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Reconsidering the legal regulation of the usage of administrative policies

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Reconsidering the legal regulation of the usage of administrative policies

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***76** *Policies are of great practical importance in administrative governance. Yet doctrinal and normative ambiguities remain in the law regulating the usage of administrative policies. Specifically, there exists a well-known tension between the rule against fettering and the legitimate expectations doctrine. Approaching this issue from a normative angle and drawing upon T.R.S. Allan's reflections on the rule of law, this paper will argue that a unified legal approach governing the usage of administrative policies, premised on the normative objective of furthering the rule of law as the rule of reason, will go a significant way towards resolving this tension and addressing the doctrinal and normative ambiguities in this practically important area of law.*

Policies are of great practical importance in administrative governance. Indeed, by providing a set of default guidelines for decision-making, they help to make more manageable the Herculean task of running the modern administrative state. However, doctrinal and normative ambiguities yet remain in the law relating to the usage of policies. For instance, a well-known tension exists between two of the key legal rules regulating the usage of administrative policies by public authorities: the rule against fettering and the doctrine of legitimate expectations. The simultaneous existence of both rules raises an issue of normative coherence within administrative law, given that they are normatively oriented in opposite directions. While the rule against fettering provides that public authorities must retain discretion to depart from their policies in response to specific circumstances, the doctrine of legitimate expectations requires them to be held to their established policies in making administrative decisions.

This article analyses the doctrinal and normative ambiguities that exist in this practically important area of law, focusing specifically on the tension between the rule against fettering and the doctrine of legitimate expectations. Approaching the issue from a normative angle, and drawing upon T.R.S. Allan's reflections on the requirements of the rule of law,[1] I will critically evaluate the responses offered ***77** thus far in the literature on this issue and propose a distinct solution. I will argue that a unified legal approach to govern the usage of administrative policies, based upon the objective of furthering rational and principled decision-making as a requirement of the rule of law, will go a significant way towards resolving the normative tension in this area of law.

By way of methodology, the article will draw primarily from UK case law. It is also important to clarify that the focus will be on the regulation of the usage of administrative policies at common law; accordingly, a discussion of the impact of legislation such as the Human Rights Act on policies is beyond the scope of this article.[2] In addition, the article is not directed at the question of whether public authorities should adopt policies, or how challenges to the legality of the content of administrative policies should be analysed, but is instead directed at how the *usage* of administrative policies by public authorities should be regulated.[3]

The tension between the rule against fettering and the legitimate expectations doctrine

The law has sought to regulate several different types of administrative decisions relating to policies: decisions to depart from an existing policy, decisions to change a policy, and decisions to adhere to a policy. Two legal doctrines have emerged as the prevailing means by which the law regulates these decisions: the doctrine of legitimate expectations and the rule against fettering. The contours of each doctrine as they have been applied to such decisions will be discussed in turn, followed by an overview of the tension that exists between both doctrines.

Policies and the doctrine of legitimate expectations

The legitimate expectations doctrine generally involves three stages of analysis.[4] First, the court will consider whether the representations of a public authority have given rise to a legitimate expectation that it would act in a certain way. Secondly, if so, the court will consider whether the public authority had unlawfully frustrated this legitimate expectation. Thirdly, should this indeed be the case, the court will determine the proper remedy that should be awarded.

Decisions by public authorities to *depart from* their policies, resulting in challenges in judicial review seeking to hold them to their prevailing policies, have attracted the legitimate expectations doctrine.[5] In essence, these challenges require ***78** the court to consider whether the applicant had a legitimate expectation that the prevailing policy would apply to their case, and if so, whether there was a justifiable reason for the departure from the policy.[6] If there are no justifiable reasons for such a departure, the court will require the public authority to abide by its prevailing policy. For example, in R. v Secretary of State for the Home Department Ex p. Khan, the Court of Appeal held that the Home Office was not permitted to refuse asylum on grounds other than those set out in a published circular.[7] Laws LJ in R. (on the application of Nadarajah) v Secretary of State for the Home Department suggested that the proper approach to determining the justifiability of a public authority's action was to consider its proportionality by reference to the aims sought to be pursued by the authority.[8]

Decisions by public authorities to *change* their policies, and to apply a new policy to the applicant instead, have also been subject to challenge on the ground of legitimate expectations. These situations are distinct from the ones described above. Here, an applicant is not merely seeking an application of the authority's prevailing policy, but a *departure* from its *presently* prevailing policy in favour of its previous one. A notable example of the doctrine being applied in this context is the decision of R. v North and East Devon HA Ex p. Coughlan. There the Court of Appeal indicated that changes of policy were capable of generating substantive legitimate expectations on the part of applicants that the old policy would apply to them, and that it was the court's role to evaluate whether the frustration of such legitimate expectations was so unfair as to amount to an abuse of power.[9]

An important distinction between departure-from-policy and change-of-policy cases is the differing degree of normative concerns they raise. Indeed, challenges to changes of general policy are particularly problematic from administrative and constitutional perspectives, given the fundamental principle of administrative governance that public bodies must be able to change their policies,[10] and also the potential of such challenges to have wide-reaching ramifications for the execution of national policy, thereby raising separation of powers concerns. In contrast, departures from existing policy with respect to individual claimants raise these concerns to a lesser degree. This difference between the two types of cases will be discussed further below.

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Policies and the rule against fettering

In addition to departing from or changing its policies, a public authority may also decide to *adhere to* its policy in relation to an affected party. Should this party wish to challenge the decision with the goal of getting the public authority to make an *exception* to its existing policy, its challenge would be based on a different legal rule from the challenges described in the preceding section: the rule against fettering.[11]

The rule against fettering has also been called the flexibility rule,[12] terminology which aptly captures the key point of the rule. Put simply, the rule requires public authorities to retain a degree of flexibility in their application of policies.[13] As Adam Perry has usefully described, the rule requires an official to be "willing to depart from her policy in particular cases", and to "consider, and be responsive to, all the merits of particular cases". In a similar vein, Aileen McHarg considered that there are two main aspects to the rule against fettering: individual cases have to be treated on their merits, and decision-makers should practise administrative flexibility in response to "changing circumstances and priorities".[14] The rule originated in the Court of Appeal decision of R. v Port of London Authority Ex p. Kynoch Ltd,[15] but found its classic expression in the House of Lords decision of British Oxygen Co v Minister of Technology,[16] and has been repeatedly affirmed in subsequent cases.[17]

The tension between the two doctrines

It should be readily apparent that the relevant legal rules relating to policies tug in opposite directions.[18] While the rule against fettering requires public authorities to avoid adhering too strictly to their policies, the legitimate expectations doctrine

suggests that public authorities have to be held to their policies. As Paul Craig has suggested, there is a conflict between the values served by the two doctrines: while the rule against fettering serves what he calls the value of legality, the legitimate ***80** expectations doctrine serves the value of certainty.[19] In a similar vein, Philip Sales and Karen Steyn have argued that there is a tension between the legitimate expectations doctrine and

"the very rationale for the conferring of a discretion upon the decision-maker—namely, the desirability of the decision-maker having flexibility to decide upon outcomes in particular cases in the light of all the circumstances perceived to be relevant at the time of making the decision".[20]

The law relating to challenges to decisions by public authorities to *change* their policies throws this tension into sharp relief. While there are indications in case law that the doctrine of legitimate expectations does limit the discretion of public authorities to adopt new policies,[21] the courts have been much less willing to intervene in this category of situations to hold public authorities to their previous policies.[22] Indeed, as highlighted above, rigorous judicial intervention in such situations would cohere uneasily with the foundational principle of administrative law that decision-makers must be free to exercise the discretion accorded to them and, if necessary, adopt new policies in furtherance of their goals[23]—the normative principle underlying the rule against fettering. Accordingly, in Findlay v Secretary of State for the Home Department, Lord Scarman in the House of Lords rejected the applicant prisoners' attempt to hold the Home Secretary to his previous parole policy through the legitimate expectations doctrine, holding that all that a prisoner could "legitimately expect is that his case will be examined individually in the light of whatever policy the Secretary of State sees fit to adopt".[24] Similarly, numerous other cases have taken the view that an authority's decision to change policies is subject only to review on the basis of Wednesbury unreasonableness. ***81** [25]

The problems raised by the tension between the two rules are further compounded by the doctrinal and normative ambiguity of the rules themselves. Indeed, the normative basis for the application of the doctrine of legitimate expectations to policies remains contentious, and has been variously described: safeguarding the reliance interest of affected parties,[26] ensuring equality of treatment,[27] promoting the consistent application of policies[28] and incentivising the careful drafting of policies.[29] Yet, as Yoav Dotan has pointed out, differing normative bases for the doctrine can produce sharply differing outcomes.[30] In addition, a strong argument can be made for the principle of consistency to be the doctrinal basis for judicial intervention in the context of administrative policies, instead of the legitimate expectations doctrine, for the sake of clarifying the latter doctrine's doctrinal and normative scope—indeed, Mark Elliott, Christopher Forsyth, and Jason Varuhas have made powerful arguments along such lines.[31] On this view, the legal approach towards authorities changing or departing from their policies would be governed by an independent doctrine of consistency which would require a public authority seeking to deviate from its policy to provide good reasons for doing so.[32] This would have the advantage of rationalising existing case law in which the legitimate expectations doctrine has been applied to situations where the claimant did not know about the relevant policy.[33] While there are obvious difficulties with saying that such claimants had a legitimate expectation that the unknown policy would apply to them, dealing with such claimants via a principle of consistency would be free of such conceptual problems. Propositions in favour of such a doctrine of consistency have found judicial support in the UK Supreme Court's decisions in Mandalia v Secretary of State for the Home Department[34] and R. (on the application of Lumba) v Secretary of State for the Home Department,[35] although they have recently been thrown into some doubt by the decision of the same court in R. (on the application of Gallaher Group Ltd) v Competition and Markets Authority.[36]

The rule against fettering also suffers from doctrinal and normative ambiguity. Indeed, the question of what precisely the doctrine requires a priori remains quite uncertain.[37] This has important doctrinal consequences—the standard of review and the factors that judges ought to consider in evaluating whether an authority had impermissibly fettered its discretion have not been expressly articulated. The ***82** normative justification for the rule against fettering has also been a matter of some debate. Perry has argued that there have been two key contending justifications in this regard: legislative intent and error-avoidance.[38] The justification based on legislative intent has the advantage of judicial authority.[39] Yet, academic commentary has often justified the rule on error-avoidance grounds instead. On this view, the rule helps to reduce flaws in decision-making, on the assumption that flexible decision-making on the merits of each case is less likely to be flawed.[40] Both of these justifications have been criticised.[41] In response to the perceived inadequacy of these justifications, Perry proposed to ground the rule on the basis of participation.[42] In other words, he argues that the rule flows out of the fair hearing rule, and requires public authorities to give affected parties the opportunity to make representations in relation to decisions rendered against them.[43] From this perspective, a rigid adherence to policies is impermissible precisely because it denies affected parties the opportunity to participate meaningfully in the decision-making process.[44] However, this proposal has also been criticised.[45] These issues will be discussed in greater detail below, and it is sufficient for present purposes to note the fact of the rule's normative ambiguity.

In sum, a normative tension exists between the two main legal doctrines governing the usage of administrative policies, exacerbated by the doctrinal and normative ambiguity of each doctrine. The next section will survey and critically evaluate

the responses to this tension that have been offered thus far in the literature. Building on the excellent work that has been done in this area, the final sections will propose a distinct solution.

A critical evaluation of various responses to this tension

Various responses have been offered to this tension. One type of response suggests that the tension should not be a matter of significant concern. For example, Jack Watson has suggested that the tension is unlikely to occur very often, since substantive protection of legitimate expectations occurs relatively rarely, and policies are unlikely to be enforced in an over-rigid fashion.[46] Peter Cane offers a related view—that there is no conflict between the two sets of doctrines because the legitimate expectations doctrine already requires the court to perform a balance between the claimant's interest in having their expectation fulfilled and the public ***83** interest in preserving the discretion of public authorities.[47] Similarly, Chris Hilson has argued that there is no conflict between the two rules because the rule against fettering itself also requires decision-makers not to stick too rigidly to its *new* policy; seen in this light, both rules achieve the same result.[48] Indeed, one may think that the tension between the two doctrines is a problem more apparent than real, given that it is unlikely to manifest in specific cases since both doctrines are invoked under different circumstances.

I suggest, however, that such a response is quite unsatisfactory. Whether or not the tension between the rules manifests in specific cases, the existence of both doctrines pulling in different normative directions within the domain of administrative law does present an issue of normative coherence. The true issues to be resolved are not as easily settled as this type of response suggests, once stated explicitly. Given this normative tension in the law relating to policies, the real problems are as follows. First, what *degree* of flexibility does the rule against fettering require? And secondly, what *degree* of certainty should the law seek to promote through the legitimate expectations doctrine? In the absence of normative solutions to these questions, the scope of the different rules will remain ambiguous. Indeed, in relation to Cane's suggestion, the very issue of *how* the court ought to strike the balance is left unanswered. As for Hilson's proposal, it leaves unanswered the question of how the public authority's old policy ought to be relevant in striking the crucial balance.

A second type of response seeks to limit the scope of one of the legal rules to minimise conflicts with the other. One specific solution in this category is to limit the scope of the legitimate expectations doctrine such that it does not apply to change-of-policy situations.[49] For example, Laws LJ in R. v Secretary of State for Education and Employment Ex p. Begbie was reluctant to apply the legitimate expectations doctrine to public authorities' decisions to change general policies, especially if such decisions lay within "the macro-political field".[50] Instead, situations involving changes in policy would be subject to review only on the basis of irrationality or the relevant considerations doctrine.[51] Prominent commentators have argued powerfully in support of this view, primarily for the sake of clarifying the doctrine of legitimate expectations.[52] The mirror image of these arguments has also been made—that is, to limit the rule against fettering such that public authorities are free to change policies but not to depart from prevailing ones. ***84** [53]

Such responses, however, do not address the tension relating to departure-from-policy cases. And as McHarg has pointed out, the tension in these situations is a real issue. In view of the continued application of the legitimate expectations doctrine in these cases, the prevailing rule in departure-from-policy cases would require authorities not to exercise discretion unless it is justifiable in the circumstances—the very opposite of what the rule against fettering requires.[54]

One may think that this problem can be resolved by narrowing even further the scope of the legitimate expectations doctrine. For example, Richard Clayton has argued that policy-based expectations should not be capable of limiting the discretion of public authorities at all.[55] Clayton takes the view that situations involving departures from policies *and* changes of policies should both be governed by the principle of consistency, thus excluding the application of the legitimate expectations doctrine in such situations.[56] Watson and Shona Wilson Stark have also expressed support for this body of scholarship.[57]

Alternatively, one may seek to resolve the problem by limiting the scope of *remedies* granted by the legitimate expectations doctrine in such contexts, instead of limiting the doctrine's scope of *application*.[58] For example, courts have suggested that instead of holding a public authority to its previous policy, the doctrine would merely require authorities to implement transitional arrangements between policies for those affected by the change.[59] The obligation to implement such arrangements can include obligations to consult parties affected by the change in policy,[60] or to announce such changes publicly.[61] In addition, if all that the legitimate expectations doctrine requires is for the public authority to take into account the legitimate expectations of the affected party as a relevant consideration in deciding to change or depart from its policy, as was suggested by the Court of Appeal in R. (on the application of Bibi) v Newham LBC (No. 1), the tension between the two doctrines is significantly reduced.[62]

While effective at the doctrinal level, a limitation of this category of responses directed at constraining the scope of one

doctrine or another is that they do not expressly address the root issue: the clash at the level of normative values as to ***85** how the law should regulate the usage of administrative policies. No purely doctrinal solution can escape this issue. Any doctrinal solution will always resolve it implicitly—indeed, any reduction in the scope of one rule in favour of the other implies a certain normative resolution as to which set of values should be emphasised. Given the necessary resolution of this normative issue, clarity as to the law's normative foundations in this regard will be improved by explicit attention to the issue, instead of seeking solutions limited to the doctrinal level.

The third category of responses addresses this issue more directly by proposing a re-conceptualisation of doctrine. Such proposals have been generally directed at re-conceptualising the rule against fettering. For example, Denis Galligan has argued that the rule against fettering is an extension of the principle of consistency. Just as consistency requires like cases to be treated alike, it also requires that unlike cases should be treated differently.[63] In a similar vein, Stark has argued that the rule against fettering and the principle of consistency are two sides of the same coin:

"[T]he non-fettering principle says that exceptions have to be considered; the consistency rule clarifies that there must be good reasons for those exceptions to be made." [64]

In response, however, McHarg has observed that the rule against fettering has always been precisely concerned with the exact opposite of consistency: the rule against fettering has been directed at "doing justice in the individual case", rather than achieving consistency in the application of policies.[65] A more fundamental rethink of the rule against fettering might therefore be required.

Another response in this category is Perry's proposal, discussed above, to reframe the rule against fettering as an extension of the fair hearing rule.[66] This would seem to offer a neat and principled way of resolving the tension between the rule against fettering and legitimate expectations doctrine, since authorities would be allowed to depart from or change their policies as long as they accord affected parties a fair hearing.

I suggest, however, that this proposal also requires further substantiation. Indeed, if the rule against fettering is ultimately about fostering *meaningful* engagement of affected parties in decision-making processes, a rule mandating participation is insufficient to attain this goal. Such a rule would have difficulty distinguishing sham hearings (which Perry emphasises are impermissible) from hearings where decision-makers are genuinely open to the arguments from affected parties—especially where the decision-maker decides against the applicant. The rule needs to contain more substantive content beyond mere participation. For meaningful engagement in decision-making, the key is whether the applicant's arguments were indeed taken into account and considered carefully, with reasons given for their ultimate rejection, if that be the outcome of the decision. If this is the key, though, then participation only goes a limited way towards the goal. The ***86** rule seems to be about something deeper than mere participation: ensuring principled and rational administrative decision-making. If so, an even deeper re-conceptualisation of the rule might be called for, as will be suggested below.

The fourth and final category of responses seeks precisely such a deeper re-conceptualisation of the relevant doctrines by drawing attention to their normative foundations.[67] McHarg has proposed a comprehensive solution along such lines. Beginning from first principles, she focused on what administrative rule-making is primarily intended to achieve and to re-conceptualise the doctrine from that foundation.[68] From this perspective, she argues that the advantage of administrative policies is that they can further procedural rule of law objectives such as transparency, consistency, and accountability. In addition, administrative policies also "bring substantive benefits in promoting better decision-making",[69] by allowing administrative decision-making to reflect a greater depth of experience and wisdom than would have been the case if all cases were dealt with on an individual basis. Accordingly, in order to harness these benefits of administrative policies, McHarg argues that the proper approach to take towards the legal regulation of administrative policies should not be through discrete legal rules such as the rule against fettering, but through a transposition of Lon Fuller's well-known account of the requirements of the rule of law to administrative policies as "regulatory standards for the control of administrative rule-making".

This category of responses, directed at resolving the normative foundation of the relevant legal doctrines relating to the usage of administrative policies, is the most promising.[70] It offers the greatest potential to resolve the tension in a comprehensive and principled manner, and at a deeper and more satisfying level than the other types of solutions. Yet, it is suggested that the solutions proffered thus far in this category can be substantiated even further. Indeed, to the extent that McHarg's proposal drew upon Fuller's account of legality as a normative foundation, her proposal is primarily directed at policy-making—Fuller's account of the rule of law was principally directed at law-making, and not at administrative decision-making. Therefore, the question of *how* public authorities ought to make decisions based on their administrative policies remains largely open in the wake of her proposal.

Allan's conception of the rule of law as a shared normative foundation

In view of the preceding critical evaluation of the existing literature, there appears to be room for a distinct solution directed at resolving the doctrinal and normative ambiguities in this area of law. The solution that will be offered here falls within the category of responses seeking a resolution of the tension at a normative level, and will build upon the existing efforts in this regard. ***87**

It is suggested that instead of separate doctrinal rules governing departure-from-policy, change-of-policy, and adherence-to-policy situations, a single legal approach is capable of applying to govern the usage of administrative policies. Indeed, when one looks at the issue through a broader normative lens, one observes that these separate doctrinal rules are actually directed at the same normative objective, suggesting the possibility of a higher-level resolution of the doctrinal tensions between the rules as well as their normative justifications.

What, then, is this normative objective? One useful means of articulating this overall normative objective is Fuller's account of the rule of law, which McHarg has already drawn upon in her insightful comments on the issue. In addition to Fuller, however, I suggest that Allan's reflections on the requirements of the rule of law provide a valuable resource in the search for a unified normative foundation for the law on policies. Indeed, Allan's conception of the rule of law is a development of Fuller's theory.[71] Allan's account of the rule of law is particularly valuable for present purposes because, in the language of the legal philosopher Ronald Dworkin, his theory fits and justifies the law regulating the usage of policies.[72] His theory is capable of explaining the existing legal doctrines regulating the usage of policies, as well as the tension between the rule against fettering and the legitimate expectations doctrine. In addition, his theory offers a vision of how the existing legal doctrines in this regard can be construed in a manner that would unite them under a shared normative objective.

A central theme in Allan's reflections upon the rule of law, developed over the course of his distinguished career, is that the rule of law is the rule of *reason*, sharply contrasted against the rule of arbitrary power.[73] The principles of due process and equality make up the central principles of the rule of law, and play a crucial role in allowing the rule of law to be characterised as the "rule of reason". These principles provide a "basic requirement of justification", "whereby the legality of a person's treatment, at the hands of the state, depends on its being shown to serve a defensible view of the common good", defined as the "good of a community whose members are accorded equal respect and dignity, according to some rational account of their well-being".[74]

Building upon Fuller's account of the rule of law, Allan has stressed the importance of procedural due process in his own conception of the rule of law. Allan, however, has sought to provide a more substantive account of the rule of law; indeed, he argues that the procedural and substantive dimensions of the rule of law are closely connected.[75] Allan perceives Fuller's requirements of internal morality as

"a demanding ideal of due process of law that, when fully elaborated, imposes an obligation on government to defend every coercive act on the basis of its contribution to the common good". ***88** [76]

Elaborating further on the relationship between this conception of the rule of law and administrative law, Allan argues that

"at the heart of the ideal of the rule of law, properly understood, is a principle requiring governmental action to be rationally justified in terms of some conception of the common good".[77]

He points out that administrative law is directed towards serving this end by imposing "standards of procedural fairness and substantive rationality" on public officials and authorities.[78] Therefore, for executive action to cohere with the requirements of the rule of law, it must be capable of justification. It must be "explicitly defended, on the basis of a conception of the common good that is both publicly avowed and open to public debate and moral scrutiny".[79] In Allan's view, judicial review plays an important role in furthering the rule of law by reinforcing the requirement of justification. It provides an avenue for "the citizen to explain his grievance, by recourse to arguments of fairness and reasonableness, and obliges the state to furnish him with satisfactory answers".[80]

A unified legal approach to policies

Thus described, Allan's reflections upon the rule of law and the proper role of judicial review raise interesting possibilities for the law regulating the usage of policies. Allan's account paves the way for a unified approach to the law in this regard. Indeed, in Allan's view, a unifying theme behind all types of governmental action relating to policies—whether to adhere to,

depart from, or make exceptions to prevailing policies—is that all such actions have to be *justified* in order for them to meet the requirements of the rule of law. Allan has characterised the rule against fettering as preventing the "wooden application of rules to inappropriate cases", which would often result in unfairness to applicants. In a similar vein, Allan argues that

"departures from self-imposed rules, or exceptions made to general policies in particular cases, should be permitted only when truly *justified*, having regard to relevant public purposes and the cogency of whatever explanation is offered of their implications for the case in question".[81]

Translating these ideas to form the central normative basis for the law relating to the administrative usage of policies, the legal regulation of policies can thus be framed as ultimately directed at furthering the rule of law as the rule of reason by requiring rational justification for decisions relating to policies.[82] With this articulation in mind, we can then observe that each of the various doctrines is *already* ordered towards this overall normative objective. Indeed, even though there are important differences in the context between decisions to depart from policies and decisions to change policies, a common thread running through the ***89** legal requirements for both types of decisions is that they must be *justifiable*.[83] For example, while it may not be entirely settled whether it is the doctrine of legitimate expectations or a principle of consistency which provides the legal basis for the court's intervention where public authorities have applied secret policies to reach decisions instead of their own existing published policies,[84] it is clear that the substantive requirement that such decisions must meet to be permissible is that they must be justifiable. As the UK Supreme Court in Lumba emphasised, "a decision-maker must follow his published policy (and not some different unpublished policy) unless there are good reasons for not doing so".[85] As for the rule against fettering, it promotes flexibility and due consideration of individualised circumstances in the process of administrative decision-making, and furthers procedural justice by requiring that affected parties must receive a fair hearing—thereby furthering the rule of law as the rule of reason by ensuring that decisions to adhere to policies are rationally justified.[86]

If one articulates the central normative foundation for the legal regulation of policies in terms of the rule of law as the rule of reason, which imposes a requirement of rational justification upon the decisions of public authorities, this foundation is capable of uniting the legal approach to *all* three situations which have hitherto been subject to regulation through different legal rules. Indeed, understanding that the different legal rules are all ordered towards this central normative objective helps to explain and resolve the tension between the rule against fettering and the legitimate expectations doctrine. The very reason that there is a tension between these legal rules is that each rule seeks to further different but important values under this central normative objective[87]: the legitimate expectations doctrine promotes rational justification in the sense of consistency of treatment, while the rule against fettering promotes rational justification in the sense of ensuring justice is done in individual cases.[88] And once we observe that these values are not in mortal opposition but are in fact ordered towards a common normative objective, we can then realise that the values represented by both doctrines are actually commensurable on the same plane. Seeking to achieve commensurability between both values becomes an intelligible exercise. Any effort to discern the degree of flexibility required by the rule against fettering, or the degree of certainty required by the legitimate expectations doctrine, is therefore ultimately a prudential decision about what the rule of law requires in the specific circumstances of each case, requiring the careful usage of practical reason. While such exercises of prudential reasoning may not ultimately yield answers in an algorithmic fashion—for example, one may discern a variety of plausible solutions in any given circumstance—I suggest that the rule of law as the rule of reason is promoted as long as the decisions of public authorities are indeed based upon exercises of prudential reasoning. In line with the spirit of judicial review ***90** orthodoxy, there is significant value in encouraging public authorities to pursue the right questions without dictating solutions on the merits.

Entering into the doctrinal specifics of such a proposal, this suggestion does not require much by way of doctrinal innovation. Indeed, once the normative justification common to all three situations has been clarified, the existing doctrines of judicial review fall neatly in place to supply the necessary doctrinal content. The starting point is that this articulation would allow public authorities to depart from policies, change policies, or adhere to policies—as long as such decisions are rationally justifiable.[89] Drawing upon Allan's ideas on the interaction between the rule of law and the usage of administrative policies, two aspects of rational justification can be identified: substantive reasonableness and procedural reasonableness. Both types of reasonableness are closely-related, but they do nevertheless usefully highlight different aspects of rational justification to which the courts' attention can be drawn.[90] Both aspects of rational justification can be given effect through the existing grounds of judicial review. The substantive reasonableness of a public authority's decision to change, depart from, or adhere to a policy can be evaluated on the basis of Wednesbury unreasonableness or an assessment of the decision's proportionality by reference to the public authority's aims, as Laws LJ suggested in Nadarajah. Procedural reasonableness concerns the fairness of the *process* of decision-making, and gives effect to Allan's emphasis on the principle of procedural due process as a central pillar of the rule of law. The procedural reasonableness of such decisions can be evaluated on other existing grounds of judicial review—for example, the fair hearing rule and the rule against bias—to ensure the integrity of the *process* of decision-making.

It is worth emphasising that what exactly the requirement of justification calls for in each administrative decision relating to the usage of policies can depend significantly on the specific circumstances of the case at hand. The "unified" approach that this paper has argued for by no means entails that all types of policies ought to be analysed the same way. Indeed, while the overarching inquiry should always be whether the relevant decision is rationally justifiable, as specified through the two senses of rational justification described above, judges have to be sensitive to the context of each case in determining whether the requirement of justification has been met. As Paul Daly has argued, an analysis of whether the requisite standard of rational justification has been met can take into account a range of contextual factors, such as the rationale of the statutory regime in question (where one exists), the consequences of a decision to an individual, and the institutional competence of the decision-maker vis-à-vis the judiciary.[91] This approach is therefore well capable of being sufficiently sensitive to context to adapt easily to a variety of types and contexts of policies.

It should be therefore clear that no radical revolution in the law regulating administrative policies is required to effectuate this proposal. Indeed, the proposed approach coheres well with how the courts in substance have already been analysing ***91** decisions relating to policies. The connection between the legitimate expectations doctrine and the requirement of rational justification should be relatively clear—as was highlighted earlier, in discerning whether the frustration of a legitimate expectation is indeed unlawful, the courts have already assessed such decisions by reference to their reasonableness or proportionality.[92]

The courts' analysis of challenges to decisions of authorities to adhere to their decisions, invoking the rule against fettering, also fits readily with the proposed approach. Indeed, Daly has observed that an analytical focus on rational justification is "unavoidable" in the application of the rule against fettering.[93] The structure of the Supreme Court's reasoning in R. (on the application of Sandiford) v Secretary of State for Foreign and Commonwealth Affairs[94] can be taken as an example. Sandiford concerned a claimant who was on death row in Indonesia. She challenged the UK Government's decision to adhere to its policy of not paying for the legal fees incurred by overseas British nationals facing criminal charges abroad. One basis for this challenge was the rule against fettering.

While the Supreme Court thought that the rule against fettering was applicable only to the context of statutory powers and therefore could not be invoked in the case at hand, it is worth noting how the court arrived at its conclusion that the rule was not violated in any event. The Supreme Court paid close attention to the *reasons* for the government's not departing from its policy: first, "there was no fair way of distinguishing between cases on the basis of costs, nor of limiting the costs of appeals"; secondly, "there was some evidence that the appellant's family were able to raise sums of the order required".[95] The court concluded that there was "nothing arguably irrational" about these reasons, and that the government had indeed "responded with appropriate urgency" to the claimant's situation nevertheless by helping to source local legal representation on an affordable basis.[96] Put another way, the substance of the court's reasoning on the basis of the rule against fettering essentially revolved around the question of whether the government's decision to adhere to policy was rationally justifiable in the circumstances.

The key doctrinal changes that this proposal *would* call for, however, would be a rejection of the rule against fettering, as McHarg has already argued for,[97] as well as a displacement of the legitimate expectations doctrine from the context of administrative policies—thus cohering nicely with the stream of scholarship referenced above arguing for the limitation of the legitimate expectations doctrine for the sake of its doctrinal and normative clarity. What then, however, of Stark's concern that collapsing the rule against fettering into rationality review might be problematic on the ground that the rule against fettering guards against a specific type of irrationality that may not be captured if decision-makers are merely placed under a vague duty to avoid acting irrationally?[98] While this is a valid and important ***92** consideration, it is suggested that this concern is addressed by the approach proposed here. Indeed, this paper proposes a legal principle that public authorities adhering to their decisions have to provide good reasons for doing so, instead of merely placing them under a general duty to avoid irrationality.

One may also raise the concern that a shift in approach towards one based on the requirement of rational justification could potentially lead to unprincipled reasoning at best and contraventions of the principle of separation of powers at worst. This concern would apply with the greatest force to the substantive reasonableness aspect of rational justification. Such a concern raises broader questions about the nature of rationality review more generally, and any response will therefore implicate a larger area of administrative law than can be done justice within the confines of this paper. Nevertheless, drawing from Daly's work on rationality review, it is suggested that a requirement of rational justification is not necessarily vulnerable to these concerns. Articulated carefully, a requirement of rational justification can be "inherently deferential" and analysed in a principled manner, for example, by focusing on the *reasons* offered by the decision-maker in reaching its decision and evaluating whether the reasons are coherent both as a matter of internal logic and in relation to the relevant constellation of law and facts.[99]

There are several benefits to adopting the approach proposed here. First, by offering a comprehensive scheme of regulation to the usage of administrative policies, this approach has the advantage of bringing into focus common concerns shared by the existing disparate rules. For example, the reluctance to intervene in macro-political matters is a shared concern across both the case law on the rule against fettering and the legitimate expectations doctrine. In an interesting parallel with Laws LJ's reluctance to intervene in the "macro-political field" in the context of the legitimate expectations doctrine,[100] the Privy Council in Save Guana Cay Reef Association v The Queen held that adhering to a carefully formulated general policy relating to high-level government strategy does not amount to an unlawful fettering of discretion; doing so would better further good administration than to resort to individualised decision-making in all cases.[101] A unified approach can therefore help to cast the spotlight on these common concerns, promoting the systematisation of legal doctrine.

Secondly, by focusing on achieving a resolution at the normative level, this approach is capable of addressing *both* the normative and doctrinal ambiguity of the existing legal rules. Indeed, a focus on the normative foundation of legal regulation in this regard helps one to get at what is really the fundamental concern behind the efforts to reconceptualise doctrine thus far—a concern to further "rational decision-making".[102] It addresses the comment made above in relation to Perry's suggestion to reconceptualise the rule against fettering as a rule requiring participation. This proposal identifies and emphasises what really underlies participation—specifically, the promotion of principled and rational ***93** decision-making—thus justifying more meaningful regulation beyond a requirement of participation. Indeed, Allan's account of the rule of law captures Perry's instincts as to the importance of ensuring procedural due process in the law regulating the administration of policies, yet goes further to link this imperative to a broader requirement of justification as synonymous with the rule of law.

Thirdly, such an approach would be more likely to achieve more rationally justifiable administrative outcomes. On this approach, public authorities would be able to adhere to their policies, provided that they do have good reasons for doing so. Public authorities may have many good reasons for such decisions—for example, where a policy relates to a macro-political matter and has been formulated by democratically elected representatives.[103] Removing the presumption against such adherence which the rule against fettering requires, and replacing it with a requirement that any decisions to adhere to policies have to be rationally justifiable, will help judges to more explicitly recognise these important considerations.

Fourthly, such an approach allows the law regulating the administrative usage of policies to take into account a broader range of relevant considerations, such as the nature of the policy in question. Indeed, courts have already been sensitive to such considerations in the application of the existing rules.[104] For example, in evaluating the justifiability of a public authority's decision to depart from its policy in the context of the legitimate expectations doctrine, the courts have demonstrated a sensitivity to the subject matter of the policy in question, requiring decision-makers to adhere strictly to policies setting out guidelines for the conduct of secret surveillance, in order to safeguard against potential abuses of such intrusive powers.[105] Similarly, in the context of the rule against fettering, the courts have illustrated a greater willingness to ensure a higher degree of flexibility in administrative decision-making in cases involving child welfare to further the best interests of each child, while the courts have evinced an opposite tendency where a strict adherence to policy is necessary to achieve an objective such as deterrence.[106] On the approach elaborated here, such considerations can be easily taken into account in an overall evaluation of whether the public authority's decision in relation to its policy is rationally justifiable.

Conclusion

By way of recap, the objectives of this article were to highlight the normative and doctrinal ambiguity of the legal rules governing the usage of policies by public authorities, and to propose a solution that can address these ambiguities as well as the tension between the rule against fettering and the legitimate expectations doctrine in this area of law. I have argued that a unified legal approach to govern the usage of administrative policies, based upon the normative objective of furthering rational decision-making as a requirement of the rule of law, can go a ***94** significant way towards resolving the normative and doctrinal ambiguities in the existing set of disparate legal rules in this regard. Hopefully, the analysis in this paper will contribute to the pursuit of clarity in this practically important domain of administrative law.

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Footnotes

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[1] T.R.S. Allan, "The rule of law as the rule of reason: consent and constitutionalism" (1999) 115 L.Q.R. 221; *T.R.S. Allan, Constitutional Justice: A Liberal Theory of The Rule of Law (Oxford: Oxford University Press, 2005)*; *T.R.S. Allan, The Sovereignty of Law: Freedom, Constitution, and Common Law (Oxford: Oxford University Press, 2013).*

[2] The UK Human Rights Act does indeed have an impact on the usage of administrative policies—see R. (on the application of Tigere) v Secretary of State for Business, Innovation and Skills [2015] UKSC 57; [2015] 1 W.L.R. 3820, for example. See also Aileen McHarg, "Administrative Discretion, Administrative Rule-making, and Judicial Review" (2017) 70 C.L.P. 267, 276.

[3] For a deeper discussion of the adoption of administrative policies, see McHarg, "Administrative Discretion, Administrative Rule-making, and Judicial Review" (2017) 70 C.L.P. 267. In relation to challenges to the legality of administrative policies in themselves, the recent UK Supreme Court decisions of R. (on the application of A) v Secretary of State for the Home Department [2021] UKSC 37; [2021] 1 W.L.R. 3931 and R. (on the application of BF (Eritrea)) v Secretary of State for the Home Department [2021] UKSC 38; [2021] 1 W.L.R. 3967 will be of interest. See also *Alison L. Young, "Judicial Review of Policies—Clarification or Judicial Retreat?" (UK Constitutional Law Association Blog, 5 August 2021)* https://ukconstitutionallaw.org/2021/08/05/alison-l-young-judicial-review-of-policies-clarification-or-judicial-retreat/ [Accessed 17 October 2021].

[4] R. (on the application of Bibi) v Newham LBC (No.1) [2001] EWCA Civ 607; [2002] 1 W.L.R. 237 at [19].

[5] Whether there has been a deviation from a policy calls for an interpretation of the policy in question—see Mandalia v Secretary of State for the Home Department [2015] UKSC 59; [2015] 1 W.L.R. 4546 at [31]. Note that McHarg argued that this approach collapses the distinction between policies and rules of law: McHarg, "Administrative Discretion, Administrative Rule-making, and Judicial Review" (2017) 70 C.L.P. 267, 285. See also Yoav Dotan, "Why administrators should be bound by their policies" (1997) 17 O.J.L.S. 23, 25.

[6] United Policyholders Group v Attorney General of Trinidad and Tobago [2016] UKPC 17; [2016] 1 W.L.R. 3383; R. (on the application of Save Britain's Heritage) v Secretary of State for Communities and Local Government [2018] EWCA Civ 2137; [2019] 1 W.L.R. 929 at [39]; *Jason N.E. Varuhas, "In Search of a Doctrine: Mapping the Law of Legitimate Expectations" in Matthew Groves and Greg Weeks (eds), Legitimate Expectations in the Common Law World (Oxford: Hart Publishing 2017), p.29.*

[7] R. v Secretary of State for the Home Department Ex p. Khan [1984] 1 W.L.R. 1337; Richard Clayton, "Legitimate expectations, policy, and the principle of consistency" (2003) 62 C.L.J. 93, 96; Rebecca Williams, "The multiple doctrines of legitimate expectations" (2016) 132 L.Q.R. 639, 649; Farrah Ahmed and Adam Perry, "The coherence of the doctrine of legitimate expectations" (2014) 73 C.L.J. 61, 66.

[8] R. (on the application of Nadarajah) v Secretary of State for the Home Department [2005] EWCA Civ 1363; Mark Elliott, "Legitimate expectations: procedure, substance, policy and proportionality" (2006) 65 C.L.J. 254.

[9] R. v North and East Devon HA Ex p. Coughlan [2001] Q.B. 213 at [57]; Philip Sales and Karen Steyn, "Legitimate expectations in English public law: an analysis" [2004] P.L. 564, 588–589.

[10] *Paul Craig, Administrative Law, 8th edn (London: Sweet & Maxwell, 2016), p.686*.

[11] The rule against fettering is capable of application to other contexts as well. Notably, Perry suggests that the flexibility rule relating to policies is distinct from the rule in other contexts: Adam Perry, "The flexibility rule in administrative law" (2017) 76 C.L.J. 375, 397–398.

[12] Perry, "The flexibility rule in administrative law" (2017) 76 C.L.J. 375.

[13] R. (on the application of Sandiford) v Secretary of State for Foreign and Commonwealth Affairs [2014] UKSC 44; [2014] 1 W.L.R. 2697; R. (on the application of West Berkshire DC) v Secretary of State for Communities and Local Government [2016] EWCA Civ 441; [2016] 1 W.L.R. 3923 at [21]–[30]; Christopher Chiam, "The Future of the Fettering Rule in Judicial Review" (2019) 38 University of Tasmania Law Review 27, 28; Chris Hilson, "Judicial review, policies and the fettering of discretion" [2002] P.L. 111, 113.

[14] McHarg, "Administrative Discretion, Administrative Rule-making, and Judicial Review" (2017) 70 C.L.P. 267, 270–271.

[15] R. v Port of London Authority Ex p. Kynoch Ltd [1919] 1 K.B. 176 CA; Perry, "The flexibility rule in administrative law" (2017) 76 C.L.J. 375, 377–378; McHarg, "Administrative Discretion, Administrative Rule-making, and Judicial Review" (2017) 70 C.L.P. 267, 271.

[16] British Oxygen Co v Minister of Technology [1971] A.C. 610 HL; Perry, "The flexibility rule in administrative law" (2017) 76 C.L.J. 375, 378; McHarg, "Administrative Discretion, Administrative Rule-making, and Judicial Review" (2017) 70 C.L.P. 267, 272.

[17] R. (on the application of Lumba) v Secretary of State for the Home Department [2011] UKSC 12; [2012] 1 A.C. 245 at [21]; R. v Secretary of State for the Home Department Ex p. Venables and Thompson [1988] A.C. 407 HL; R. v North West Lancashire HA Ex p. A [2000] 1 W.L.R. 977 CA; *Varuhas, "In Search of a Doctrine: Mapping the Law of Legitimate Expectations" in Legitimate Expectations in the Common Law World (2017), p.22*.

[18] Hilary Biehler, "Upholding standards in public decision-making: getting the balance right" (2017) 57 Irish Jurist 94, 108–109; Jack Watson, "Clarity and Ambiguity: A New Approach to the Test of Legitimacy in the Law of Legitimate Expectations" (2010) 30 L.S. 633, 649; Melanie Roberts, "Public Law Representations and Substantive Legitimate Expectations" (2001) 64 M.L.R. 112, 114.

[19] *Craig, Administrative Law (2016), p.671*; Chris Hilson, "Policies, the Non-Fetter Principle and the Principle of Substantive Legitimate Expectations: Between a Rock and a Hard Place" (2006) 11 J.R. 289, 291; see also Chiam, "The Future of the Fettering Rule in Judicial Review" (2019) 38 University of Tasmania Law Review 27, 34–35; Sales and Steyn, "Legitimate expectations in English public law: an analysis" [2004] P.L. 564, 569; Ahmed and Perry, "The coherence of the doctrine of legitimate expectations" (2014) 73 C.L.J. 61, 81–82.

[20] Sales and Steyn, "Legitimate expectations in English public law: an analysis" [2004] P.L. 564, 569.

[21] R. v Ministry of Food and Agriculture Ex p. Hamble [1995] 1 All E.R. 714, UK Association of Fish Producer Organisations v Secretary of State for Environment, Food and Rural Affairs [2013] EWHC 1959 (Admin) at [80]; R. v Inland Revenue Commissioners Ex p. MFK Underwriting Agents Ltd [1990] 1 W.L.R. 1545; R. (on the application of BAPIO Action Ltd) v Secretary of State for the Home Department [2008] UKHL 27; [2008] 1 A.C. 1003; Clayton, "Legitimate expectations, policy, and the principle of consistency" (2003) 62 C.L.J. 93, 96–97; Joanna Bell, "The doctrine of legitimate expectations: power-constraining or right-conferring legal standard?" [2016] P.L. 437, 444; Abhijit P.G. Pandya, "Legitimate Expectations in English Law: Too Deferential an Approach?" (2009) 14 J.R. 170, 173; Mark Elliott, "British jobs for British doctors: legitimate expectations and inter-departmental decision-making" (2008) 67 C.L.J. 453, 453; Allan, "The rule of law as the rule of reason: consent and constitutionalism" (1999) 115 L.Q.R. 221, 233.

[22] McHarg, "Administrative Discretion, Administrative Rule-making, and Judicial Review" (2017) 70 C.L.P. 267, 280.

[23] Dotan, "Why administrators should be bound by their policies" (1997) 17 O.J.L.S. 23, 31. Forsyth notes that the legitimate expectations doctrine is in tension with the rule against fettering: Christopher Forsyth, "*Wednesbury* protection of substantive legitimate expectations" [1997] P.L. 375, 375; see also Silvano Domenico Orsi, "Legitimate Expectations: An Overview" [2010] J.R. 388, 388; Hilson, "Policies, the Non-Fetter Principle and the Principle of Substantive Legitimate Expectations: Between a Rock and a Hard Place" (2006) 11 J.R. 289, 289–290.

[24] Findlay v Secretary of State for the Home Department [1985] A.C. 318 at 337–338; Forsyth, "*Wednesbury* protection of substantive legitimate expectations" [1997] P.L. 375, 378–379.

[25] R. (on the application of Bhatt Murphy (A Firm)) v Independent Assessor; R. (on the application of Niazi) v Secretary of State for the Home Department [2008] EWCA Civ 755; R. v Secretary of State for the Home Department Ex p. Hargreaves [1997] 1 W.L.R. 906; R. v Secretary of State for Transport Ex p. Richmond-upon-Thames LBC [1994] 1 W.L.R. 74; Hughes v Department of Health and Social Security [1985] A.C. 776; Forsyth, "*Wednesbury* protection of substantive legitimate expectations" [1997] P.L. 375, 380; Sales and Steyn, "Legitimate expectations in English public law: an analysis" [2004] P.L. 564, 585; Pandya, "Legitimate Expectations in English Law: Too Deferential an Approach?" (2009) 14 J.R. 170, 175.

[26] Dotan, "Why administrators should be bound by their policies" (1997) 17 O.J.L.S. 23, 26–27.

[27] Dotan, "Why administrators should be bound by their policies" (1997) 17 O.J.L.S. 23, 28.

[28] Iain Steele, "Substantive legitimate expectations: striking the right balance?" (2005) 121 L.Q.R. 300, 303; Allan, "The rule of law as the rule of reason: consent and constitutionalism" (1999) 115 L.Q.R. 221, 233.

[29] Williams, "The multiple doctrines of legitimate expectations" (2016) 132 L.Q.R. 639, 661–662.

[30] Dotan, "Why administrators should be bound by their policies" (1997) 17 O.J.L.S. 23, 30.

[31] Elliott, "Legitimate expectations: procedure, substance, policy and proportionality" (2006) 65 C.L.J. 254, 254–255; *Varuhas, "In Search of a Doctrine: Mapping the Law of Legitimate Expectations" in Legitimate Expectations in the Common Law World (2017), pp.29–30*; Christopher Forsyth, "Legitimate Expectations Revisited" (2011) 16 J.R. 429, 433.

[32] Mandalia [2015] 1 W.L.R. 4546 at [29]–[31]; *Craig, Administrative Law (2016), pp.688–689*.

[33] R. (on the application of Rashid) v Secretary of State for the Home Department [2005] EWCA Civ 744 (Admin); [2005] Imm. A.R. 608; Williams, "The multiple doctrines of legitimate expectations" (2016) 132 L.Q.R. 639, 660; Hilary Biehler, "Legitimate expectation—an odyssey" (2013) 50 Irish Jurist 40, 48–49.

[34] Mandalia [2015] 1 W.L.R. 4546 at [29]–[31].

[35] Lumba [2012] 1 A.C. 245 at [35]; See also *Varuhas, "In Search of a Doctrine: Mapping the Law of Legitimate Expectations" in Legitimate Expectations in the Common Law World (2017), p.31*.

[36] R. (on the application of Gallaher Group Ltd) v Competition and Markets Authority [2018] UKSC 25; [2019] A.C. 96 at [24].

[37] McHarg, "Administrative Discretion, Administrative Rule-making, and Judicial Review" (2017) 70 C.L.P. 267, 295.

[38] Perry, "The flexibility rule in administrative law" (2017) 76 C.L.J. 375.

[39] Sandiford [2014] 1 W.L.R. 2697; Kevin Costello, "The scope of application of the rule against fettering in administrative law" (2015) 131 L.Q.R. 354, 355; Chiam, "The Future of the Fettering Rule in Judicial Review" (2019) 38 University of Tasmania Law Review 27, 30–31.

[40] Perry, "The flexibility rule in administrative law" (2017) 76 C.L.J. 375, 376; Chiam, "The Future of the Fettering Rule in Judicial Review" (2019) 38 University of Tasmania Law Review 27, 31; Sales and Steyn, "Legitimate expectations in English public law: an analysis" [2004] P.L. 564, 568; Watson, "Clarity and Ambiguity: A New Approach to the Test of Legitimacy in the Law of Legitimate Expectations" (2010) 30 L.S. 633, 639–640.

[41] For criticism of legislative intent, see Denis J. Galligan, "The Nature and Function of Policies within Discretionary Power" [1976] P.L. 332, 332; McHarg, "Administrative Discretion, Administrative Rule-making, and Judicial Review" (2017) 70 C.L.P. 267, 293. For criticism of error-avoidance, see Perry, "The flexibility rule in administrative law" (2017) 76 C.L.J. 375, 387–391.

[42] Perry, "The flexibility rule in administrative law" (2017) 76 C.L.J. 375, 391–397.

[43] Perry, "The flexibility rule in administrative law" (2017) 76 C.L.J. 375, 393–394.

[44] Perry, "The flexibility rule in administrative law" (2017) 76 C.L.J. 375, 397.

[45] McHarg, "Administrative Discretion, Administrative Rule-making, and Judicial Review" (2017) 70 C.L.P. 267, 294–295.

[46] Watson, "Clarity and Ambiguity: A New Approach to the Test of Legitimacy in the Law of Legitimate Expectations" (2010) 30 L.S. 633, 650–651.

[47] *Peter Cane, Administrative Law, 4th edn (Oxford: Oxford University Press, 2004), pp.205–206*; Hilson, "Policies, the Non-Fetter Principle and the Principle of Substantive Legitimate Expectations: Between a Rock and a Hard Place" (2006) 11 J.R. 289, 290.

[48] Hilson, "Policies, the Non-Fetter Principle and the Principle of Substantive Legitimate Expectations: Between a Rock and a Hard Place" (2006) 11 J.R. 289, 290–291.

[49] Findlay [1985] A.C. 318; R. v Secretary of State for Transport Ex p. Richmond-upon-Thames LBC [1994] 1 W.L.R. 74; Paul Craig, "Legitimate expectations: a conceptual analysis" (1992) 108 L.Q.R. 79, 90–91.

[50] R. v Secretary of State for Education and Employment Ex p. Begbie [2000] 1 W.L.R. 1115 at 1130–1131; David Southern, "R. (on the application of Dickinson) v HMRC and R. (on the application of Vacation Rentals (UK) Ltd) v HMRC: delegitimising legitimate expectations—the macro-political field" (2019) 2 British Tax Review 126, 129; Sales and Steyn, "Legitimate expectations in English public law: an analysis" [2004] P.L. 564, 588.

[51] Bhatt Murphy (A Firm); Niazi [2008] EWCA Civ 755; DM v Secretary of State for the Home Department [2014] CSIH 29; 2014 S.C. 635 at [25]–[26]; *Varuhas, "In Search of a Doctrine: Mapping the Law of Legitimate Expectations" in Legitimate Expectations in the Common Law World (2017), pp.27–28*; Pandya, "Legitimate Expectations in English Law: Too Deferential an Approach?" (2009) 14 J.R. 170, 175.

[52] *Varuhas, "In Search of a Doctrine: Mapping the Law of Legitimate Expectations" in Legitimate Expectations in the Common Law World (2017), p.21*; Ahmed and Perry, "The coherence of the doctrine of legitimate expectations" (2014) 73 C.L.J. 61, 82–83.

[53] Craig, "Legitimate expectations: a conceptual analysis" (1992) 108 L.Q.R. 79, 90.

[54] McHarg, "Administrative Discretion, Administrative Rule-making, and Judicial Review" (2017) 70 C.L.P. 267, 281–282.

[55] Clayton, "Legitimate expectations, policy, and the principle of consistency" (2003) 62 C.L.J. 93, 103.

[56] Clayton, "Legitimate expectations, policy, and the principle of consistency" (2003) 62 C.L.J. 93, 104–105.

[57] Watson, "Clarity and Ambiguity: A New Approach to the Test of Legitimacy in the Law of Legitimate Expectations" (2010) 30 L.S. 633, 639–640; *Shona Wilson Stark, "Non-fettering, Legitimate Expectations and Consistency of Policy: Separate Compartments of Single Principle?" in Jason N.E. Varuhas and Shona Wilson Stark (eds), The Frontiers of Public Law (Oxford: Hart Publishing, 2020), p.602*.

[58] Aside from the remedies suggested here, commentators have also suggested that one way to protect legitimate expectations is by way of compensation—see, for example, Biehler, "Upholding standards in public decision-making: getting the balance right" (2017) 57 Irish Jurist 94, 112; Steele, "Substantive legitimate expectations: striking the right balance?" (2005) 121 L.Q.R. 300, 322.

[59] R. (on the application of Patel) v General Medical Council [2013] EWCA Civ 327; [2013] 1 W.L.R. 2801; R. (on the application of Luton BC) v Secretary of State for Education [2011] EWHC 217 (Admin); [2011] Eq. L.R. 481; Williams, "The multiple doctrines of legitimate expectations" (2016) 132 L.Q.R. 639, 654–655, 658–659; Steele, "Substantive legitimate expectations: striking the right balance?" (2005) 121 L.Q.R. 300, 308; C.J.S. Knight, "Expectations in transition: recent developments in legitimate expectations" [2009] P.L. 15, 23–24; Sales and Steyn, "Legitimate expectations in English public law: an analysis" [2004] P.L. 564, 570.

[60] R. (on the application of Luton BC) v Secretary of State for Education [2011] Eq. L.R. 481; R. v Secretary of State for Transport Ex p. Richmond-upon-Thames LBC [1994] 1 W.L.R. 74 at 92–93; Williams, "The multiple doctrines of legitimate expectations" (2016) 132 L.Q.R. 639, 655–656; Bell, "The doctrine of legitimate expectations: power-constraining or right-conferring legal standard?" [2016] P.L. 437, 448.

[61] Save Britain's Heritage [2019] 1 W.L.R. 929 at [48].

[62] Bibi [2002] 1 W.L.R. 237 at [39]; Steele, "Substantive legitimate expectations: striking the right balance?" (2005) 121 L.Q.R. 300, 320; Forsyth, "Legitimate Expectations Revisited" (2011) 16 J.R. 429, 435–436.

[63] *Denis J. Galligan, Discretionary Powers: A Legal Study of Official Discretion (Oxford: Clarendon Press, 1990), p.283.*

[64] *Wilson Stark, "Non-fettering, Legitimate Expectations and Consistency of Policy: Separate Compartments of Single Principle?" in The Frontiers of Public Law (2020), p.607*.

[65] McHarg, "Administrative Discretion, Administrative Rule-making, and Judicial Review" (2017) 70 C.L.P. 267, 282.

[66] Perry, "The flexibility rule in administrative law" (2017) 76 C.L.J. 375, 391–397.

[67] See also Paul Reynolds, "Legitimate expectations and the protection of trust in public officials" [2011] P.L. 330, 348.

[68] McHarg, "Administrative Discretion, Administrative Rule-making, and Judicial Review" (2017) 70 C.L.P. 267, 298.

[69] McHarg, "Administrative Discretion, Administrative Rule-making, and Judicial Review" (2017) 70 C.L.P. 267, 298.

[70] See, for the importance of paying attention to the normative dimension of the relevant rules, Craig, "Legitimate expectations: a conceptual analysis" (1992) 108 L.Q.R. 79, 91–92.

[71] *Allan, Constitutional Justice: A Liberal Theory of The Rule of Law (2005), p.6*.

[72] See *Ronald Dworkin, Law's Empire (Cambridge, Massachusetts: Belknap Press, 1986)*.

[73] Allan, "The rule of law as the rule of reason: consent and constitutionalism" (1999) 115 L.Q.R. 221, 223. See also *Allan, The Sovereignty of Law: Freedom, Constitution, and Common Law (2013), pp.89, 119*.

[74] *Allan, Constitutional Justice: A Liberal Theory of The Rule of Law (2005), p.2*. See also *Allan, The Sovereignty of Law: Freedom, Constitution, and Common Law (2013), pp.90–91*.

[75] *Allan, Constitutional Justice: A Liberal Theory of The Rule of Law (2005), p.27*. See also *Allan, The Sovereignty of Law: Freedom, Constitution, and Common Law (2013), p.100*.

[76] *Allan, Constitutional Justice: A Liberal Theory of The Rule of Law (2005), p.74*.

[77] Allan, "The rule of law as the rule of reason: consent and constitutionalism" (1999) 115 L.Q.R. 221, 231.

[78] Allan, "The rule of law as the rule of reason: consent and constitutionalism" (1999) 115 L.Q.R. 221, 243–244.

[79] *Allan, Constitutional Justice: A Liberal Theory of The Rule of Law (2005), pp.22, 40*. See also *Allan, The Sovereignty of Law: Freedom, Constitution, and Common Law (2013), p.107*.

[80] *Allan, Constitutional Justice: A Liberal Theory of The Rule of Law (2005), pp.9, 85*.

[81] *Allan, Constitutional Justice: A Liberal Theory of The Rule of Law (2005), p.128*.

[82] Dotan, "Why administrators should be bound by their policies" (1997) 17 O.J.L.S. 23, 28.

[83] Lumba [2012] 1 A.C. 245 at [26]; see also Dotan, "Why administrators should be bound by their policies" (1997) 17 O.J.L.S. 23, 41.

[84] Begbie [2000] 1 W.L.R. 1115 at 1132; *Varuhas, "In Search of a Doctrine: Mapping the Law of Legitimate Expectations" in Legitimate Expectations in the Common Law World (2017), p.33*; Forsyth, "Legitimate Expectations Revisited" (2011) 16 J.R. 429, 434.

[85] Lumba [2012] 1 A.C. 245 at [26].

[86] *Allan, The Sovereignty of Law: Freedom, Constitution, and Common Law (2013), p.109*.

[87] Biehler, "Legitimate expectation—an odyssey" (2013) 50 Irish Jurist 40, 43.

[88] *Galligan, Discretionary Powers: A Legal Study of Official Discretion (1990)*.

[89] Sales and Steyn, "Legitimate expectations in English public law: an analysis" [2004] P.L. 564, 571.

[90] For an example of an acknowledgment of both aspects of rational justification, see the Supreme Court of Canada decision of Dunsmuir v New Brunswick, 2008 SCC 9; [2008] 1 S.C.R. 190 at [47]. See also Paul Daly, "Struggling Towards Coherence in Canadian Administrative Law? Recent Cases on Standard of Review and Reasonableness" (2016) 62 McGill L.J. 527, 532–533.

[91] Daly, "Struggling Towards Coherence in Canadian Administrative Law? Recent Cases on Standard of Review and Reasonableness" (2016) 62 McGill L.J. 527, 555.

[92] For example, see Khan [1984] 1 W.L.R. 1337; Nadarajah [2005] EWCA Civ 1363.

[93] Paul Daly, "The *Vavilov* Framework and the Future of Canadian Administrative Law" (2020) 33 Canadian Journal of Administrative Law & Practice 111, 130.

[94] Sandiford [2014] 1 W.L.R. 2697.

[95] Sandiford [2014] 1 W.L.R. 2697 at [69].

[96] Sandiford [2014] 1 W.L.R. 2697 at [71]–[72].

[97] McHarg, "Administrative Discretion, Administrative Rule-making, and Judicial Review" (2017) 70 C.L.P. 267, 292–296.

[98] *Wilson Stark, "Non-fettering, Legitimate Expectations and Consistency of Policy: Separate Compartments of Single Principle?" in The Frontiers of Public Law (2020), pp.593–594*.

[99] Daly, "The *Vavilov* Framework and the Future of Canadian Administrative Law" (2020) 33 Canadian Journal of Administrative Law & Practice 111, 125–127; see also Canada (Minister of Citizenship and Immigration) v Vavilov, 2019 SCC 65.

[100] See Begbie [2000] 1 W.L.R. 1115 at 1130–1131.

[101] Save Guana Cay Reef Association v The Queen [2009] UKPC 44.

[102] McHarg, "Administrative Discretion, Administrative Rule-making, and Judicial Review" (2017) 70 C.L.P. 267, 282.

[103] Save Guana Cay Reef Association [2009] UKPC 44; see also Chiam, "The Future of the Fettering Rule in Judicial Review" (2019) 38 University of Tasmania Law Review 27, 39.

[104] Sales and Steyn, "Legitimate expectations in English public law: an analysis" [2004] P.L. 564, 582–583.

[105] R. v Secretary of State for the Home Department Ex p. Ruddock [1987] 1 W.L.R. 1482; Sales and Steyn, "Legitimate expectations in English public law: an analysis" [2004] P.L. 564, 582–583.

[106] See Attorney General ex rel Tilley v Wandsworth LBC [1981] 1 W.L.R. 854; R. v Nottinghamshire CC Ex p. Howitt [1999] COD 530; McHarg, "Administrative Discretion, Administrative Rule-making, and Judicial Review" (2017) 70 C.L.P. 267, 273–274. See also R. (on the application of S) v Chief Constable of South Yorkshire [2004] UKHL 39; [2004] 1 W.L.R. 2196.