parliament has conferred a discretion, rather than an explicit power to make rules, it must have intended that discretion be exercised.¹²⁴ This assumption appears to underpin recent decisions that the no-fettering rule has no application to rules adopted under explicit statutory authority,¹²⁵ or in exercise of common law or prerogative powers.¹²⁶ In *Sandiford*,¹²⁷ two alternative statutory intent-based justifications were offered. For Lords Carnwath and Mance:

The basis of the statutory principle is that the legislature in conferring the power, rather than imposing an obligation to exercise it in one sense, must have contemplated that it might be appropriate to exercise it in different senses in different circumstances. But prerogative powers do not stem from any legislative source ... and there is no external originator who could have imposed any obligation to exercise them in one sense, rather than another. They are intrinsic to the Crown and it is for the Crown to determine whether and how to exercise them in its discretion.¹²⁸

¹²⁴ See authorities cited by Costello, above n16, at 356.

¹²⁵ *Nicholds*, above n32.

¹²⁶ *Elias*; *Sandiford*, above n109. For earlier contrary authority, see Costello, above n16, at 356.

¹²⁷ Above n109

¹²⁸ Above n109, at para 61.

For Lord Sumption, on the other hand:

The basis of the rule against the fettering of discretions ... is that a discretion conferred on a decision-maker is to be exercised. Within the limits of that discretion ... members of the class of potential beneficiaries have a right to be considered, even if they have no right to any particular outcome. The effect of the decision-maker adopting a self-imposed rule that he will exercise his discretion in only some of the ways permitted by the terms in which it was conferred, is to deny that right to those who are thereby excluded.¹²⁹

Neither explanation is convincing. In relation to the former, as Galligan has pointed out, Parliament may have conferred a discretion, not so as to ensure that it be exercised differently in different circumstances, but rather simply to allow the administrator to decide how to act,¹³⁰ which may encompass the *form* of decision-making – through individualised decision-making or through rules – as well as the content. Indeed, in many parts of the administrative state, particularly those involving complex regulatory decisions by expert decision-makers, it makes more sense to understand discretion essentially as *delegated* power rather than as individuated power. Nor, given the haphazard nature of the British administrative state, should too much be read into the presence or absence of express rule-making powers in particular contexts.¹³¹

As far as Lord Sumption's argument is concerned, this appears to involve a category error. Whereas a right to be considered may be derived from a discretionary *duty*, it cannot logically be derived from a discretionary *power* without assuming that which it is trying to prove – *ie*, that there is a duty to exercise a discretionary power which cannot therefore be fettered.¹³² And even in the case of discretionary duties, these are not always capable of giving rise to individually enforceable rights. It would, for instance, be odd to justify the exercise of prosecutorial discretion on the basis of a suspected offender's right to have her case considered on its merits.

An alternative justification for the no-fettering rule is that it is a means of ensuring the avoidance of errors.¹³³ Lord Sumption appears to allude to this rationale in *Sandiford*, where he states that the adoption of a self-imposed rule 'also leads to the arbitrary exclusion of information relevant to the discretion conferred, and thereby to inconsistent, capricious and potentially irrational decisions.'¹³⁴ However, Perry convincingly rejects the error-avoidance justification on the basis, first, that administrative flexibility does not necessarily reduce the possibility of errors; indeed, it may increase it, for instance where complex decisions are made by decision-makers who are inexperienced, under-resourced, negligent or prone to prejudice. Secondly, he argues that other values associated with rigid policies, such as efficiency and predictability, may be more important than error avoidance in certain contexts.¹³⁵

¹²⁹ Above n109, at para 81.

¹³⁰ Above n13 (1976,) at 332. See also Perry, above n19, at 386.

¹³¹ Cf Galligan (1976), above n13, at 344.

¹³² Cf Galligan (1976), above n13, at 353.

¹³³ See Perry, above n19, at 387 – 388.

¹³⁴ *Sandiford*, above n109, at para 81.

¹³⁵ See Perry, above n19 at 388 – 391.

Perry himself offers a third rationale for the no-fettering rule based on the value of participation, tying the justification for the rule to the right to a fair hearing.¹³⁶ He argues that a hearing should be a real opportunity to participate in the decision at issue, and that this occurs *only* if the relevant policies to be applied are flexible.¹³⁷ Again, though, this argument is problematic. To begin with, as Perry acknowledges, the no-fettering rule has not usually been understood since *British Oxygen Co* as being connected to the right to a hearing,¹³⁸ and as argued above, Lord Reid in that case appeared to reject the view implicit in *Kynoch* that a hearing was always required to avoid unlawful fettering. Secondly, as Perry also recognises, hearings are not universally required, so to tie the no-fettering rule to the right to a hearing would be to restrict its scope substantially.¹³⁹ Third, and most fundamentally, the premise that meaningful participation requires an opportunity to contest the applicable rules is simply incorrect as a matter of law. In any hearing involving statutory rather than administrative rules, the only issue concerns the *application* of the relevant rules to the facts, not the decision-making standards to be applied. Accordingly, if there is a difference between hearings involving administrative rules and those involving statutory rules, this must be founded on some basis other than the right to a hearing itself. In other words, the scope or content of the hearing that the law requires depends on one's rights or expectations as to the nature of the decision-making process (rigid or flexible), rather than *vice versa*.

Instead, the rule appears to embody presumptions about the nature of the administrative process and the proper allocation of functions. As Galligan put it, '[t]here is an idea buried deep in the hearts of various constitutional theorists and judges that "to discipline administrative discretion by rule and rote is somehow to denature it."' ¹⁴⁰ But there is no consensus about why that should be. As suggested above, one view is that the no-fettering rule embodies a distinction between legislation and administration, the making of rules being a function for Parliament, permissible by administrators only upon an express delegation.¹⁴¹ For Wade and Forsyth, however, the distinction is between adjudication, which involves deciding cases according to legal rules and precedents, so that like cases are treated alike, and administration, which requires cases to be treated on their merits.¹⁴² By contrast, Harlow and Rawlings argue that the no-fettering rule imposes on the administration an adjudicative model of individualised decision-making,¹⁴³ whereas for de Smith, it is just an attempt to balance the competing values of certainty and consistency, on the one hand, against the value of responsiveness, on the other.¹⁴⁴

This confusion as to the rule's doctrinal basis perhaps reflects the fact that, as a matter of principle, there is simply no justification for any presumption in favour of administrative discretion. Rule-making is a perfectly normal feature of the administrative process – indeed the stereotypical view of bureaucracy is one which is heavily dependent upon rules¹⁴⁵ – and the desirable balance between

¹³⁶ Ibid, at 391 – 397.

¹³⁷ Ibid, at 393.

¹³⁸ Ibid, at 393.

¹³⁹ Ibid, at 394, 397.

¹⁴⁰ Above n13 (1976), at 332 (reference omitted).

¹⁴¹ See nn 17 - 18, above and accompanying text.

¹⁴² Above n28, at 272.

¹⁴³ Above n4, at 217.

¹⁴⁴ Above n19, at para 9.005.

¹⁴⁵ See Christopher Hood, *Administrative Analysis: An Introduction to Rules, Enforcement and Organisations* (Harvester Wheatsheaf, 1986) 19.

rules and discretion will vary from context to context.¹⁴⁶ As Hilson has pointed out, the reformulation of the no-fettering rule in *British Oxygen Co* – a permissive approach to rule-making tempered by a duty to consider exceptional cases – represents an unsatisfactory compromise between the benefits of rules and discretion, which may in some circumstances prevent full realisation of the benefits of rules, while in others permitting excessive structuring.¹⁴⁷ In practice, as I have suggested, the application of the no-fettering rule is highly context dependent. But approaching the issue of the appropriate degree of structuring through the lens of a *rule* against fettering may result in a more intrusive judicial approach than might be warranted if the contextually-sensitive nature of the judgment were explicitly acknowledged.

2. A Presumption in Favour of Rules?

If the no-fettering rule is to be abandoned, ought it to be replaced by a fettering rule – *ie*, a presumption (rebuttable where appropriate) that administrative agencies *should* seek to structure their discretionary powers through rules?

Certainly it would be difficult to argue that courts should *never* mandate the adoption of administrative rules. While *Purdy* and the other assisted suicide cases do raise legitimate concerns about breach of the separation of powers, they are somewhat unusual in involving a potential conflict between the content of administrative guidance and the strict letter of the law. In the standard case, the function of administrative rules or policies is to supplement the underpinning legal provisions; indeed they would be *ultra vires* if they were to contradict the letter of the law. But even in *Purdy* the separation of powers objection seems to be overblown. For one thing, if it was legitimate for the DPP to adopt offence-specific guidelines voluntarily (as he had done for some other offences), it is difficult to see why it is objectionable for a court to mandate such guidelines. Secondly, the DPP's assisted suicide guidelines are just that: they set out factors tending towards and against prosecution, rather than creating *de facto* exceptions to the assisted suicide offence.¹⁴⁸

The real objection again is to the appropriateness of any *general* presumption in favour of rule-making. Rules have significant advantages in terms of promoting certainty, consistency, efficiency, and accountability. But they can also have disadvantages in terms of rigidity, complexity, and lack of responsiveness.¹⁴⁹ Again the optimum balance between rules and discretion will vary depending on the administrative context. Moreover, the relationship between rules and discretion is a complex one. It is not straightforwardly the case that more of one means less of the other; in practice, therefore, rules may not be the best way of controlling discretionary powers.¹⁵⁰ Neither the value of rules nor their effectiveness are judgments which courts are necessarily best placed to make. For example, in *Purdy* it is not self-evident that the desire for certainty was more important than preservation of flexibility, or indeed that the published guidelines have done much to promote it. Nor is it obvious

¹⁴⁶ See, eg, Baldwin, above n13, ch 3, Galligan (1990), above n13, ch 4; Carl E Schneider, 'Discretion and Rules: A Lawyer's View', in K Hawkins (ed) *The Uses of Discretion* (Oxford University Press, 1992).

¹⁴⁷ Hilson, above n13, at 113 – 114.

¹⁴⁸ See: Director of Public Prosecutions, *Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide* (2010, revised 2014), available at:

http://www.cps.gov.uk/publications/prosecution/assisted_suicide_policy.html.

¹⁴⁹ See references in n146, above.

¹⁵⁰ See, eg, Nicola Lacey, 'The Jurisprudence of Discretion: Escaping the Legal Paradigm', in Hawkins (ed), above n146.

that the measures the DPP had already taken to promote consistency and prevent arbitrary decision-making (concentrating decision-making in a Special Crimes Division and giving reasons for decisions not to prosecute) were insufficient.

As Lord Neuberger acknowledged in *Purdy*, those best placed to judge whether, and to what degree, discretion should be structured through rules are administrators themselves. As he also stated, this does not mean that the courts should play no role.¹⁵¹ But it does suggest that the judicial role ought to be a residual one, essentially applying an irrationality test, and subject to an appropriate degree of deference to the primary decision-maker.¹⁵² A stronger degree of control may be necessary in Convention rights cases, in order to comply with the Convention principle of legality, but even here there is obvious room for disagreement over the degree of clarity and accessibility that can appropriately be expected in particular contexts.

The Conditions of Legitimate Administrative Rule-Making

While an essentially permissive approach may be appropriate in relation to the decision *whether to* adopt administrative rules, judicial restraint seems much less justified in relation to the *regulation of* administrative rules, if an agency has chosen to adopt them. As the cases discussed above demonstrate, the unregulated use of rules contains considerable potential for unfairness and abuse of power. The challenge, though, is to find a coherent basis for judicial intervention which relies not merely upon being able to bring rule-making practices within existing judicial review doctrines nor upon a vague invocation of notions of fairness or good administration.

Although space precludes the development of a fully worked-out model of legitimate administrative rule-making, I argue that the seeds of a rational approach can be found in the reasons for acting through rules. A functional approach provides an immanent standard by which judges can hold administrators to the values which they can themselves be taken to profess. It is also an approach which seeks not simply to *control* administrative action, but rather to enhance its legitimacy and thereby its effectiveness.

What, then, are the functions of rules? These can be categorised in various ways,¹⁵³ but for present purposes it is helpful to distinguish between two broad sets of functions. First are the formal or 'Rule of Law' functions of rules; benefits which flow from decision-makers acting *through the form of* rules. These include: ensuring consistency and equality of treatment; preventing arbitrariness and reducing the likelihood of mistakes by controlling the reasons for which decisions are made; promoting transparency and official accountability; and so on. The formal functions of rules emphasise their role in constraining and guiding behaviour, both of the decision-makers who employ them and of those who are subject to them. Secondly, however, rules also bring *substantive* benefits in promoting better decision-making. Rule-makers typically have more time to consider problems, and have access to a broader range of experience, information and opinion than is possible through individuated decision-making. As Baldwin puts it, '[t]he effect of using rules is ... to place each decision in the broader

¹⁵¹ Above n111, at paras 99 – 100. See also *Sandiford*, above n109, per Lords Carnwath and Mance at para 65.

¹⁵² Cf Perry, above n19, at 390 – 391.

¹⁵³ See, eg Baldwin, above n13, at 12 – 14; Schneider, above n146, at 68 – 79; J Jowell, 'The Legal Control of Administrative Discretion' [1973] PL 178.

context, allowing the longer view to be taken and incorporating more resources and evidence into the process of decision-making.¹⁵⁴

Extrapolating from these formal and substantive functions of rule-making may help us both to account for the ways in which rules are currently regulated, and to fill in the gaps in the current law.

1. Rules and the Rule of Law

The best-known formal account of the Rule of Law is Lon Fuller's theory of the internal morality of law.¹⁵⁵ Fuller regarded law as a purposive 'enterprise of subjecting human conduct to the governance of rules'¹⁵⁶ and governing through rules as involving a kind of reciprocity between government and the governed: in expecting citizens to follow rules, the government also undertakes to comply with them. If this bond of reciprocity is breached, he argued, there is nothing left upon which to found the citizen's duty to observe the rules. He thus identified eight principles, the observance of which – though always a matter of degree – was necessary for law to function as law. In addition to a requirement of generality – *ie*, the need for there to be rules of some sort – Fuller's principles of legality included requirements of:

- Publicity;
- Non-retroactivity;
- Clarity;
- Non-contradiction;
- Performability;
- Constancy; and
- Congruence between official action and the law.

The description of these criteria as *moral* principles is controversial.¹⁵⁷ Fuller regarded the existence of a legal system as a moral good, and therefore the principles of legality – as constitutive of an effective legal system – as themselves moral precepts. Whether or not this is correct, it seems inapplicable in the context of administrative rule-making given that, as I have argued, the existence of rules cannot be regarded as a categorical good. Nevertheless, if – as many of Fuller's critics argue – the principles of legality are seen as principles of *efficacy*, they are equally (the requirement of generality apart) applicable to administrative rule-making.¹⁵⁸ Indeed, that these principles *are* necessary conditions of effective rule-making is not controversial¹⁵⁹ (even if it may be argued that they are incomplete).¹⁶⁰ Viewed as functional principles, they are capable of generating regulatory standards for the control of administrative rule-making, just as the purpose of a statute generates standards for the control of decisions made under it. However, as aspirational rather than absolute

¹⁵⁴ Above n13, at 13; see also Schneider, above n146, at 72 – 73.

¹⁵⁵ *The Morality of Law* (revised edn, Yale University Press, 1969) ch 2.

¹⁵⁶ *Ibid*, at 96.

¹⁵⁷ For an overview, see Peter P Nicholson, 'The Internal Morality of Law: Fuller and His Critics' (1974) 84 *Ethics* 307.

¹⁵⁸ In fact, Fuller himself seemed to accept that they could be applied to systems of internal rule-making, eg, in trade unions or universities – above n155, at 129.

¹⁵⁹ See Nicholson, above n157, at 312.

¹⁶⁰ See Robert S Summers, 'Professor Fuller on Morality and Law' (1965) 18 *Journal of Legal Education* 1, 19 – 21. And see further text accompanying nn166-168 below.

obligations, the principles of legality may sometimes have to yield to considerations of practicality or overriding considerations of fairness or public interest.

Thus, the application of these principles to administrative rule-making can help us to make sense of the emerging case law discussed above, and guide its future development. For example, the obligation not to depart from established rules without good reason may be understood as being based, not on the principle of consistency, but rather on the requirement of congruence between official action and law. It is concerned, in other words, not with the substantive merits of an official's action, but rather with its formal legitimacy. As such, it should carry no corresponding obligation to consider making an exception to the rule, thereby avoiding contradictory imperatives to apply rules yet not to fetter discretion.¹⁶¹ As argued above, the requirement to treat unlike cases differently is better seen as an aspect of the substantive rationality of a rule, in which case it requires an exception *actually to be made* and not merely considered.

The principle of congruence between official action and the rules (and in particular the principle of reciprocity which underpins it) also justifies strong judicial control of the interpretation of rules, but would suggest that rule-*application* ought equally to be subject to a correctness rather than merely a reasonableness standard. Similarly, the condemnation of secret rules in *Salih* and *Lumba* accords with Fuller's requirement that laws be published, as well as the requirement of non-contradiction between rules – and suggests that publication should indeed be a general requirement for administrative rule-making, not restricted to cases affecting significant interests, nor limited to an obligation to give notice to those directly affected.¹⁶²

The principle of non-contradiction – and hence the requirement that administrative rules should be consistent with the general law – also supports the argument that there should be no limits on the courts' ability to review the substantive legality of administrative rules. Rules cannot perform their function of guiding official and citizen behaviour if there is doubt about the legality of the advice they contain. The availability of substantive review is further supported by the principles of non-retrospectivity, performability, and clarity. Moreover, clarity (in the sense of intelligibility as distinct from precision) should be regarded as a requirement of all administrative rules, not merely those affecting Convention rights. Finally, the requirement of constancy might suggest rather stronger control over changes to rules than the current law permits. While Fuller recognised that change must be permitted,¹⁶³ he nevertheless argued that the harm done by too frequent changes is similar to that done by retrospectivity, namely, the frustration of expectations formed in reliance on the previous law.¹⁶⁴ Arguably, therefore, instead of protecting reliance interests only exceptionally via the legitimate expectations doctrine, they should be more routinely protected through positive obligations on rule-makers, for example to give adequate notice of changes, and/or to make suitable transitional provisions.¹⁶⁵

¹⁶¹ Harlow and Rawlings, above n4, at 232. See also Perry, above n19, at 379 – 382.

¹⁶² But cf Hood's argument that non-publication might be justifiable where those subject to rules are highly opportunistic – above n145, at 23 – 24.

¹⁶³ Above n155, at 44 – 45.

¹⁶⁴ Above n155, at 80.

¹⁶⁵ See Fuller, above n155, at 80; Dotan, above n74, at 38; Williams, above n65, at 654 - 659.

2. Rules and Better Government

Fuller's principles of legality go a considerable way towards a bespoke scheme of regulation for administrative rule-making, but they are not exhaustive. In particular, they contain no obvious space for procedural obligations beyond notice and publicity requirements. However, the second rationale for rules – the ability of rule-making processes to take into account a broader range of evidence and opinion than is possible in individuated decision-making – could perhaps found a duty to consult over the making and re-making of rules. It is the expectation that rule-making proceeds on a broad evidential base which explains the allocation of rule-making functions to legislative bodies in classic separation of powers theory. While it is clearly unrealistic to expect parliamentary oversight of all administrative rule-making, there might therefore be a case for saying that, in order to perform its substantive function of improving decision-making quality, administrative rule making ought to follow a similarly open and participatory process through consultation.

As noted above, there is considerable judicial resistance to the imposition of consultation obligations on rule-making processes,¹⁶⁶ and the academic literature tends to be similarly wary.¹⁶⁷ There are three main objections: first, that there would be definitional problems in determining when consultation obligations were to apply; second, that consultation requirements might be excessively rigid, failing to recognise the range of ways in which decision-makers could legitimately seek to inform their rule-making; and third, that consultation obligations would impose significant costs and burdens on administrators, perhaps for little real gain. The first two objections are valid ones, but they are equally applicable to any common law procedural requirements.¹⁶⁸ In relation to the rules of natural justice, for instance, these problems are dealt with by defining the scope and content of the obligations in very general terms. The real issue, then, is the relative costs and benefits of imposing consultation obligations. Space constraints preclude a detailed exploration of this issue here. Nevertheless, both the widespread use of consultation processes in practice, and the absence of robust empirical evidence about their costs and benefits suggest that a duty to consult should not be dismissed out of hand.

Conclusion

In any area of law it is easier to criticise what currently exists than it is to propose something better. In suggesting that a clearer distinction should be drawn between the question whether or not to act through rules and the legal consequences of choosing to do so, I have been conscious of two main considerations. One is the difficulty of making any general statements about the respective merits of rules and discretion, and therefore the need for great contextual sensitivity in making any judgments about the appropriate degree to which administrators should confine or structure their discretion through rules. However, the second is an awareness of the sheer ubiquity of administrative rule-making, and its potential for abuse if not robustly regulated. Accordingly, while I have recommended

¹⁶⁶ See text accompanying nn103 – 105.

¹⁶⁷ For criticism of compulsory notice and comment procedures for non-legislative rule-making in the US context, see Michael Asimow, 'Non-Legislative Rule-Making and Regulatory Reform' (1985) *Duke LJ* 381. See also Baldwin, above n13, at 76 – 79, 112 – 113; Cane, above n53, at 106 – 113. For more sympathetic views, see Tony Prosser, 'Towards a Critical Public Law' (1982) 9 *Brit J of Law and Society* 1; Ian Harden and Norman Lewis, *The Noble Lie: the British Constitution and the Rule of Law* (Harper Collins, 1986) ch 8.

¹⁶⁸ cf Baldwin and Houghton, above n2, at 279.

a retreat from judicial control in relation to the first issue – and in particular abandonment of the no-fettering rule - I have suggested an extension of judicial control in relation to the second.

The obvious objections to this approach are that it involves too great a judicial intrusion into the administrative process, and that it may still involve insufficient sensitivity to the variety of administrative rules. I would answer this in two ways. First, if judicial review is to exercise any influence over the administrative process beyond the facts of particular cases – and if judicial discretion itself is to be constrained – it must necessarily operate through general standards which will require to be tailored to the specific circumstances in which they are applied. Second, by drawing upon an understanding of the *functions* of rules to generate standards for regulating the particular features of administrative rule-making, I see the role of judicial review as being, not merely to control administrative rule-making according to some external standard of fairness or good administration, but rather to contribute to the effective realisation of administrative goals by employing regulatory standards which ought to make sense to anyone choosing to operate through rules – and with which, for the most part, administrative decision-makers voluntarily comply. Certainly, there will be times when compliance with such standards is irksome to administrators. Nevertheless, by being constrained to follow standards of good rule-making there should be longer term, systemic benefits for the overall legitimacy and effectiveness of the administrative process.